The International Survey of Family Law

2008 Edition

Published on behalf of the International Society of Family Law

General Editor: Professor Bill Atkin

Family Law

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General Editor
Bill Atkin
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

Associate Editor (Africa)
Fareda Banda
Reader in the Laws of Africa
School of Oriental and African Studies
London

Family Law

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EDITOR OF THE INTERNATIONAL SURVEY
Professor Bill Atkin
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
NEW ZEALAND
Tel: (04) 463 6343
Fax: (04) 463 6366
E-mail: bill.atkin@vuw.ac.nz

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E-mail: dominique.goubau@fd.ulaval.ca

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Fax: 34 972 41 81 46
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E-mail: bea.verschraegen@univie.ac.at

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College of Law
Ajou University
Hanyang Apt. 25-705
Abguchung-Dong, Kangnam-Ku
Seoul 135-906
KOREA
E-mail: mkcho@ajou.ac.kr

The Rt Hon the Baroness Deech
St Anne's College
Oxford OX2 6HS
UK
Tel: 44-1865-274820
Fax: 44-1865-274895
E-mail: ruth.deech@st-annes.ox.ac.uk

Professor Dr Nina Dethloff, LLM
Institut für Deutsches, Europäisches und Internationales Familienrecht
Universität Bonn
Adenauerallee 8a
D 53113 Bonn
GERMANY
Tel: 49 228 739290
Fax: 49 228 733909
E-mail: www.nina-dethloff.de

Professor Hugues Fulchiron
Faculte de Droit
Universite Jean Moulin
Lyon 3, 15 quai Claude-Bernard
F-69007 Lyon
FRANCE
Tel: 00 33 4 72 41 05 54
Fax: 00 33 4 78 78 71 31
E-mail: hugues.fulchiron@online.fr

Professor Giselle Groeninga de Almeida
Rua das Jaboticabeiras, 420
Cidade Jardim
Sao Paolo – SP. 05674-010
BRAZIL
E-mail: giselle@att.net

Professor Urpo Kangas
Faculty of Law
Institute of Private Law
University of Helsinki
SF – 000140 University of Helsinki
Helsinki
FINLAND
Tel: 358 0 1912 2918
Fax: 358 0 1912 3108
E-mail: urpo.kangas@helsinki.fi

Professor Sanford N Katz
Boston College Law School
885 Centre Street
Newton Centre, Mass 02459
USA
Tel: 1-617-552-437
Fax: 1-617-552-2615
E-mail: sanford.katz@bc.edu

Professor Aleksandra Korac
Faculty of Law
University of Zagreb
Trg m. Tita 14
10000 Zagreb
CROATIA
E-mail: aleksandra.korac@zg.t-com.hr

Professor Satoshi Minimakata
Faculty of Law
Niigata University
8050 Ikarashi-ninocho
Niigata
JAPAN 950-2181
Tel/Fax: 81-25-262-6478
E-mail: satoshi@jura.niigata-u.ac.jp

Professor Avv Maria Donata Panforti
Dipartimento di Scienze del linguaggio e della cultura
Largo Sant'Eufemia 19
I-41100 Modena
ITALY
Tel: 39 059 205 5916
Fax: 39 059 205 5933
E-mail: panforti.mariadonata@unimore.it

Professor J A Robinson
Faculty of Law
Potchefstroom Campus of the North West University
North West University
Potchefstroom 2520
SOUTH AFRICA
Tel: 27 18 299 1940
Fax: 27 18 299 1933
E-mail: pvjar@puknet.puk.ac.za

Professor Anna Singer
Uppsala University
Faculty of Law
PO Box 512
SE-751 20 Uppsala
SWEDEN
Tel: 46 18 471 20 35
Fax: 46 18 15 27 14
E-mail: anna.singer@jur.uu.se

Professor Olga A Khazova
Institute of State and Law
Russian Academy of Sciences
Znamenka Str. 10
119992 Moscow
RUSSIA
E-mail: olga@khazova.msk.ru

Professor Marie-Therese Meulders
29, Chaussee de la verte voie
1300 Wavre
BELGIUM
Tel: 32.10.24.78.92
Fax: 32.10.22.91.60
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Professor Linda Nielsen
Rector /Vice Chancellor
University of Copenhagen
Nørregade 10
P.O.B. 2177
K-1017 Copenhagen K
DENMARK
Tel: 45 35 32 26 26
Fax: 45 35 32 26 28
E-mail: rektor@adm.ku.dk

Professor Patrick Parkinson
Head of School
Faculty of Law
University of Sydney
173-175 Phillip Street
Sydney, New South Wales 2006
AUSTRALIA
E-mail: familylaw@law.usyd.edu.au

Professor Bart Rwezaura
Dept of Law
University of Hong Kong
Pokfulam Road
Hong Kong
CHINA
Tel: 852- 2859-2936
Fax: 852- 2857-3146
E-mail: rwezaura@hkucc.hku.hk

Professor dr. juris Tone Sverdrup
Department of Private Law
Faculty of Law, University of Oslo
PO Box 6706 St. Olavs plass
NO-0130 Oslo
NORWAY
Tel: 47 22859781
Fax: 47 22859620
E-mail: tone.sverdrup@jus.uio.no

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Tel: 0086-10-82650072
Fax: 0086-10-82650072
E-mail: yinlan112@sina.com

THE INTERNATIONAL SOCIETY OF FAMILY LAW

A THE HISTORY OF THE SOCIETY

On the initiative of Professor Zeev Falk, the Society was launched at the University of Birmingham, UK, in April 1973. The Society's first international conference was held in West Berlin in April 1975 on the theme *The Child and the Law*. There were over 200 participants, including representatives of governments and international organisations. The second international conference was held in Montreal in June 1977 on the subject *Violence in the Family*. There were over 300 participants from over 20 countries. A third world conference on the theme *Family Living in a Changing Society* was held in Uppsala, Sweden in June 1979. There were over 270 participants from 26 countries. The fourth world conference was held in June 1982 at Harvard Law School, USA. There were over 180 participants from 23 countries. The fifth world conference was held in July 1985 in Brussels, Belgium on the theme *The Family, The State and Individual Security*, under the patronage of Her Majesty Queen Fabiola of Belgium, the Director-General of UNESCO, the Secretary-General of the Council of Europe and the President of the Commission of the European Communities. The sixth world conference on *Issues of the Ageing in Modern Society* was held in 1988 in Tokyo, Japan, under the patronage of HIH Takahito Mikasa. There were over 450 participants. The seventh world conference was held in May 1991 in Croatia on the theme, *Parenthood: The Legal Significance of Motherhood and Fatherhood in a Changing Society*. There were 187 participants from 37 countries. The eighth world conference took place in Cardiff, Wales in June/July 1994 on the theme *Families Across Frontiers*. The ninth world conference of the Society was held in July 1997 in Durban, South Africa on the theme *Changing Family Forms: World Themes and African Issues*. The Society's tenth world conference was held in July 2000 in Queensland, Australia on the theme *Family Law: Processes, Practices and Pressures*. The eleventh world conference was held in August 2002 in Copenhagen and Oslo on the theme *Family Life and Human Rights*. The Society's twelfth world conference was held in Salt Lake City, Utah in July 2005 on the theme *Family Law: Balancing Interests and Pursuing Priorities*. The Society's thirteenth world conference is to be held in Vienna in September 2008. The Society has also increasingly held regional conferences including those in Lyon, France (1995); Quebec City, Canada (1996); Seoul, South Korea (1996); Prague, Czech Republic (1998); Albuquerque, New Mexico, USA (June 1999); Oxford, UK (August 1999); and Kingston, Ontario (2001). In 2003, regional conferences took place in Oregon, USA; Tossa de

Mar, Spain; and Lyon, France and, in July 2004, in Beijing, China, on the theme 'Divorce and its Consequences'. In 2005, a regional conference took place in Amsterdam (the Netherlands) and dealt with the centennial anniversary of the establishment of legislation on child protection and the juvenile courts. In 2007 there were regional conferences in Chester (England), entitled 'Family Justice: For Whom and How?' and Vancouver (Canada), entitled 'Making Family Law: Facts, Values and Practicalities'.

B ITS NATURE AND OBJECTIVES

The following principles were adopted at the first Annual General Meeting of the Society held in the Kongresshalle of West Berlin on the afternoon of Saturday 12 April 1975.

(1) The Society's objectives are the study and discussion of problems of family law. To this end the Society sponsors and promotes:
   (a) International co-operation in research on family law subjects of world-wide interest.
   (b) Periodic international conferences on family law subjects of world-wide interest.
   (c) Collection and dissemination of information in the field of family law by the publication of a survey concerning developments in family law throughout the world, and by publication of relevant materials in family law, including papers presented at conferences of the Society.
   (d) Co-operation with other international, regional or national associations having the same or similar objectives.
   (e) Interdisciplinary contact and research.
   (f) The advancement of legal education in family law by all practical means including furtherance of exchanges of teachers, students, judges and practising lawyers.
   (g) Other objectives in furtherance of or connected with the above objectives.

C MEMBERSHIP AND DUES

In 2007 the Society had approximately 584 members.

(a) Membership:
   - Ordinary Membership, which is open to any member of the legal or a related profession. The Council may defer or decline any application for membership.
   - Institutional Membership, which is open to interested organisations at the discretion of, and on terms approved by, the Council.
   - Student Membership, which is open to interested students of law and related disciplines at the discretion of, and on terms approved by, the Council.

- Honorary Membership, which may be offered to distinguished persons by decision of the Executive Council.

(b) Each member shall pay such annual dues as may be established from time to time by the Council. At present, dues for ordinary membership are €41 (or equivalent) for one year, €100 (or equivalent) for three years and €155 (or equivalent) for five years, plus €7 (or equivalent) if cheque is in another currency.

D DIRECTORY OF MEMBERS

A Directory of Members of the Society is available to all members.

E BOOKS

The proceedings of the first world conference were published as *The Child and the Law* (F Bates, ed, Oceana, 1976); the proceedings of the second as *Family Violence* (J Eekelaar and S Katz, eds, Butterworths, Canada, 1978); the proceedings of the third as *Marriage and Cohabitation* (J Eekelaar and S Katz, eds, Butterworths, Canada, 1980); the fourth, *The Resolution of Family Conflict* (J Eekelaar and S Katz, eds, Butterworths, Canada, 1984); the fifth, *Family, State and Individual Economic Security (Vols I & II)* (MT Meulders-Klein and J Eekelaar, eds, Story Scientia and Kluwer, 1988); the sixth, *An Ageing World: Dilemmas and Challenges for Law and Social Policy* (J Eekelaar and D Pearl, eds, Clarendon Press, 1989); the seventh *Parenthood in Modern Society* (J Eekelaar and P Sarcevic, eds, Martinus Nijhoff, 1993); the eighth *Families Across Frontiers* (N Lowe and G Douglas, eds, Martinus Nijhoff, 1996) and the ninth *The Changing Family: Family Forms and Family Law* (J Eekelaar and T Nhlapo, eds, Hart Publishing, 1998). The proceedings of the tenth world conference in Australia were published as *Family Law, Processes, Practices and Pressures* (J Dewar and S Parker, eds, Hart Publishing, 2003). The proceedings of the eleventh world conference in Denmark and Norway were published as *Family Life and Human Rights* (P Lødrup and E Modvar, eds, Gyldendal Akademisk, 2004). The proceedings of the twelfth world conference held in Salt Lake City, Utah are being published as *Family Law: Balancing Interests and Pursuing Priorities* (L Wardle and C Williams, eds, Wm S Hein & Co, 2007). These proceedings are commercially marketed but are available to Society members at reduced prices.

F THE SOCIETY'S PUBLICATIONS

The Society regularly publishes a newsletter, *The Family Letter*, which appears twice a year and which is circulated to the members of the Society and reports on its activities and other matters of interest. *The International Survey of Family Law* provides information on current developments in family law throughout the world and is received free of charge by members of the Society. The editor is currently Bill Atkin, Faculty of Law, Victoria University of

Wellington, PO Box 600, Wellington, New Zealand. The Survey is circulated to members or may be obtained on application to the Editor.

PREFACE

This edition of the International Survey is a bumper one. I acknowledge the hard work of so many authors, some of whom contribute regularly year by year, some who write for the Survey every so often and others who appear for the first time in this 2008 edition. It is not always easy to get a wide representation of countries from around the world. There is a natural bias towards European and English-speaking countries. Nevertheless I am delighted with the chapters in particular from Africa and Asia and would like to see rather more from Latin America.

Family law remains one of the most fascinating areas of study. It affects so many people at the heart of their lives but often lags behind the way in which our lives are led. One of the themes coming through several of the chapters is the clash of cultures and values. We live in a world where increased mobility and communication mean that we cannot easily remain insulated from differing perspectives and customs. The Survey is one excellent way of increasing world-wide understanding and learning how countries have addressed contemporary problems. It is not possible to list all the issues that authors have tackled, but domestic violence, childcare and same-sex relationships occur more than once.

I have been enormously helped by Tracy Warbrick, my secretary. She has kept everything in order and made sure that nothing has gone wrong in the process. I also thank Peter Schofield for translating a chapter into English, Jamie Eng, one of my senior students, for helping me edit one chapter in particular, and Dominique Goubau who has been kept very busy translating the résumés into French. Thanks also to the Jordan Publishing staff and in particular Cheryl Prophett who does a remarkable job with the final editing.

Bill Atkin
Wellington, June 2008

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[1] Ou la contrevaleur en US dollars.

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Annual Review of International Family Law 2006

*Ursula Kilkelly**

Résumé

L'année 2006 a été riche sur le plan du droit international de l'enfance et de la famille et ce texte fait état des développements récents dans le cadre des Nations Unies ainsi que du Conseil de l'Europe. Nous traiterons d'abord de l'*Étude des Nations Unies sur la violence subie par les enfants* qui fut publiée en 2006. Cette étude fait de nombreux constats sur l'ampleur du phénomène et formule des recommandations pratiques sur les actions à prendre. Dans la même année, le Comité des droits de l'enfant a publié deux Commentaires généraux: le premier (Commentaire général no 8) concerne également les questions de violence, plus particulièrement les châtiments corporels et les autres formes de punitions cruelles ou dégradantes et le second (Commentaire général no 9) offre une analyse précieuse et détaillée de l'application de la *Convention sur les droits de l'enfant* aux enfants handicapés.

La deuxième partie de cet article se concentre sur la jurisprudence de la Cour européenne des droits de l'Homme. En 2006, la Cour a continué à rendre des arrêts importants dans différents domaines touchant au droit de l'enfance et de la famille, incluant le droit de garde et d'accès, l'enlèvement d'enfants, le placement en milieux substituts, la paternité et l'administration de la preuve dans les procédures familiales. Ces arrêts touchent au droit et à la pratique dans de nombreux États membres. À travers ses jugements, la Cour continue à apporter une contribution significative tant au droit substantiel qu'au droit procédural.

I INTRODUCTION

The year 2006 was an active one in international law relating to children's rights and family law. The United Nations Study on Violence against Children was published and the Committee on the Rights of the Child published two General Comments, on corporal punishment and the rights of children with disabilities. In the Council of Europe, the European Court of Human Rights handed down judgments in a variety of cases on a range of important subjects including custody/access, child abduction, alternative care and paternity. The purpose of this chapter is to outline these developments up to 31 December 2006, and to consider their likely impact.

* Senior Lecturer, Faculty of Law, University College Cork.

II UNITED NATIONS

(a) Study on Violence Against Children

The Report of the Independent Expert for the United Nations Study on Violence Against Children, Paulo Sérgio Pinheiro, was submitted to the General Assembly of the United Nations on 29 August 2006.[1] Accompanied by a more detailed book on violence against children, the report provides a global picture of violence against children and proposes recommendations to prevent and respond to this issue. It provides information on the incidence of the forms of violence against children within the family, schools, alternative care institutions and detention facilities, places where children work and communities. It was prepared through a participatory process which included regional, subregional and national consultations, expert thematic meetings and field visits and many governments also provided comprehensive responses to a questionnaire transmitted to them by the independent expert in 2004.

The Study is important for a number of reasons. It is the first global study which aims to document the level of violence against children and it is the first study of its kind to engage directly with children and young people on this issue. One of the findings of the Study is that, despite the unjustifiable nature of violence against children, violence against children exists 'in every country of the world, cutting across culture, class, education, income and ethnic origin'. It notes that 'in every region, in contradiction to human rights obligations and children's developmental needs, violence against children is socially approved, and is frequently legal and State-authorised'.[2] The report notes that the vast majority of violence against children is perpetrated by adults known to them in their families,[3] schools[4] and communities.[5] According to the evidence, young children are at greatest risk of physical violence, while sexual violence predominantly affects those who have reached puberty. Boys are at greater risk of physical violence than girls, while girls face greater risk of sexual violence, neglect and forced prostitution. Some groups of children are especially vulnerable to violence including children with disabilities, those from ethnic minorities and other marginalised groups like 'street children' and children in conflict with the law. Growing income inequality, globalisation, migration, urbanisation, health threats, especially the HIV/AIDS pandemic, technological advances and armed conflict, affect how we treat children. Social and cultural patterns of conduct, stereotyped roles and socio-economic factors like income and education also play an important role.

The Study notes that, in the same way that some factors increase the susceptibility of children to violence, there are also factors that may prevent or

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1 UN Doc A/61/299. See further www.violencestudy.org.

2 Ibid, para 1. On the violence experienced by children in the care and justice systems see paras 53–63.

3 See more details of the violence experienced by children in the home at paras 38–47.

4 See more details of the violence experienced by children in educational settings at paras 48–52

5 See more details of the violence experienced by children in the community at paras 69–80.

reduce the likelihood of violence. Although more research is needed on these protective factors, it is already clear that stable family units can be a powerful source of protection from violence for children in all settings. Other factors include good parenting, the development of strong attachment bonds between parents and children and positive non-violent discipline. Factors that are likely to protect against violence at school include school-wide policies and effective curricula that support the development of non-violent and non-discriminatory attitudes and behaviours. High levels of social cohesion have been shown to have a protective effect against violence in the community, even when other risk factors are present. Most importantly, the Study notes that research has identified factors that appear to facilitate resilience in children who have experienced violence. These include secure attachment of the child to an adult family member, high levels of paternal care during childhood, a warm and supportive relationship with a non-abusing parent; as well as supportive relationships with peers who have a positive influence.[6]

In terms of reported state responses to violence against children, the Study notes that the primary response to date has been legislative with far less attention focused on reviewing the legal framework to ensure that it can address violence against children more effectively. Overall, while the Study reports that some states have developed positive frameworks and strategies for responding to and dealing proactively with violence against children, it notes that the implementation of laws, including legal reforms, remains a challenge.[7] In conclusion, the Study makes a number of overarching recommendations including:

- strengthening international, national and local commitment;
- prohibiting all violence against children;
- prioritising prevention;
- promoting non-violence values and awareness raising;
- enhancing the capacity of all who work with and for children;
- providing recovery and social reintegration services;
- ensuring the participation of children;
- creating accessible and child-friendly reporting systems and services;
- ensuring accountability and end impunity;
- addressing the gender dimension of violence against children; and

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6 Ibid, paras 28–35.
7 Ibid, para 85.

- developing and implementing systematic national data collection and research.

In addition, the Study makes a number of sector-specific recommendations addressed at protecting children from violence in the home and family setting, the school and educational setting, in the care and justice settings, in the workplace and in the community. Overall, the Study makes clear that responsibility for the implementation of these recommendations lies with the state but that international co-operation is essential to monitor and promote greater implementation. To this end, the Secretary General is recommended to appoint a special representative on violence against children to act as a global advocate to promote prevention and elimination of all violence against children, encourage international and regional co-operation and ensure follow-up to the recommendations. These recommendations, including the appointment of Special Representative, were approved by the General Assembly on 16 November 2007.[8]

(b) General Comment on the Right of the Child to Protection from Corporal Punishment

It is a measure of the importance and the urgency of the issue of violence against children that 2006 also saw the publication by the Committee on the Rights of the Child of its Eighth General Comment in this area.[9] Described as the first of a series of General Comments concerning eliminating violence against children, the Eighth General Comment focuses on the abolition of corporal punishment and highlights that addressing the widespread tolerance of corporal punishment of children is not only an obligation under the Convention but it is also a key strategy for reducing and preventing all forms of violence in societies.

The General Comment defines corporal or physical punishment as 'any punishment in which physical force is used and intended to cause some degree or pain or discomfort, however light'. In the view of the Committee, corporal punishment is invariably degrading but in addition other non-physical forms of punishment, like that which ridicules, scares, threatens or belittles the child, are also incompatible with the Convention.[10] Similar to the Study on Violence Against Children above, the Comment notes that punishment that is incompatible with the Convention takes place in various settings including in the home, in education and penal institutions and in the community and, while noting that parents and others working with children may be confronted by

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8 UN Doc A/C.3/62/L.24/Rev.1, paras 47–63. Progress made in the implementation of the recommendations was also presented to the sixty-second session of the General Assembly in October 2007. See UN Doc A/62/209.

9 Committee on the Rights of the Child, General Comment No 8 (2006), *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts 19, 28 para 2; and 37 inter alia)*, CRC/C/GC/8, 21 August 2006. This is available at www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.GC.8.En?OpenDocument.

10 Ibid, para 11.

dangerous behaviour or be required to intervene to protect children, the Committee makes a clear distinction between the use of force to protect and the use of force to punish.

The General Comment contextualises the use of physical punishment as an issue of equality and physical integrity. It refers to human rights instruments like the Universal Declaration on Human Rights and the United Nations Covenants in support of these key human rights principles and explains their relevance to Art 37 of the Convention on the Rights of the Child (CRC), which prohibits inhuman and degrading treatment or punishment, and Art 19, which requires states to take measures to protect children from 'all forms of physical or mental violence'. The General Comment is written in strong and unequivocal language. For example, it notes that there is 'no ambiguity' that corporal punishment is a form of violence which states must take all appropriate legislative, administrative, social and educational measures to eliminate. At the same time, it is noted that the term 'corporal punishment' is not explicitly mentioned in either Art 19 or Art 28(2), which refers to school discipline being administered in a manner consistent with the child's human dignity and in conformity with the Convention and notes also that this issue was not mentioned during the drafting of the Convention. Nonetheless, the need to interpret the Convention as a living instrument means that regard must be had to the increasing visibility of the corporal punishment of children and that, once visible, it is clear that it directly conflicts with the equal and inalienable right of children to respect for their dignity and physical integrity.[11]

The Comment also notes in support of its position the growing wealth of statements against corporal punishment from UN bodies like the Human Rights Committee, from the Council of Europe Court of Human Rights and Committee of Social Rights, and from regional human rights institutions under the African Charter on Human and Peoples' Rights and the American Convention on Human Rights. Indeed, the extent to which the General Comment shows the convergence of standards in this area is one of its strongest features. The other contribution that the General Comment makes is in the extensive recommendations it sets out in the form of measures and mechanisms required to eliminate corporal punishment and other cruel or degrading forms of punishment.[12] In terms of legal measures, for example, the General Comment notes that laws which permit 'reasonable chastisement' of children are not compliant with the Convention and should be repealed. It notes also the requirement of equality between children and adults in terms of their protection from violence. Like the Study on Violence against Children, the General Comment emphasises the change in attitudes and practices required to fully implement any ban on corporal punishment. Although it is unequivocal about the need to protect children completely, the Comment also highlights that, within the home, the aim should be to stop parents from using degrading methods of punishment through supportive and educational rather than

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[11] Ibid, paras 20–21.
[12] Ibid, paras 30–53.

punitive interventions. 'Prosecuting parents', the Comment notes, 'is in most cases unlikely to be in their children's best interests' and through this approach the General Comment is seen to adopt a fine balance between unequivocal protection for children and the more sophisticated means by which this must be achieved. In this regard, the Comment provides important guidance on the need to raise awareness, provide guidance and training and support to parents and all those who work with and for children and highlights the importance in this context of the state recognising children as individual rights holders. The Comment concludes with the need to ensure ongoing monitoring and research into the most effective ways to realise children's right to protection and in particular highlights the need to research families in order to accurately assess the prevalence of violence against children and attitudes to its use.

(c) General Comment on the Rights of Children with Disabilities

The Convention on the Rights of the Child makes very weak provision for the rights of children with disabilities and so a General Comment setting out the Convention's scope in this area has been long awaited.[13] The inadequate nature of the Convention's provision is perhaps illustrated by the otherwise positive fact that no reservation or declarations have been entered specifically to Art 23 of the Convention, the provision dealing with the rights of children with disabilities. The Ninth General Comment is an extensive and comprehensive document, which sets out in some detail the rights to which children with disabilities are entitled under the Convention. It identifies Art 2 (non-discrimination) and Art 23 (rights of children with disabilities) as the key provisions for children with disabilities. In relation to the former, it recommends that states explicitly prohibit discrimination on the grounds of disability at constitutional level, provide effective remedies in case of violations of the rights of children with disabilities and undertake awareness raising campaigns targeted at both the public and professionals with a view to eliminating discrimination.[14] Article 23 of the Convention is described here as the leading principle that children with disabilities have the right to enjoy a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active participation in the community. The General Comment provides that this core message of inclusion should direct measures taken by the state in the area of education and health. It also requires that, in order to implement Art 23, states must develop and effectively implement a comprehensive policy with a plan of action designed to ensure that children with disabilities enjoy all their Convention rights. Although Art 23 contains the caveat of being 'subject to available resources', the General Comment recommends nonetheless that states make the provision of special care and assistance to children with disabilities 'a matter of high priority' and recommends also that they pursue the twin goals of inclusion and non-discrimination to the maximum extent of available resources.

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[13] Committee on the Rights of the Child, General Comment No 9 (2006), *The rights of children with disabilities*, CRC/C/GC/9, 29 September 2006.

[14] Ibid, paras 8–16.

The principal parts of the General Comment follow the Committee's reporting guidelines and deal with the rights of children with disabilities under the headings of measures of implementation, general principles, civil rights and freedoms, family environment and alternative care, basic health and welfare, education and leisure and special protection measures. Key among the recommendations here are the adoption of a widely accepted definition for disabilities, the allocation of sufficient resources to relevant programmes and the establishment of an effective coordinating body to ensure the efficient delivery of services to children with disabilities. The need to establish independent monitoring systems and to make them accessible to children with disabilities in particular is also highlighted. The General Comment recognises that children with disabilities, more than other children, often have decisions made about them by adults acting alone. In this regard, it is important that the Comment highlights the right of children with disabilities to participate in decisions made about them under Art 12 of the Convention, and in the section on children's civil rights and freedoms important attention is also paid to children's right to access appropriate information, inter alia to enable them to live independently and participate fully in all aspects of life.[15] Importantly, also, the impact of physically inaccessible public transport is recognised and the Comment requires that all new public buildings should comply with international specifications for access of persons with disabilities and that existing buildings, including schools and shopping areas, undergo necessary alterations that make them accessible.

The section on alternative care highlights the particular vulnerability of children with disabilities in state care and sets out detailed recommendations as to how to prevent the abuse of and violence against such children. Particular reference is made to providing support groups for children and parents, taking measures to combat school bullying and ensuring that institutions are staffed with appropriately trained, vetted and monitored staff. The process whereby children are placed with alternative carers should also be Convention compliant, inter alia by ensuring that children are heard and participate at all stages through the evaluation, separation and placement process. Measures necessary to prevent and to ensure early diagnosis of various forms of disability are highlighted in the section on the right to health and welfare and the importance of a multidisciplinary treatment of each individual child is stressed.[16] The Comment reflects the importance of education to children with disabilities and highlights in the context of Arts 28 and 29 of the Convention (on access to and aims of education) that these provisions, which require effective access to education that is appropriate to the child's needs and that ensures the promotion of the child's personality, talents and mental and physical abilities to their full potential, are especially relevant to children with disabilities. The fact that the child's education must be used to strengthen positive self-awareness is also highlighted and in this regard the goal of inclusive education is recommended insofar as that is compatible with the

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[15] Ibid, paras 32–33 and 37–40.

[16] Ibid, paras 51–58.

individual educational needs of the child.[17] The importance of recreation, leisure, sport and vocational training activities are also explained. Finally, reference is made to children with disabilities who are additionally vulnerable such as those in conflict with the law, those subject to economic or sexual exploitation, refugee children and street children. According to the Committee, states must take specific measures to ensure that all such children are protected by and benefit from the rights in all relevant Convention provisions to ensure that children with particular circumstances enjoy full protection of their rights.

Overall, the General Comment is a welcome reaffirmation of the rights of children with disabilities under the Convention and in light of the weak nature of Art 23 – which is riddled with caveats mainly about resources – it represents a strong statement about the rights to which all such children are entitled. The principal messages of the General Comment – inclusion, non-discrimination and participation – are reflected also in Art 7 of the Convention on the Rights of Persons with Disabilities, also adopted in 2006.[18] In this regard, focus on the measures necessary to ensure effective implementation of the rights of children with disabilities is very welcome and should form a key part of the Convention's monitoring process on an ongoing basis.

III CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

There was little activity in the Council of Europe in 2006 in the adoption or ratification of treaties relevant to children and their families. Ukraine was the only country to ratify the Convention on the Exercise of Children's Rights and the Convention concerning Contact in 2006 and no other instruments of ratification were received by any other states in respect of these treaties, which by 31 December 2006 have been ratified by 12 and five states respectively. Although proposals to overhaul the Convention on Adoption were developed, they have not reached any definitive conclusion to date.

In contrast to this relative inactivity, or perhaps because of it, the European Court of Human Rights delivered judgments in a number of important areas – custody/access, child abduction, alternative care and paternity. These are now outlined below.

(a) Custody and access

A number of decisions handed down by the European Court in 2006 concerned issues of custody and access or contact notably in circumstances where one parent had frustrated the exercise by the other of rights granted to them by the domestic authorities. While essentially private law disputes, the Court made it clear at an early stage in its history that nonetheless these cases fall within the

[17] Ibid, paras 62–67.

[18] For further details on the Convention and its ratification process see www.un.org/disabilities.

terms of the Convention where they concern measures necessary to protect the parties' family life interests under Art 8. Several cases have since come before the Court involving contact and residence disputes concerning children between parents and/or other members of the children's family and *Mihailova v Bulgaria*[19] was one such decision in 2006. Here, the mother had been awarded custody by the courts but this decision remained unenforced. She took proceedings to enforce the custody order 10 months after it was made by the Court in which time the father had grown opposed to the decision, a situation which then necessitated some reassessment by the authorities. The Court reminded them that, while the authorities are under an obligation to take measures to facilitate reunion of parents and children, this is not an absolute obligation and depends on all the circumstances of the case. On the facts, the Court was in no doubt that custody could not be transferred immediately to the mother, and it noted in this regard that the authorities had taken preparatory measures in advance of the move. These included the domestic court interviewing the parties and supervising a meeting between the mother and the child before ordering that the order be enforced. However, on leaving the courthouse the father forcibly took his daughter back into his custody and thereafter a very difficult and tense period followed where the parents' behaviour was far from constructive. These difficulties contributed to the frustration of efforts to resolve the situation and also generated opposition in the child to being reunited with her mother.

In terms of the responsibility of the authorities, the Court noted that under the relevant law neither the enforcement judge nor the social services had the power to issue binding orders for preparatory meetings and contact arrangements that were not provided for in the judgment to be enforced. It also noted that it could not be excluded that in a particular case an issue under Art 8 of the Convention may arise insofar as a deficient regulatory framework may in certain circumstances disclose a failure to comply with positive obligations under that provision. However, in this case, the Court noted that the applicant had not shown that she was seeking the assistance of the authorities to realise preparatory contacts with her daughter and that they failed to do what was necessary in the circumstances. Indeed, the facts of the case demonstrate that obstruction by the applicant's former husband but also the applicant's own lack of understanding for the need of a careful preparation as a precondition to effective enforcement of her custody rights both played a significant role in the events. Moreover, the Court noted the child's father was repeatedly fined, that the police made efforts to put pressure to bear on him and that the applicant did not request a partial revision of the contact measures as she could have under the Family Code. In sum, the Court concluded that the authorities did what was reasonable in the circumstances to enforce the custody agreement between the child's parents. They enforced it some 2 months after they were requested to do so and thereafter made further attempts when the father

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[19] (App no 35978/02) ECHR 12 January 2006; [2006] 1 FCR 327.

illegally took the child back. In the event, the fact that those attempts were unsuccessful did not disclose a failure to comply with positive obligations under Art 8 of the Convention.[20]

In many respects *Mihailova* reflects a typically acrimonious and complex custody battle between parents and the difficulties that authorities face in mediating between and working towards the implementation of a court order made in the child's best interests when the parties cannot agree. The case highlights in general terms the inadequacies of the law in dealing with these problems and the need for multi-faceted approaches to these controversial and difficult problems. While the usefulness of bringing such disputes to the Strasbourg Court may well be questioned – even those who win enjoy only a moral victory – nonetheless the contribution of the Convention to these matters is clear. In particular, the Court's case-law attempts to strike a fair balance between the rights of the parties and to ensure that the child's best interests are protected in the implementation as well as the making of court orders on custody matters. At the same time it reinforces the importance of the rule of law and the need to put in place effective mechanisms that enforce judgments in family law matters.

These principles were evident also in the slightly more complicated and less conventional case of *C v Finland*.[21] This case concerned a bitter custody dispute between the parents of two children. Following their divorce, the children lived with their mother and her female partner, L, until their mother's death, after which the Supreme Court awarded custody of the children to L. The father sought to challenge the custody order as contrary to his Art 8 rights, inter alia due to what he described as the undue weight attached by the Court to the views of his children. The Court noted that the Supreme Court had given decisive weight to the expressed wishes of the children that they remain with L, referring to legislation which prevented the enforcement of decisions against the will of children over the age of 12. In this regard, it noted the general acceptance that 'courts must take into account the wishes of children in such proceedings' and noted also that, on a practical basis, there may also come a stage where it becomes 'pointless, if not counter-productive and harmful, to attempt to force a child to conform to a situation which, for whatever reasons, he or she resists'.[22] What was particularly important here was that all court instances in this case essentially agreed as to the consistency and strength of the children's views and so the reasons relied on by the Supreme Court were clearly relevant. However, as the Court noted, the weight to be attached to the children's views was an issue considered in some depth in the lower courts which concluded that, notwithstanding their wish to remain with L, it was in the children's best interests for custody to be given to their father. Moreover, the Court of Appeal emphasised that it was not bound to follow the opinions of a child even where aged 12 or more. The Supreme Court, however, placed exclusive weight on the views expressed by the children without considering any

[20] Ibid, paras 79–102.
[21] (App no 18249/02) ECHR 9 May 2006; [2006] 2 FCR 195.
[22] Ibid, paras 57–58.

other factors, in particular the applicant's rights as a father, effectively giving the children, who had both reached the age of 12, an unconditional veto power, and reversing the decisions which had hitherto been in the applicant's favour. Furthermore it did so without holding an oral hearing in which it might have invited the parties to address the matter. Nor did it take steps to clarify, through further evidence or expert opinion, any divergent interpretation of the evidence or whether greater harm would be caused to the children's welfare by a decision in the applicant's favour than a decision in L's favour which would effectively deprive them of a relationship with their father. According to the Court, the decision was reached in a manner which 'understandably left the applicant with the impression that L, the mother's partner, had been allowed to manipulate the children and the court system to deprive him unjustifiably of his parental role'.[23] As a result, the Court concluded that the decision-making procedure had failed to strike a proper balance between the respective interests resulting in a violation of Art 8 of the Convention.

The Court's judgment in *C* reinforces the importance of the rights of the parent under Art 8 and might be criticised for doing so in a manner that undermines the rights of the children. On closer inspection, however, there is much to commend this decision from a children's rights perspective. First, it reflects the fact that the children's relationship with their father should be maintained in line with Art 9 of the Convention on the Rights of the Child and this must be considered especially important given that their other parent is deceased. Secondly, while it appears to reject the importance of the views of the children involved, in fact it rejects giving children complete responsibility for decisions concerning their residence. This must be considered to be fully in line with Art 12 of the Convention on the Rights of the Child which provides for children's right to be heard on matters that concern them, rather than their responsibility or indeed full autonomy to determine such matters. At the same time, more consideration might have been given to introducing the children's perspective into the judgment and to reflect that their rights – to family life and to be heard – were also at stake. To this end, the Court should give serious consideration to appointing an independent advocate to represent the rights of the child in such cases.

A further controversy that will be familiar to lawyers in many countries is what to do with allegations of abuse when they are made in the context of disputed residence or contact proceedings. Such cases raise serious issues about how to balance the child's right to protection with the mutual right of parent and child to contact. In *Bove v Italy,*[24] the child's father was granted access to his daughter by the Court until allegations were made that his father and two of his friends had sexually abused her. At this time (June 2000), his contact was restricted ultimately to one supervised visit per week, a situation which did not improve even when the criminal proceedings were discontinued in April 2001. The applicant instituted various proceedings to challenge the lack of contact in

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[23] Ibid, para 58.

[24] (App no 30595/02) ECHR 30 June 2005.

the courts and when contact was finally order in January 2003, this order was not enforced. Before the European Court the applicant complained that this situation interfered with respect for his family life, and the Court agreed. The applicant had not seen his daughter since September 2002 and the authorities had not set a schedule for any further meetings. The difficulties in arranging visits were, admittedly, partly attributable to the animosity between the child's mother and to the child's reluctance to meet her father. However, the Court did not accept that the applicant could be held responsible for the ineffectiveness of the relevant decisions or measures in actually bringing about contact. The inaction of the authorities had forced the applicant to have constant recourse to a succession of time-consuming and ultimately ineffectual remedies to enforce his rights. In conclusion, the Court considered that the failure to enforce the applicant's access rights since September 2002 had infringed his right to respect for his family life. It accordingly held by six votes to one that there had been a violation of Art 8 of the Convention.

(b) Child abduction

Previous Surveys have noted the increasing number of cases being brought to the European Court of Human Rights concerning the state's failure to facilitate the reunion of a parent with a child especially following the child's unlawful removal by the other parent. In addition to wholly domestic, private law cases like *Hokkanen v Finland*[25] about the failure to enforce court orders on residence and contact issues, an increasing number of international disputes are coming before the European Court.

The first significant case of this kind was *Ignacollo-Zenide v Romania*[26] concerning the abduction of the applicant's two daughters by their father. Their mother complained that the Romanian authorities had not taken sufficient steps to ensure rapid execution of the court decisions granting her custody and to facilitate the return of her daughters to her, contrary to her rights under Art 8 of the Convention (right to respect for family life). According to the Court, the national authorities had a duty to facilitate reunion of the family in this context but this was not absolute since 'the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken'.[27] It noted that 'the nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always an important ingredient'. Accordingly:[28]

> '. . . whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into

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25 (App no 19823/92) (1995) 19 EHRR 139, 23 September 1994.
26 *Ignacollo-Zenide v Romania*, ECHR 2000-I, 25 January 2000.
27 Ibid, para 94.
28 See also *Hokkanen v Finland* (App no 19823/92) (1995) 19 EHRR 139, para 58, Ryssdal J, 23 September 1994.

> account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them.'

The European Court has also held that in cases of this kind 'the adequacy of a measure is to be judged by the swiftness of its implementation' in light of the fact that the passage of time can have irreversible consequences for relations between the child and the parent who does not live with him.[29] The essence of such an application is thus to protect the individual from the damage that may result from the lapse of time and here the Court has referred to the requirement of expedition set out explicitly in Art 11 of the Hague Convention on Child Abduction.[30] In such cases, the Court has held not only that the authorities failed to take all the measures that could reasonably be expected to reunite parent and child, but that it did not do so 'without delay'.[31]

Thus, while the principles in both domestic and international disputes about custody are similar, the cross-border element of the international cases has resulted in the European Court giving consideration to the Hague Convention on Child Abduction. In fact, one of the interesting dimensions to the case-law in this area is the relationship between the duty on the state under Art 8 of the ECHR and the Hague Convention on Child Abduction. Domestic decisions in the area of child abduction are usually made in the framework of the Hague Convention, at least among states that have ratified it. However, in recent cases the Court has been asked to assess complaints under Art 8 which also ask whether states are complying with their Hague obligations. For instance, in *Ignacollo-Zenide*, the Court made reference to the Hague Convention in the context of assessing whether the domestic authorities had taken the measures required under Art 7 (which sets out the duties on Convention states with respect to securing the prompt return of an abducted child) in reaching its conclusion under Art 8 of the ECHR.[32] This issue arose again in 2006 in *Iosub Caras v Romania*,[33] which concerned the failure to take measures to reunite an abducted child with his parent in pursuit of obligations under the Hague Convention. In particular, the domestic courts had decided the custody issue while proceedings under the Hague Convention were pending in breach of Arts 16 and 17 of the latter treaty. Although this caused the European Court some concern, it was not decisive for its finding that Art 8 had been violated because, it concluded, the domestic courts had referred to reasons relevant to the best interests of the child when determining the custody issue, meaning that

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29 *Ignacollo-Zenide v Romania*, above n 26, para 102. See also *Sylvester v Austria* (App Nos 36812/97 and 40104/98), 24 April 2003, para 60.

30 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

31 For example, *Sylvester v Austria*, above n 29, para 72.

32 Para 113. See also *Karadiz v Croatia* (App no 35030/04) ECHR 35030/04, para 54, Rozakis J for the Court, 15 December 2005 and *Monory v Hungary and Romania* (App no 71099/01) ECHR 71099/01, 5 April 2005, paras 69–85.

33 *Iosub Caras v Romania* (App no 7198/04) ECHR 7198/04, 27 July 2006. See also *Lafargue v Romania* (App no 37284/02) ECHR 13 July 2006 concerning the failure to enforce rights of access.

its decision could not be considered to be arbitrary. Where it found fault with the process, however, was with the issue of delay. Here, contrary to Art 7 of the Hague Convention which sets down a 6-week time-limit, a period of 18 months had elapsed without explanation between the father's request for the return of his child and the date of the final decision.[34]

This issue arose again in 2006 in *Bajrami v Albania* where the applicant complained about the state's failure to reunite him with his daughter following her removal by the child's mother.[35] The Court noted that the custody decision in the applicant's favour had remained unenforced for 2 years without any reasonable justification being put forward for this lengthy delay.[36] The Court observed that, although a wide range of legislative measures had been taken in this area, they did not include any effective measure for securing the reunion of parents with their children in a situation of international child abduction. In particular, it noted 'there is no specific remedy to prevent or punish cases of abduction of children from the territory of Albania' and that Albania was not a party to the Convention nor has it implemented the UN Convention on the Rights of the Child. While the Court noted that ratification of such international treaties is not required by the Court, nonetheless the absence of 'any alternative framework affording the applicant the practical and effective protection that is required by the State's positive obligation enshrined in Article 8 of the Convention' was problematic and resulted in a violation of Art 8. Accordingly, it is clear that the Court's conclusion resulted from Albania's failure either to ratify the Hague Convention or to provide the necessary legal framework to ensure the applicants' rights were protected under Art 8.[37]

(c) Alternative care

The issue of alternative care has preoccupied the European Court of Human Rights for a number of decades and there appears to be no abatement in the number of challenges coming before it from parents who seek to challenge the state's removal of their children or their failure to return them to their care. Cases decided in 2006 were against the Czech Republic, Italy, Austria and Finland showing that this is not a problem associated with a particular legal system or approach. While the focus had shifted in recent years to care decisions made in emergency situations,[38] in 2006 concern returned to the proportionality of the decision to remove children into care. In *Moser v Austria,*[39] the Court reaffirmed that the test is whether, in the light of the case

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34 *Iosub Caras v Romania*, above n 33, paras 32–40.

35 (App no 35853/04) ECHR 35853/04, 12 December 2006.

36 See also *HN v Poland* (App no 77710/01) ECHR 13 September 2005; [2005] 3 FCR 85.

37 *Bajrami v Albania*, above n 35, paras 56–69.

38 See *K and T v Finland* [GC] ECHR 2001-VII and *P,* C *and S v the United Kingdom*, ECHR 2002-VI.

39 21 September 2006. See further U Kilkelly 'Annual Review of International Family Law' in A Bainham (ed) *The International Survey of Family Law 2004 Edition* (Jordan Publishing, 2004) 11–17.

as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of Art 8(2) and that the test includes a procedural component according to which parents must be involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. In *Moser*, the applicant's child was taken into care not because of her incapacity to care for him on account of any physical or mental illness or on account of any violent or abusive conduct, but rather because of her lack of appropriate accommodation and financial means, and her unclear residence status. In other words, her precarious situation would have made it difficult for her to care for a very young child. In this context, the issue was to what extent the authorities had considered alternatives to separating the mother from her child. According to the Court, no positive action was taken to explore possibilities which would have allowed the applicants to remain together, for instance by placing them in a mother-child centre or taking steps to clarify the applicant's residence status. The Court found that this failure to make a full assessment of all possible alternatives was aggravated by the fact that no measures were taken to establish and maintain the contact between the applicants while the proceedings were pending; this was considered particularly serious given that they did not have a chance to bond in the first place.[40] There were also serious procedural flaws in the process: the mother was heard only once by the Court, was not furnished with reports on which the decision to remove her child was based and had no representation in the legal proceedings in question. Overall, she was found to be insufficiently involved to ensure respect for her family life[41] and on the basis of all three conclusions – failure to consider alternatives, to involve her adequately and to ensure her contact with her child – Art 8 was found to have been violated. Article 6 was also found to have been violated by the failure to conduct a public hearing in the case and to pronounce the judgment publicly.[42]

Also decided in 2006, *Wallova and Walla v Czech Republic*[43] concerned a similar investigation of the reasons underlying a decision to take the applicants' children into care. At the relevant time, the family had been suffering material deprivation – the father was unemployed and the mother had not taken the necessary steps to acquire social welfare benefits – and their fundamental problem was acknowledged to be the lack of adequate housing. In the Court's view the underlying problem was a lack of resources and yet the Czech authorities' intervention to address this problem was a drastic and serious step which involved separating the applicants from their five children. The Court noted that the authorities should have had recourse to less invasive measures, including to monitor the applicants' living conditions and hygiene arrangements and advising them on the steps they could take to improve their situation. Consequently, the Court considered that, although the reasons given by the Czech administrative and judicial authorities had been relevant, they had not been sufficient to justify such a serious interference in the applicants'

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40 Ibid, paras 60–71.
41 Ibid, paras 72–73.
42 Ibid, paras 89–104.
43 (App no 23848/04) ECHR 26 October 2006.

family life as the placement of their children in public institutions. In addition, it was not evident from the facts of the case that the social protection authorities had made serious efforts to help the applicants overcome their difficulties and get their children back as soon as possible. This had led to a violation of their Art 8 rights.

Two other cases decided in 2006 concerned parents alleged to have sexually abused their children and the compatibility with Art 8 of the state's response. In *HK v Finland*,[44] the applicant complained about the emergency and then the normal care order issued in respect of his daughter whom, it was alleged, he had abused. The Court found no reason to question the necessity of these orders in the circumstances and concluded also that there was no evidence that they been implemented in a harsh or exceptional way. In particular, they noted that the child was initially placed with her mother, who was her other legal custodian at the time, and was only removed into foster care where it was clear that the prospects for her healthy development appeared far more positive. The evidence thus suggested that the decisions had indeed been based on an assessment of what was in the best interests of the child. Nor were restrictions on direct access between father and child disproportionate, particularly in light of the potential threat he posed to her and the fact that he enjoyed telephone contact.[45] The Court reached a similar conclusion in *Roda and Bonfatti v Italy*[46] where a child was removed into care on the basis of allegations that she had been abused by her father and members of her mother's family. Although it found nothing to cast doubt on the proportionality of the decision to remove the child into care, particularly given the father's alleged direct involvement and the mother's inability to protect her from other family members, the Court was critical of the long period of time that elapsed during which there was no contact between the applicants (the child's mother and brother) and the child. Even taking into account the hesitation expressed by the child who was reluctant to have more frequent contact with her mother, the Court concluded that it was appropriate that the measures taken to strike a fair balance between the girl's interests and the rights of her mother and her brother to respect for their family life had not been entirely satisfactory. It concluded therefore that there had been a violation of Art 8 on account of the prolonged suspension of contact and the unsatisfactory arrangements for meetings between the applicants.

(d) Paternity and identity issues

The 2007 Survey discussed two cases against Russia on the subject of paternity rights, relating in particular to the registration of the birth of a baby who was stillborn – *Znamenskaya v Russia*[47] – and *Shofman v Russia*[48] concerning the

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44 (App no 36065/97) ECHR 36065/97, 26 September 2006.
45 Ibid, paras 113–118 (on the care orders) and paras 122–123 (on access).
46 (App no 10427/02) 21 November 2006.
47 *Znamenskaya v Russia* (App no 77785/01) Judgment of 2 June 2005 [Section I].
48 *Shofman v Russia* (App no 74826/01) Judgment of 24 November 2005 [Section I].

compatibility with the Convention of time-barred paternity proceedings. This Survey saw the Court adjudge the compatibility with the Convention of law and practice in this area in a number of cases involving Slovakia, Malta and Poland from the perspective of both the child, and parents attempting to dispute and to assert paternity.

It is well established that a legal presumption that the husband to a formal marriage is the father of a child born to his wife does not, of itself, contravene the Convention. However, according to *Kroon v Netherlands*,[49] biological and social reality should prevail over legal presumptions and the quest for legal certainty of relations, so that any presumption of paternity must be effectively capable of being rebutted and not amount to a de facto rule. This was confirmed in *Mizzi v Malta*[50] in 2006. The facts of this case were that the applicant and his wife had a child, Y, in 1967 and he was registered as the father. Although he had doubts from the beginning as to his paternity, Maltese law did not allow him to institute an action to rebut the legal presumption that he was Y's father. His marriage was annulled and, although he paid maintenance during the child's life, he claimed to have never accepted her as his daughter. At an unspecified date in 1993, Y agreed to undergo the blood test in Switzerland and, although the applicant alleged that this established that he was not her father, he complained that there was no tribunal in which this could be independently adjudged. In particular, he claimed that he was deprived of a domestic remedy by which he could now challenge the presumption that he is Y's father. In 1993, Maltese law changed meaning that a man in the applicant's position can now contest paternity on the basis of scientific evidence and proof of adultery if the application is lodged within 6 months of the child's birth. However, according to the Court, the applicant's only means of redress is to lodge a constitutional application seeking a declaration that notwithstanding the provisions of the Civil Code, the husband had a right to proceed with an action for disavowal of paternity. Although such an action would have adequately secured his interests, as he had legitimate reasons to believe that Y might not be his daughter and wished to challenge in court the legal presumption that he was her father, the fact that his application was rejected means that he was never afforded the possibility of bringing, with reasonable prospects of success, an action aimed at rebutting the presumption in question. The Court rejected the government's argument that such a radical restriction of the applicant's right to institute proceedings to deny paternity was 'necessary in a democratic society' as required by Art 8(2). According to the Court, the potential interest of Y in enjoying the 'social reality' (interestingly, the 'biological reality' or 'right to identity' was not mentioned, perhaps because she opposed the action) of being the daughter of the applicant (who was a well-known Maltese businessman) cannot outweigh the latter's legitimate right to have at least the opportunity to deny paternity of a child who, according to scientific evidence, was not his own. It follows then that a fair balance was not struck between the general interest in the protection of legal certainty of family

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[49] Judgment of 27 October 1994, Series A no 297-C, para 40.
[50] ECHR 12 January 2006; [2006] 1 FCR 256.

relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of biological evidence.[51] In addition, the Court concluded that the circumstances of the case also gave rise to a violation of the applicant's Art 6 rights. As to the interests of legal certainty, the Court rejected that this justified the denial of the applicant's right of access to court leading to a violation of Art 6(1) of the Convention. Moreover, the Court also concluded that the applicant's case showed a violation of Art 14 (non-discrimination) read together with Arts 6 and 8 and in doing so distinguished this case from that of *Mikulic* which concerned the child's right to identity.[52]

In many of the paternity cases coming before the Court, the applicants seek to challenge their inability to use DNA evidence to contest their paternity. Those who were previously unable to prove that they were not the child's father can find themselves time-barred from taking legal action even though scientific progress makes such findings conclusive. This arose in *Tavli v Turkey* in 2006.[53] Here, the applicant had doubts from the beginning that he was the child's father but was unable to prove this fact to the satisfaction of the Court when he took proceedings disputing paternity. When DNA testing became more widespread he was able to establish that he was not the child's father but the Court refused to hear the matter again because scientific progress was not considered to be a condition for a retrial. The Court held that using this ground to justify preventing the applicant from disclaiming paternity was disproportionate. It followed that a fair balance had not been struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence. Accordingly, the Court concluded that the domestic courts should interpret the existing legislation in light of scientific progress and the social repercussions that follow. To do otherwise is to fail to respect the applicant's respect for his family life.

Similar problems arose in *Jaggi v Switzerland*.[54] The applicant who had been born in 1939 complained that he had been unable to have a DNA test carried out on his father since deceased to establish paternity. A legal presumption in operation at the time had resulted in his father's name being entered on his birth certificate and blood tests carried out in 1948 had only afforded the possibility of ruling out paternity. Considering whether the state's failure to allow the test to be carried out on his putative father violated his rights under Art 8, the Court recalled that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, it held, particularly rigorous scrutiny is called for when weighing up the competing interests which in this case included the applicant's right to respect for private life and the inviolability of the dead and respect for the deceased. In this case, the Court recognised the clear importance to the applicant of

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51 A similar conclusion was reached in *Paulik v Slovakia*, 10 October 2006, paras 41–47.

52 See further Kilkelly 'Annual Review of International Family Law' in A Bainham (ed) *The International Survey of Family Law 2004 Edition* (Jordan Publishing, 2004) 7–11.

53 (App no 11449/02) ECHR 11449/02, 9 November 2006.

54 (App no 58757/00) ECHR 58757/00, 13 July 2006.

establishing paternity which was part of a life-long and genuine search to identify his father which had implied mental and psychological suffering. On the other hand, it noted that the lease on the father's tomb expired in 2016 when his remains would have to be exhumed; this meant that his right to rest in peace was temporary. Having regard to the circumstances of the case and the overriding interest at stake for the applicant, the Swiss authorities were found not to have secured respect for his private life to which the applicant is entitled under the Convention.[55]

To date, the cases heard by the Court have concerned either fathers challenging the presumption of paternity or children seeking to establish their identity. In 2006, *Rozanski v Poland*[56] concerned a father's attempt to assert his rights of paternity. The context was a 4-year relationship with the child's mother and a demonstrable interest in and commitment to the child both before and after the birth. However, the applicant was confronted with the absence of a directly accessible procedure by which he could claim to have his legal paternity established. Moreover, although the authorities enjoyed discretionary powers to decide whether to challenge legal paternity established by way of a declaration made by another man, the Court found that domestic law offered no guidance as to how such powers should be exercised. The Court was also critical about how the authorities exercised their powers when dealing with the applicant's requests to challenge this paternity and taking all of these elements together, the Court concluded that the authorities had failed to secure to the applicant the respect for his family life to which he is entitled under the Convention.[57]

(e) Evidence in family law proceedings

Sensitive and confidential information is often used in family law proceedings but that does not mean it will always be justified. In *LL v France*[58] the applicant complained that the admissibility and use by the judge in divorce proceedings of a document relating to his alcoholism, which he alleged his wife had obtained by fraudulent means, violated his right to respect for his private life. The document had been relied on by the Court in granting the divorce on the grounds of his fault alone. While the Court acknowledged that, while it is not unusual that confidential information will be disclosed during divorce proceedings, it held that nonetheless it is vital that any unavoidable interference be limited as far as possible to that which is rendered strictly necessary by the specific features of the proceedings and by the facts of the case. In this regard, it noted the importance of ensuring confidentiality to medical data and that this principle is respected in all Convention states. The government had argued that the document was relied upon as only a secondary and alternative basis for

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55 Ibid, paras 28–44.
56 (App no 55339/00) ECHR 18 May 2006; [2006] 2 FCR 178.
57 Ibid, paras 60–79.
58 (App no 7508/02) ECHR 10 October 2006, paras 41–48.

the conclusion reached in granting the divorce. However, the Court concluded that this undermined the necessity for its use in the circumstances and found this situation to breach Art 8(2).

IV CONCLUSION

The case-law of the European Court of Human Rights continues to throw up unusual and important cases and, while some may appear unique on their facts, there is no doubt that in many areas the Court's case-law now represents a coherent body of law unique in its substance and the contribution it makes to domestic and international family law. An example of where the Court has made such a positive mark is in the area of enforcement of decisions on residence and contact issues and the related area of child abduction. Here, the Court's willingness to set down basic principles, allied to the Hague Convention on Child Abduction, has undoubtedly strengthened its influence and, although it is inescapable that recourse to the Strasbourg Court can only ever be a last resort, it is nonetheless important that it is providing a remedy to those unable to assert the Hague Convention effectively in domestic proceedings.

In 2006, the work of the United Nations appeared to concentrate on violence against children and the Secretary General's Study and the guidance of the Committee on the Rights of the Child are very welcome developments on this important topic. The increasing convergence of international standards on family law and children's rights means that these standards are not only for guidance purposes. They also offer those arguing before and judging in domestic, regional and international courts evidence of best practice and international consensus, and putting them to this use may give them the teeth that they need to become effective too.

Australia

BLUNTING THE SWORD OF SOLOMON – AUSTRALIAN FAMILY LAW IN 2006

Frank Bates[*]

Résumé

L'élément marquant en 2006 fut l'adoption de la *Loi de réforme du droit de la famille (Responsabilité parentale partagée)* de 2006. Cette loi permet à la réforme de 1995 de franchir de nouvelles étapes et elle était réclamée du gouvernement par de nombreuses personnes. Elle met l'accent sur l'implication continue des parents quel que soit le contexte familial. Même si l'objectif peut paraître louable, il se peut que des problèmes administratifs entraînent cette législation dans le bourbier des contestations judiciaires menées en particulier par des pères insatisfaits. Comme pour plusieurs développements en 2006, l'avenir de la cette réforme semble bien incertain. L'attention fut essentiellement portée sur la nouvelle loi pendant cette année, mais il y a également eu quelques développements jurisprudentiels intéressant dans les domaines des relations parents-enfants, celui du droit patrimonial et du droit judiciaire. En ce qui concerne le premier, ce sont les questions relatives aux enfants victimes d'abus, au déménagement des enfants et au droit alimentaire des enfants adultes qui ont essentiellement retenu l'attention. Pour ce qui est du droit patrimonial, la jurisprudence s'est concentrée sur le droit des tiers, la faillite et les pensions qui ont fait l'objet de réformes législatives. Finalement, en matière de droit judiciaire, les tribunaux se sont surtout penchés sur l'arrimage de la réforme avec le droit existant. Il y a également eu des développements intéressants en ce qui a trait à l'utilité des procédures de révision, des ordonnances judiciaires et des expertises.

Somme toute, le processus continue …![1]

I SHARED PARENTING

After various warnings by the present[2] writer regarding the likelihood of major legislative change in Australia, it has finally happened. Before seeking to

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* Professor of Law, University of Newcastle (NSW).

1 The reference to Blunting the Sword of Solomon is derived from I Kings 3:16–28.

2 F Bates 'A Direction Enforced – Immigration and Australian Family Law in 2003' in A Bainham (ed) *International Survey of Family Law 2005 Edition* (Jordan Publishing, 2005) 41 at 67, and 'There was Movement at the [Family Law] Station – Australian Family Law in 2004' in A Bainham (ed) *International Survey of Family Law 2006 Edition* (Jordan Publishing, 2006) 59 at 91.

examine the substantive changes to the Family Law Act 1975, it is worth noting that the Act has been subject to no less than 67 amendments since its inception. Some of those amendments have represented very considerable conceptual change to the Act, some, such as those in 1995, have been more than a little controversial,[3] whilst others, such as those in 2000[4] and 2001[5] have, in this writer's view, been little short of catastrophic. In 2006, the Family Law Amendment (Shared Parental Responsibility) Act 2006 had the potential to be, at the very least, as controversial and unfortunate as any major amendment which had preceded it.

At the same time, the Australian Federal Government has made very considerable claims for the Act and it is against the background of those very claims that the substantive provisions of the new legislation must be considered. Thus, the Government claims[6] that the legislation represents:

> '… the most significant reforms to the family law system for 30 years. The initiatives represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed – away from litigation and towards co-operative parenting solutions. The Government wants to change the way people think about family breakdowns, and to improve outcomes for children.'

In that context, the policy statement continues, inter alia, by stating that:

> 'The reforms also aim to ensure that as many children as possible grow up in a safe environment with the love and support of both of their parents … [T]he Government hopes that through these changes, more children will have a loving and healthy home environment, whether their parents are together or not, to help them achieve their full potential.'

The key provisions in the legislation relate to shared parenting itself. It is, first of all, immediately clear that the Act seeks to send out strong messages in relation to shared parenting, especially after parental separation. Thus, first, a new s 60B(1) sets out the objects of Part VII as a whole, the objects being:

> '… to ensure that the best interests of children are met by:
>
> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent with the best interests of the child; and
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

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3 See, for example, R Bailey-Harris 'The Family Law Reform Act 1995. A New Approach to the Parent/Child Relationship' (1996) 18 *Adelaide Law Review* 83.

4 See Family Law Act 1975, Part VII, Division 13A; Part VIIIA. For comment, see F Bates 'Family law Reform in Australia, 1992 and Beyond' (2001) 3(3) *European Journal of Law Reform* 331.

5 Family Law Act 1975, Part VIIIB.

6 Law Council of Australia, Family Law Section, *The New Family Law Parenting System* (2006) at 5.

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the case, welfare and development of their children.'

Section 60B(2) then sets out the principles underlying those objects, except when it is or would be contrary to the child's best interests. There are five of these:

(1) that children have the right to know and be cared for by both parents, regardless of whether their parents are married, separated, have never married or lived together;

(2) that children have a right to spend time on a regular basis with and communicate on a regular basis with both their parents as well as other people significant to their care, welfare and development such as grandparents and other relatives;

(3) that parents should jointly share duties and responsibilities concerning the care, welfare and development of their children;

(4) that parents should agree about the future parenting of their children; and

(5) that children have a right to enjoy that culture, including the right to enjoy that culture with other people who share the same culture.[7]

However, it must be remembered that, as now stated in s 60CA, the child's best interests remain the paramount consideration. As regards that essential criterion, the method of determination of the child's best interests is now set out in s 60CC, rather than s 68F(2). The new provision is somewhat different from its predecessor. Thus, s 60CC(2) sets out the primary considerations which are:

'(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.'

These considerations, as a note to the provision points out, are clearly consistent with the provisions of s 60B.

The secondary considerations in s 60CC(3) and (4), which approximate more closely to those of s 68F(2) and various semi-institutionalised guidelines which have developed in times past, are as follows:

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[7] Section 60B(3) provides that, for the purpose of that last provision, an Aboriginal child's or a Torres Strait Islander child's right so to enjoy that culture includes the right to maintain a connection with that culture and to have the support, opportunity and encouragement necessary to explore the full extent of that culture consistent with the child's age, developmental level and views and to develop a positive appreciation of that culture.

'(3) . . .

(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding), that the court thinks are relevant to the weight it should give to the child's views;
(b) the nature of the relationship of the child with:
    (i) each of the child's parents; and
    (ii) other persons (including any grandparent or other relative of the child);
(c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
    (i) either of his or her parents; or
    (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
(e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
(f) the capacity of:
    (i) each of the child's parents; and
    (ii) any other person (including any grandparent or other relative of the child) to provide for the needs of the child, including emotional and intellectual needs;
(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
(h) if the child is an Aboriginal or a Torres Strait Islander child:
    (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
    (ii) the likely impact any proposed parenting order under this Part will have on that right;
(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
(j) any family violence involving the child or a member of the child's family;
(k) any family violence order that applies to the child or a member of the child's family, if:
    (i) the order is a final order; or
    (ii) the making of the order was contested by a person;
(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
(m) any other fact or circumstance that the court thinks is relevant.

(4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

(a) has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and
(ii) to spend time with the child; and
(iii) to communication with the child; and

(b) has facilitated, or failed to facilitate, the other parent:
(i) participating in making decisions about major long-term issues in relation to the child; and
(ii) spending time with the child; and
(iii) communicating with the child; and

(c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.'

Further, s 60CC(4A) states that, if the child's parents have separated, in applying s 60CC(4), courts must, particularly, have regard to events which have happened, or circumstances which have existed, since the separation.[8]

There can be little doubt that s 60CC will prove to be controversial in its construction and application. The primary considerations are certainly aimed at having rather more than a didactic application than did the previous objects and principles. In addition, given the structure of the provision, the wishes of the child, traditionally given a specially strong voice,[9] will be subject to more generally expressed, yet overriding, objects and principles. Indeed, it will be apparent that it is only abuse, violence or neglect which will challenge the object of shared parenting. The very specificity of s 60CC(3) may be, of itself, productive of its own difficulties, especially when the context of the section at large is considered; in Chisholm's own words,[10] it may lead to an 'undignified scramble for legislative pegs on which to hang arguments, with parties particularly eager to find factors that will gain some enhancement'. That may, in turn, lead to increased litigation in matters involving children.

Although ss 60B and 60CC may be the most obviously and graphically important, the emphasis on shared parenting is apparent elsewhere: thus, s 61DA seeks to create a presumption of equal shared parental responsibility, so that s 61DA(1) provides that: 'When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of a child for the child's parents to have equal shared parental responsibility for the child.' A note to that subsection states that:

> 'The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).'

Section 61DA(2) then provides that the presumption will not apply if:

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8 A similar provision to that noted, above n 7, is made in relation to Aboriginal or Torres Strait Islands in s 60CC(6).

9 See, for example, F Bates '"Completing the Charm" – The Relevance of Children's Wishes in Contested Cases' (2004) 5(2) *Newcastle Law Review* 97.

10 R Chisholm *A Look at the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (College of Law, Sydney, 05/164).

> '… there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
>
> (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
> (b) family violence.'

In those circumstances, s 61DA(4) provides that the presumption may be rebutted by evidence which satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. Here again, in order to provide such evidence, that evidence must relate specifically to abuse and family violence, where the presumption is most clearly inappropriate.

Section 65DAA, as was earlier suggested, deals with the time each parent is to spend with the child, and it seems likely that disputes will most obviously arise in relation to this issue. Courts are required thereby to consider the child spending equal or substantial and significant time with each parent. As regards equal time, s 65DAA(1) provides that:

> 'If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:
>
> (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
> (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
> (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.'

Notes to that provision state that in making such a parenting order, courts must regard the best interests of the child as the paramount consideration and that the issue of practicality is dealt with in s 65DAA(5).

Section 65DAA(2), (3) and (4) deal more specifically with orders requiring a child to spend substantial and significant time with each parent; courts must, by reason of s 65DAA(2):

> '. . .
> (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
> (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
> (e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.'

Again, notes refer to the issues of orders being in the child's best interests and of practicality. Section 65DAA(3) goes on to state that a child:

> '… will be taken to spend *substantial and significant time* with a parent only if:

(a) the time the child spends with the parent includes both:
  (i) days that fall on weekends and holidays; and
  (ii) days that do not fall on weekends or holidays; and
(b) the time the child spends with the parent allows the parent to be involved in:
  (i) the child's daily routine; and
  (ii) occasions and events that are of particular significance to the child; and
(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.'

Further, s 65DAA(4) states that the preceding subsection does not limit other matters to which courts can have regard in determining whether the time spent with a parent is substantial and significant.

Given the mobile nature of Australian society and the demographics of the country in general, s 65DAA(5) seeks to deal with the issue of practicality and, hence, requires courts to have regard to:

'(a) how far apart the parents live from each other; and
(b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
(c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
(d) the impact that an arrangement of that kind would have on the child; and
(e) such other matters as the court considers relevant.'

In notes to s 65DAA(5), reference is made, first, to the provisions of s 60CC(3) in regard to the determination of orders in the best interests of children. Notably reference is made to s 60CC(3)(c) – the willingness and ability of each of the parents to facilitate a close and continuing relationship between the child and the other parent – and s 60CC(i) – the attitude to the child, and to the responsibilities of parenthood demonstrated by each of the child's parents. Further, as regards future capacity in s 60CC(3), it is noted that courts have, by reason of s 13C, the powers to make orders for parties to attend family counselling or family dispute resolution or to participate in courses, programmes or services.

That would seem all very well: courts must *consider* the issues to which reference has continually been made hitherto. There is case-law from administrative law. Thus, in that context, reference was made in a recent commentary[11] to the decision of the Full Court of the Federal Court of Australia in *Tickner v Chapman*[12] where it had been variously said that *consideration* 'involves an active intellectual process directed at that representation or submission'[13] or, obtaining 'an understanding of the facts

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[11] Above n 6 at 57.
[12] (1995) 57 FCR 451.
[13] Ibid at 462 per Black CJ.

and circumstances set out in them, and of the contentious urge based on those facts and submissions'.[14] If such approaches were to be adopted in this context, it would mean more than lip service being paid to the notion.

In addition s 65DAC seeks to illuminate the meaning of shared parental responsibility as it applies to major long-term issues in relation to a child. That provision applies if, under a parenting order, two or more persons are to share parental responsibility for a child and the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to a child and the order requires those persons to make a decision jointly. Section 65DAC(3) then requires each of those persons to consult the other person in relation to the decision to be made about that issue and to make a genuine effort to come to a joint decision about it. The definition of *major long-term issue*, found in s 4(1) of the Act, includes, but is not limited to, the child's education (both present and future); the child's religious and cultural upbringing; the child's health; the child's name and changes to the child's living arrangements which make it significantly more difficult for the child to spend more time with a parent. The provision goes on to state that, to avoid doubt:

> '… a decision by a parent of a child to form a relationship with a new partner is not, of itself, a major long-term issue in respect of a child. However, the decision will involve a major long-term issue if, for example, the relationship with a new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent.'

On the other hand, there is no obligation to consult on matters which are not major long-term issues, as is pointed out in s 65DAE. Those issues will normally be decided by the person with whom the child is spending time under a parenting order.

The terms of s 65DAE refer to s 64B which revises the terminology attaching to parenting orders – just as the 1995 amendments abandoned the phraseology of *custody* and *access* and replaced them with *residence* and *contact*, so are those replacements themselves replaced. Thus, s 64B(2) now provides that:

> 'A parenting order may deal with one or more of the following:
>
> (a) the person or person with whom a child is to live;
> (b) the time a child is to spend with another person or other persons;
> (c) the allocation of parental responsibility for a child;
> (d) if 2 or more persons are to share parental responsibility for a child – the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
> (e) the communication a child is to have with another person or other persons;
> (f) maintenance of a child;
> (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
> (i) a child to whom the order relates; or

[14] Ibid at 476 per Burchett J.

(ii) the parties to the proceedings in which the order is made;

(h) the process to be used for resolving disputes about the terms or operation of the order;

(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).'

The new nomenclature, again more specific than its predecessors, may very well give rise to problems in negotiation which may, ultimately, depend on the factual circumstances of each case. It may also be that the original terminology remains, together with attendant attitude, hard to displace.

One concept introduced in 1995 was the *parenting plan*. Although there was much scepticism regarding its initial introduction,[15] it remains in the 2006 amendments and is given more force than was previously the case. Thus, s 64D makes parenting orders subject to later parenting plans. This is the case regardless of how the plan was arrived at, and this is made all the stronger by the provision contained in s 64D(2) that it is only 'in exceptional circumstances' that a parenting order may be made in such terms that it cannot be varied by a subsequent plan. That provision, therefore, represents a significant barrier for courts to overcome if they seek to take control of a difficult case.

II FAMILY DISPUTE RESOLUTION – INCLUDING ALLEGATIONS OF VIOLENCE

Although the shared parenting provisions of the Act are obviously at its centre, that does not mean that other parts of it are not of immediate significance. One such part is a new process of family dispute resolution. The object of the compulsory family dispute resolution procedure is found in s 60I of the new Act. There, it is stated that:

'The object of this section is to ensure that all persons who have a dispute under this Part (a *Part VII order*) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.'

In turn, s 10F provides that:

'*Family dispute resolution* is a process (other than a judicial process):

(a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and

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[15] See R Ingleby 'The Family Law Reform Act – A Practitioner's Perspective' (1996) 10 *Australian Journal of Family Law* 8.

(b) in which the practitioner is independent of all the parties involved in the process.'

The way in which s 10F is drafted leads to s 10G, which seeks to define *family dispute resolution practitioner*, and states that:

'A *family dispute resolution practitioner* is:

(a) a person who is accredited as a family dispute resolution practitioner under the Accreditation Rules; or
(b) a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or
(c) a person who is authorised to act under section 38BD, or engaged under subsection 38R(1A), as a family dispute resolution practitioner; or
(d) a person who is authorised to act under section 93D of the *Federal Magistrates Act 1999*, or engaged under subsection 115(1A) of that Act, as a family dispute resolution practitioner.

(2) The Minister must publish, at least annually, a list of organisations designated for the purposes of paragraph (b) of the definition of *family dispute resolution practitioner.*

(3) An instrument under this section is not a legislative instrument.'

It will be immediately apparent that that definition does not, ipso facto, include family law practitioners, which is strange as it is admitted in a government sponsored document[16] that 'the vast majority of family law disputes handled by lawyers are successfully resolved amicably, inexpensively and in a child-focussed manner'. In addition, there is a great deal of anecdotal evidence which suggests that it is clients themselves who seem anxious for the intervention of lawyers and for recourse to the curial process. In addition, distrust of other professions is likely to be involved. That attitude is longstanding[17] and whether it will be undermined by these provisions remains to be seen.

The compulsory family dispute resolution is to be introduced in three phases: the first phase operates from the commencement of the Act, in July 2006, until 30 June 2007, the existing dispute resolution provisions contained in the Family Law Rules 2004 are extended, by reason of s 601(2) and (4) of the Act, to all courts applying the Family Law Act; the second phase operates between 1 July 2007 and 30 June 2008; and the third phase covers all applications thereafter.[18]

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16 Above n 6 at 35.

17 See F Bates 'Counselling and Reconciliation Procedures – An Exercise in Futility' (1978) 8 Fam Law 248.

18 The only substantive difference is that the second phase only applies to fresh proceedings, in the sense that none of the parties had applied for Part VII orders before 1 July 2007.

Section 60I(7) states that, generally, a court exercising jurisdiction must not hear a Part VII application unless the applicant files a certificate given to that applicant by a family dispute resolution practitioner. It is provided in s 601(8) that:

> 'A family dispute resolution practitioner may give one of these kinds of certificates to a person:
>
> (a) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;
> (aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issues or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;
> (b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;
> (c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issues or issues.'

A note to that provision states that the court may take a certificate into account, in considering whether to make an order referring parties to family dispute resolution or in making a costs order.

Section 60I(9) provides that s 60I(7) does not apply where:

> '(a) the applicant is applying for the order:
> (i) to be made with the consent of all the parties to the proceedings; or
> (ii) in response to an application that another party to the proceedings has made for a Part VII order; or
> (b) the court is satisfied that there are reasonable grounds to believe that:
> (i) there has been abuse of the child by one of the parties to the proceedings; or
> (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
> (iii) there has been family violence by one of the parties to the proceedings; or
> (iv) there is a risk of family violence by one of the parties to the proceedings; or
> (c) all the following conditions are satisfied:
> (i) the application is made in relation to a particular issue;

(ii) a Part VII order has been made in relation to that issue within the period of 12 months before the application is made;
(iii) the application is made in relation to a contravention of the order by a person;
(iv) the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order; or

(d) the application is made in circumstances or urgency; or
(e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or
(f) other circumstances specified in the regulations are satisfied.'

It is provided in s 60I(9) that, where an exception applies, a referral to family dispute resolution may be made.

There are immediate problems which arise from these various provisions. First, a certificate may be issued to the effect that a party 'did not make a genuine effort to resolve the issues'. How s 60I(8)(c) will be interpreted is liable to be central to the operation of these provisions. A hint may be found in the decision of the National Native Title Tribunal which was required to decide on analogous matters in *Western Australia v Taylor*.[19] In addition, s 60I(9)(b) seems to create an impression that courts may be required to make findings about the matters stated therein in the sense of a hearing, of unspecified kind, based on evidence. Lastly, the certificate relates to attendance at family dispute resolution, but there is no obligation there to settle.

Section 60J deals with family dispute resolution where there are allegations of child abuse or family violence. That provision aims at ensuring that people who are unable to attend family dispute resolution for proper reason will still be able to obtain information about services which may be available to them.

In addition to these provisions, which are essentially court-based, there are substantial changes to procedures and methodology in relation to non-court-based dispute resolution, family counselling and family dispute resolution practitioners. These changes are substantial in volume, involving the repeal of Parts II, III, IIIA and IIIB, of the Act and their replacement with new provisions. These are very substantial and a detailed exposition is beyond the scope of a relatively brief commentary of this nature.

More directly relevant is s 60K which requires courts to take prompt action in relation to allegations of child abuse or family violence. That provision will apply if an application is made to a court for a Part VII order and, it is stated in s 60K(1)(c), that the document alleges, as a consideration that is relevant to the outcome of the application, that:

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[19] [1996] 134 FLR 211.

'(c) …
(i) there has been abuse of the child by one of the parties to the proceedings; or
(ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
(iii) there has been family violence by one of the parties to the proceedings; or
(iv) there is a risk of family violence by one of the parties to the proceedings …'[20]

The court must consider what interim or procedural orders (if any) should be made so as:

'(a) …
(i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
(ii) to protect the child or any of the parties to the proceedings; and
(b) make such orders of that kind as the court considers appropriate; and
(c) deal with the issues raised by the allegation as expeditiously as possible.'

By reason of s 60K2A, that action must be taken as soon as practicable after the document is filed and, if it is appropriate in the circumstances, to take the action within 8 weeks after the document is filed. In addition, s 60R sets out the powers of the court, in making a violence order, to revive, vary, discharge or suspend any existing order, injunction, or arrangement under the Act.

In this general context, note should be taken of the new definition of *family violence* contained in s 4(1) of the Family Law Act. This now means:

> '… conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of that person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.'[21]

Three matters instantly emerge: first, the reference to *reasonably* imparts an objective element; secondly, it may be that the definition is unnecessarily restrictive and does not take appropriate account of the many forms which family violence may be manifested; and thirdly, there is no reference to any temporal matters, which may be important in cases where the threat of violence has existed over a relatively long period of time.

Other provisions in this area relate, first, to the relationship of an order and injunction made under the Act with any existing inconsistent family violence

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[20] Section 60K(2).

[21] A note to the provision states that a person reasonably fears for or is reasonably apprehensive about, his or her personal well-being or safety, if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal safety or well-being.

order[22] and, secondly, the power of a court making a family violence order to revive, vary, discharge or suspend any existing order, injunction or arrangement under the Act.[23]

The terminology relating to the separate representation of children is changed in that the role is now referred to as the *independent children's lawyer*. Section 68L, though, only applies to proceedings where the child's 'best interests' are either paramount or relevant, although an order for an independent children's lawyer may be made in cases involving the operation of the Hague Convention on Civil Aspects of International Child Abduction, but only where exceptional circumstances exist, and those circumstances must be specified.[24]

The role of the independent children's lawyer is described[25] as threefold. First, the lawyer must form an independent view based on the evidence of what is in the child's best interests, act on that view, so inform the court and act in the child's best interests. The lawyer, secondly, must, if satisfied that the adoption of a particular course is in the child's best interests, make submissions to the court suggesting that course's adoption. Thirdly, the lawyer is not the child's legal representative and is not obliged to act on the child's instruction. The duties of the lawyer are set out,[26] although the provision largely replicates the formulation in *P and P*.[27]

Despite criticism of the notion of *parenting plans* as introduced in 1995,[28] it is clear that such plans[29] are preferred methods of documenting agreements. Thus, parenting orders are subject to later parenting plans.[30] It is clear from the totality of the provisions that the new legislation envisages a still broader role for the parenting plan in keeping with its broader legislative aims in seeking to implement greater shared parenting as its central objectives.

Yet one fears that all of this will not prove the end of the shared parenting continuum. On 19 September 2006, the Minister for Community Services in the State of New South Wales, Australia's most populous jurisdiction, referred an inquiry into the impact of the legislation to the Standing Committee on Law and Justice for inquiry and report by December. An impetus for that course may have been found in a journalistic comment[31] that abused women were being coerced into mediation regardless of its suitability. In addition, note must be made of s 117AB of the Act, inserted together with the provisions discussed

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22 Section 68Q.
23 Section 68R.
24 Section 68L(2A).
25 Section 68LA(2), (3), (4).
26 Section 68L(5).
27 (1995) FLC 92–615.
28 Above n 15.
29 For a definition of parenting plans, see s 63C(2).
30 Section 64D. In addition, further new and supportive provisions are found in s 63C(2A), (2B), (2C).
31 See *The Age* (Melbourne), 18 December 2006.

previously. This states that, if the court is satisfied that a party to proceedings has knowingly made a false allegation or statement in the proceedings,[32] then: 'The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.'[33] Concern has been expressed that this may be used as a deterrent to women from making allegations of violent conduct which could be disputed. Indeed, journalistically and anecdotally, it has been suggested that the legislation at large is the product of pressure brought on the Australian Government by men's organisations. Amongst lawyers, a deeply held concern has been voiced that, at least in its early stages, the 2006 legislation may result in every case involving children being litigated. So the waiting process[34] is revivified.

III OTHER FAMILY ACTIVITIES INCLUDING PARENT AND CHILD, AND FINANCE AND PROPERTY

The 2006 legislation does not, of course, mean that other family law activities have ceased – especially in the area of finance and property, Australian courts have been active, notably in those areas which are derived from recent legislation.

(a) Parent and child

Whatever the state of the law, the risk of child abuse and its inevitable concomitants is always to be found. Thus, in *KN and Child Representatives and Ors*,[35] the child in question had lived from birth with her mother and her mother's de facto partner until the mother was admitted to a psychiatric hospital. The child then lived with her maternal grandparents. The grandparents brought proceedings in which they sought a residence order, that the mother should have contact with the child, but that the de facto partner be restrained from coming into contact with the child. They alleged that the child had complained that the partner had acted in a sexually inappropriate manner and that he and the mother had had a violent relationship. Further, they asserted that the child was at risk owing to the mother's psychiatric condition. The trial judge had concluded that living with the mother presented an unacceptable risk to the child and, hence, granted residence to the grandparents.

The mother appealed, and both she and the child representative disputed the findings in relation to the sexual abuse and violence and the aggregation of those findings together with the mother's psychiatric history. These matters appeared to have led the trial judge to a conclusion that there was an unacceptable risk of harm to the child were she to continue to live with her

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[32] Section 117AB(1)(b).
[33] Section 117AB(2).
[34] Above n 2.
[35] (2006) FLC 93–294.

mother. Submissions were also made that the trial judge had failed to make findings in relation to the attitude of the grandparents to the relationship of the child with her mother and as to the likelihood that they would comply with court orders. The Full Court[36] allowed the appeal and remitted the matter for rehearing.

In reaching that decision, Bryant CJ and Kay J, first, pointed out[37] that:

> 'Whilst there may be circumstances in which the cumulative effect of a series of potential risks might be said to amount to an appropriate basis for choosing one claimant for residence over and above another, our analysis of the matters in this case that were said to constitute such circumstances lead us firmly to the conclusion that the result reached by the trial judge is unsafe …'

That was the more so when the trial judge would not have found an unacceptable risk of child abuse, a view with which Bryant CJ and Kay J agreed.

More generally, they went on to say that the obligation of the trial judge in such cases was to identify and evaluate the issues which would relevantly determine the outcome of such proceedings by reference to the statutory criteria.[38] That course would require an evaluation of the competing households, bearing firmly in mind that one household contains a parent who has the primary bond with the child and who, it was conceded, would be a caring and loving caregiver to the child. The issues, they considered, surrounding the allegations of sexual abuse were unlikely to be usefully revisited.

Finn J adopted a rather different approach and, indeed, directed her attention to the issues of family violence and sexual abuse. First, she was concerned[39] as to whether the trial judge had actually concluded that there was an unacceptable risk of sexual abuse if the child lived with her mother and the partner. However, she continued[40] by saying that, if a court is 'confronted with allegations of abuse, it must at least satisfy itself that the allegations support a finding of unacceptable risk according to the civil standard, if a decision is to be made wholly or in part on the basis of those allegations'. Finn J considered that it was not clear whether that finding had been made by the trial judge.

One wonders, in the context of the case-law regarding the notion of *unacceptable risk* at large, how much further the judgments in *KN* take the matter. It may be that excessive particularity and, at the same time, excessive generality are both unsatisfactory ways of approaching a continuing issue.

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36 Bryant CJ and Kay and Finn JJ.
37 (2006) FLC 93–294 at 80, 870.
38 At the time, those were to be found in Family Law Act 1975, ss 60B, 65E and 68F.
39 (2006) FLC 93–294 at 80, 874.
40 Ibid at 80, 875.

Similar issues were involved in *McCawley and Stewart,*[41] where Finn J was also involved. In that case, the mother had appealed against a decision of a federal magistrate. In evidence, the mother's first preference was for the child to live with her and her second was for the child to live with the father, as opposed to any shared parenting arrangement. At trial, in final addresses, the father had changed his position from seeking a shared residence arrangement to seeking a residence order in his favour. Counsel for the mother had been given an opportunity to reply, but failed to respond to the father's latter proposal. In examining the proposals, the federal magistrate had found that, were the child to live with the mother, there would be an unacceptable risk that she would be exposed to scenes of violence. Accordingly, a residence order in favour of the father was made.

On appeal, the mother claimed, initially, that the federal magistrate was in error in finding that the father's position had changed at the 'end of the case'. The father, it appeared, had not put forward any evidence in support of the change, nor filed amended Minutes of Order. In addition, it was claimed that the federal magistrate was in error in four other instances: first, in failing to apply the high degree of certainty required under the *Briginshaw*[42] principle when determining issues relating to violence; secondly, in failing to place any weight on evidence relating to the father's violence towards the mother; thirdly, in finding that a 'possibility of violence' constitutes an unacceptable risk; and, finally, in finding that there was an unacceptable risk of the child's being exposed to violence if she resided with the mother. Finn J dismissed the appeal.

As regards the first ground, Finn J held,[43] not altogether surprisingly, that it would be an unduly technical approach to hold, as the father's case had changed at the end of evidence, that it would constitute an appealable error for it to have been held that it had changed 'at the end of the case'. The real question, the judge thought,[44] was whether a party should be permitted to change her or his position only in final submissions. In a case concerning the future living arrangements for a child, Finn J continued:

> '… the parties should be at liberty to urge upon the court in final submissions whatever proposal would appear best in the light of the evidence overall to be in the best interests of the child in question, subject always to the other party having the opportunity to be heard in relation to such a proposal.'

As regards the remaining grounds, first, Finn J noted that, in the instant case, there was no allegation that the child had been abused in any way. Hence, there was no need for the *Briginshaw* test to be applied. The judge also pointed out that the finding at first instance had been that there was an unacceptable risk that the child would be exposed to *scenes of violence*, not violence to the child.

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41 (2006) FLC 93–250.
42 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
43 (2006) FLC 93–250 at 80, 203.
44 Ibid at 80, 204.

A finding that the child might be so exposed was open on the facts[45] to the federal magistrate, as were his findings relating to the father's past violent behaviour.[46] Essentially, the task of the federal magistrate was to consider what was in the best interests of the child in the light of the legislation,[47] including the need to protect the child from exposure to violence directed at others.[48]

Here again, one observed the application of the *unacceptable risk* test, originally devised by the High Court of Australia in *M v M*[49] in relation to child sexual abuse cases, to a broader variety of cases. One can only speculate on the effects of this broader application, especially given its initial critical response.

Another controversial issue in Australian parent and child law is that of the primary caregiver who wishes to relocate, either locally or internationally, with the child (or children). That question was considered by Carmody J in *Walls and Robinson*.[50] There, the parents, both of whom were New Zealand citizens, each applied for parenting orders in respect of three children aged 11, 8 and 5. The family had lived in New Zealand before moving to Australia for 4 years before the case was heard. It appeared that the children were well settled in Australia, with strong parenting links to the community in which the parents were both heavily involved. The mother argued that the children should live with her in New Zealand or, were that application not successful, with her in Australia. The bases of her submission were that: she was the primary carer and wished to gain financial independence and family security; she had no family in Australia and wished to be closer to her own family in New Zealand and felt unhappy and isolated in Australia; as she was partly Maori, she wished to reconnect with Maori culture and she had an offer of employment in New Zealand which had linked accommodation. Conversely, the father argued that the children should live with him in Australia.

Carmody J considered at some length[51] various Australian authorities,[52] as well as cases and authorities from England,[53] New Zealand,[54] Canada[55] and the

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45 Ibid at 80, 209.
46 Ibid at 80, 217.
47 Ibid at 80, 218.
48 Notably Family Law Act 1975, s 68F(2) as it then stood.
49 (1988) 166 CLR 69.
50 (2006) FLC 93–250 at 80, 215.
51 Ibid at 80, 224.
52 *Holmes and Holmes* (1988) FLC 91–918; *AMS v AIF* (1999) 199 CLR 160; *Paskandy and Paskandy* (1999) FLC 92–878; *Martin and Matruglio* (1999) FLC 92–876; *U v U* (2002) 211 CLR 238; *Hatton and Tomlinson* [2004] Fam CA 200; *D v SV* (2003) FLC 93–137; *PJ and MW* [2005] Fam CA 162; *Driscoll and Valentine* [2004] Fam CA 830; *Bolitlo and Cohen* (2005) FLC 93–224.
53 *Payne and Payne* [2001] 1 FLR 1052; *Poel and Poel* [1971] WLR 1469; *Nash* v *Nash* [1973] All ER 704; *A v A (Child: Removal from Jurisdiction)* (1980) 1 FLR 380; *Chamberlain v De La More* (1983) 4 FLR 434; *Belton v Belton* [1987] 2 FLR 343; *Tyler* v *Tyler* [1989] 2 FLR 158; *Re S* (*Remove from Jurisdiction*) [2003] 2 FLR 1043; *Re B* (*Leave to Remove*) (*Impact of Refusal*) [2005] 2 FLR 239; *Re G* (*Removal from Jurisdiction*) [2005] 2 FLR 166. A Perry '*Payne v Payne*: Leave to Remove Children from Jurisdiction' (2001) 13 *Child and Family Law Quarterly* 455.

United States.[56] After an analysis of the general background to the phenomenon, Carmody J reached the conclusion[57] that the appropriate approach was to be found in the decision of the Full Court of the Family Court of Australia in *A and A*: *Relocation Approach*.[58] In that case, the Court[59] had examined the principles governing the issues and the processes by which they were to be put into effect.[60] In *Walls and Robinson*, Carmody J considered that the best interests of the children required that orders be made awarding residence to the mother, contact to the father and refusing the mother's application to relocate. The major factors which led him to the decision were that: first, the mother was the primary caregiver; secondly, the children were living in a safe, secure and settled environment and were well established in their schools and sporting activities; thirdly, the mobility rights of the primary carer could, and should, yield to what was in the best interests of the children. Permitting the relocation would have disadvantaged rather than benefited them; fourthly, the children had a need for their father as an adult male figure and role model and he was also an active participant in their lives; fifthly, the eldest child was strongly opposed to the relocation and the judge was not satisfied that the mother would be unduly unhappy or stressed by remaining in Australia and, in addition, the children had not forgone opportunities to forge links with their Maori heritage more than at any time since the family had come to live in Australia; and finally, and importantly for the purposes of this discussion, Carmody J noted that the Family Court was unapologetically in favour of contact and that the legislation placed strong emphasis on the right of the children, and their need, to have regular contact with both parents.

It is effectively certain that *Walls and Robinson* will not be the end of the juristic process regarding relocation, although the detailed analysis provided by Carmody J may well help in the resolution of a problem which is endemic in Australian society, for demographic reasons as much as for any other.

Carmody J was once again the judge and, once again, was able to demonstrate his grasp of comparative jurisprudence in the rather extraordinary case of *Re AM (Adult Child Maintenance)*.[61] That case involved an application by a 28 year old for adult child maintenance under s 66L of the Family Law Act by way of both periodic payments and a lump sum. The applicant was an unmarried woman who had been diagnosed, at the age of 21, as suffering from urticarial

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54 *D* v *S* [2002] NZFLR 116.

55 *Gordon* v *Goertz* [1996] 2 SCR 27; B Parminder '*Gordon v Goertz* – The Supreme Court Compounds Confusion over Custody and Access' (1998) 61 *Saskatchewan Law Reports* 159.

56 See the various cases reviewed in C S Bruch and J M Bowermaster 'The Relocation of Children and Custodial Parents: Public Policy, Past and Present' (1996) 30 *Family Law Quarterly* 245.

57 (2006) FLC 93–251 at 80, 266.

58 (2000) FLC 93–035.

59 Nicholson CJ, Ellis and Coleman JJ.

60 For comment, see F Bates 'What Change is for the Better? Australian Family Law in 2000' in A Bainham (ed) *International Survey of Family Law 2002 Edition* (Jordan Publishing, 2002) 33 at 44.

61 (2006) FLC 93–262.

vasculitis arthritis which was a degenerative disease which prevented her from working and which gave rise to a need for significant and ongoing care. She had also been diagnosed as suffering from various other ailments.

The applicant asserted that she had a physical disability which came within the meaning of the legislation. The application was made against the applicant's father who then joined the mother as second respondent in a cross-claim for contribution. The parents had divorced in 1983.

The father claimed no legal liability for his daughter, arguing that the disability did not present itself in her childhood and that such an infirmity could not revive any duty of support provided as of law to her 18th birthday. He further submitted that, by making voluntary monthly payments, he was meeting his moral and social responsibilities. He rejected any suggestion regarding the appropriateness of a contribution to capital costs.

The mother, though, accepted that she had a continuing duty to support her daughter and agreed to abide by any order apportioning maintenance between her and her former husband.

Hence, the following issues arose: first, whether the maturity of the applicant and the time of the manifestation of the disorder precluded the making of an order; secondly, what level of financial support was necessary for the reasonable maintenance of the applicant in the future; thirdly, what the respective contributions of the parents should be; and, finally, how long any periodic order should last.

Carmody J allowed the application for periodic maintenance but disallowed the lump sum claim. In reaching that decision, the judge considered[62] the history of child maintenance in Australia and case-law from the United States[63] where 'an abiding duty on a parent to support an incapacitated adult child' had frequently been recognised. Conversely, in Australia, in the words of Carmody J:[64]

> 'Harsh as it may sound to modern humanitarian ears the common law doctrine of non-liability to provide for an adult child unable to earn a living due to some physical or mental defect has never really doubted by courts here.'

This meant that the duty was now wholly to be found in s 66L(1)(b) which provides that:

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62 Ibid at 80, 432.

63 See *Crain v Malone* 113 SW 67 (1908); *Van Tinkler v Van Tinkler* 229 P 2d 333 (1951); *Smith v Smith* 176 A 2d 862 (1962); *Wells v Wells* 44 SE 2d 31 (1947); *Barchert v Barchert* 45 (25) 463 (1946); *Kruvant v Kruvant* 100 NJ super 107 (1968); *Towery v Towery* 685 SW 2d 155 (1985); *Filippone v Lee* 700 A 2d 348 (1997); *Siniger v Siniger* 479 A 2d 1354 (1984).

64 (2006) FLC 93–262 at 80, 436.

> 'A child maintenance order in relation to a child who is eighteen or over must not be made unless the court is satisfied that the provision of maintenance is necessary … because of a mental or physical disability of the child.'

After a detailed analysis of the manner in which the provision ought to be interpreted,[65] the judge expressed the view[66] that its implementation required a two-step process. The first step was determining the level of financial support which was necessary for the reasonable maintenance of the applicant in the future. In that context, Carmody J stated that:

> 'There is no real disagreement that the provision of some maintenance is "necessary" because of the applicant's disability. She is … totally unemployable, has virtually no ability to earn an income otherwise. She has proven special needs in a number of areas which give rise to recurring future costs she cannot meet due to her disability.'

Hence, after analysing the applicant's proven needs and available means, the lump sum claim was disallowed and necessary periodic support fixed at $1,500 per week.

The second step involved deciding on the respective contribution of each of the respondents. In so doing, Carmody J commented[67] that:

> '… [his] obligation is to share the burden equitably not equally. I know the first respondent can pay much more but capacity is not the only consideration. The second respondent will be stretched to the limit in meeting this order but that is the way she has structured her finances in the past five years anyway.'

It was decided that the mother should pay $975 per week and the father $525, both linked to the Consumer Price Index for Sydney. In addition, the question arose as to how long the periodic order should be made to last and the judge noted that:

> '… finality is not a goal to be strived for at any cost. The ultimate touchstone is fairness. It would be wrong for me to make an ongoing order too far into the future and further than I can presently see.'

Hence, the order was to last for 5 years with the prospect of reviewing it in the future.

(b) Finance and property

The majority of the significant cases decided in 2006 in the areas of finance and property were, as might reasonably have been expected, concerned with superannuation and the position of third parties. This is explicable because of

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65 Ibid at 80, 436–80, 443.
66 Ibid at 80, 444.
67 Ibid at 80, 445.

recent legislation dealing with those specific topics and these cases will be examined shortly. However, there have been cases on the operation of ss 75 and 79 of the Family Law Act.

Thus, *Crampton and Crampton*[68] involved an appeal by the husband and a cross-appeal by the wife against an order for property settlement. The parties had begun to cohabit in 1981 and married in 1988, the husband had two children from a previous marriage and there were three children of the marriage in question. The parties separated in 2003. At first instance, the wife was awarded 55% of the assets, the remainder being awarded to the husband.

The husband appealed,[69] his appeal including an application to adduce further evidence regarding an impact on the value of his business and real property. The husband made four substantive submissions: first, that the evidence at first instance had only established that the wife's gambling was out of control and not necessarily that she was unable to control it and that the trial judge ought to have 'added back in' the wife's gambling losses; secondly, in relation to a trust and to a company which the husband did not wish to continue, the judge ought to have ordered the liquidation of both; thirdly, the trial judge's findings as to contributions were not reasonably open to him; and, finally, the judge's findings in relation to s 75(2) was not appropriate. Accordingly, the husband sought 55% of the asset pool.

The Full Court,[70] though it allowed the cross-appeal, dismissed the husband's appeal. As regards the wife's gambling, the Full Court took the view[71] that the essential question was whether the totality of the evidence about the wife's gambling losses was such as to demonstrate conduct which should result in her bearing the entirety or some other portion of the losses, and, on the evidence, it was open to the trial judge to conclude that the wife's conduct was not such as should see her bear the losses.

As regards the liquidation of the assets, the judge was required to consider any depreciation in the asset pool which might follow liquidation and, hence, based on the evidence,[72] the decision not to order liquidation was open to the trial judge. Similarly, in respect of the relative contributions made by the parties, the Full Court was not satisfied[73] that the course taken by the judge was not open to him, even though some particular considerations had been given improper weight, and, likewise, in relation to s 75(2) factors.

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68 (2006) FLC 93–269.

69 The wife's cross-appeal related to errors in the trial judge's orders which she claimed did not give effect mathematically to the judge's intentions as were deducible from the reasons given.

70 Bryant CJ, Warnick and Boland JJ.

71 (2006) FLC 93–269 at 80, 564.

72 Ibid at 80, 569.

73 Ibid at 80, 571.

The issue of the importance of s 75(2) adjustment factors was also of significance in the Full Court's decision in *McCrossen and McCrossen*.[74] There, the husband and wife were aged 51 and 43 respectively and, after separation, the children had continued to live with the wife, who had not worked since 1995. Prior to that time, she had held a senior position in the public service, but gave evidence that she wished to retrain as a teacher rather than return to her previous occupation. However, expert evidence suggested that a position in the public service would return a higher salary than that which she would receive after retraining as a teacher.

The trial judge had balanced the husband's continuing liability for child support and his own living expenses against the wife's responsibility for caring for the children, her financial circumstances and her unutilised working capacity. Ultimately, he concluded that there was little adjustment required for any disparity in the parties' financial circumstances and, on appeal, the wife argued that the trial judge was in error in concluding that an adjustment of 10% should be made under s 75(2) in her favour, taking into consideration her employment circumstances, income and responsibilities in respect of the children.[75] On that issue, the Full Court[76] was of the view that the trial judge was in error because he had failed to take into account the financial disparity between the parties. He had no regard to the realities of the wife's position at the trial and the disparity in the earning capacity of husband and wife. He also failed to consider how the wife was to pay her mortgage or meet her other liabilities. In view of those considerations, the Court was of the view[77] that the order of the trial judge could not be regarded as just and equitable.[78]

The issue of the importance of trusts in the scheme of things, which had occurred tangentially in *Crampton*,[79] arose before the Full Court of the Family Court of Australia in *O'Chee v O'Chee*.[80] During the course of the relationship between the husband and wife, a housing unit (hereinafter referred to as 'the property') had been bought in the name of the husband's brother. During their

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74 (2006) FLC 93–283.

75 She also argued that the trial judge erred in dismissing a claim for spousal maintenance and that she might not have had a fair trial, or a miscarriage of justice had occurred owing to delay in the judgment's being handed down.

76 Bryant CJ, Finn and Coleman JJ.

77 (2006) FLC 93–283 at 80, 846.

78 As regards the other issues alleged by the wife, the Full Court noted, in respect of spousal maintenance, that s 72 requires that parties establish that they are unable to support themselves in a particular area, as opposed to another which might be available. In determining whether the level of income would be insufficient for adequate support, the trial judge was required to consider whether employment was available to the wife having regard to her age, experience and length of time out of the workforce and the income which she might receive. The trial judge was not in error in deciding that she had not satisfied the threshold test. Secondly, whilst delay itself was not a ground for appeal, it would require that the appellate court should scrutinise carefully the trial judge's findings. The present was not a matter where credit was an issue or where the demeanour of witnesses was relevant. Nothing which had been mentioned vitiated the trial judge's findings of fact.

79 Above text at n 68.

80 (2006) FLC 93–275.

relationship the husband and wife lived in the property. During that time, the husband was in paid work, though the wife was not and was the primary carer of their children.

At trial, the husband contended that the property was held by his brother as trustee for a particular trust of which there were several beneficiaries, including the husband and the children, but not the wife. The wife argued that, at all material times, the property had been beneficially owned by the husband and that the funds which had been used to acquire the property had been provided by the husband. The trial judge had formed a poor view of the husband's credit as well as of his failure to comply with court orders and directions. The judge had noted that the husband had failed to register the transfer of the property for 5 years after the settlement. Although the husband had made the greater initial contributions, they had been dissipated by mortgagee sales. The trial held that the trust, which purported to be the owner of the property, had not been validly created. On the other hand, if it had been validly created, it was, in fact, a 'sham'. He ordered that the property be sold and the proceeds divided in shares of 70% to the husband and 30% to the wife. The husband appealed on the grounds that the trial judge's findings were contrary to the evidence and to the weight of the evidence.

At the appeal, the husband submitted that the fact the purchase money had been provided to the trust by his brother disposed of the 'sham' question and was determinative of the whole issue relating to the trust. He also claimed that the trial judge had deprived his brother of natural justice by refusing to admit his affidavit to be relied on at trial. Because of that refusal, it was further claimed, the trial judge had precluded himself from having the opportunity to have all relevant evidence before him in relation to the trust issue.

The Full Court[81] considered that it was preferable to consider, first, whether the acquisition of the property by the trust was, indeed, a sham. After that had been ascertained, it would be necessary to consider if the trust had been validly created. In deciding as to the threshold issue of the sham, the Court referred[82] to the decision of the Full Court of the Federal Court of Australia in *Sharrment Pty Ltd v Official Trustee.*[83]

In *Sharrment*, Lockhart J had stated[84] that a 'sham' was:

> '… something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not.'

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81 Finn, Coleman and May JJ.
82 (2006) FLC 93–275 at 80, 648.
83 (1988) 18 FCR 449.
84 Ibid at 454, with Beaumont and Foster JJ concurring.

In *Sharrment*, Lockhart J and, in *Wilson v Wilson*; *Figtree Gardens Caravan Park Pty Ltd*: *Wilson: Wilson*,[85] Moss J had set out various matters which might categorise a particular transaction as a sham. In the former case, Lockhart J had concluded[86] that to draw on inference from surrounding circumstances that a particular transaction is a sham was a strong finding and one which could not be made if another inference was at least equally open.

In dismissing the appeal, the Full Court in *O'Chee* noted that, in determining whether the acquisition of the property was a sham, regard had to be had to all of the circumstances surrounding its acquisition. However, the most potentially significant fact was the acquisition's funding; that is, if it were funded from sources other than the husband, other anomalies would be insufficient for the transaction to be regarded as a sham.[87]

Second, the actual owner of the purchase money was determinative of whether the trust was a sham, rather than who caused it to be paid. The trial judge had concluded on the evidence that the husband was the provider of the purchase money and, based in part on that finding, he was the beneficial owner of the property. The Full Court decided[88] that that view was open to the judge. Once it had been established that the husband had been the source of the funds, then the acquisition of the property fell within the definition of a sham[89] as advanced by Windeyer J in the High Court of Australia's decision in *Scott v FCT (No 2)*.[90] There, it had been said that:

> '… if the scheme, including the deed, was intended to be a mere façade behind which other activities might be carried on which were not to be really directed to the stated purposes but to other ends, then words of the deed should be disregarded.'[91]

The legislation concerning third parties and bankruptcy has been noted and, as might be expected, some interesting developments took place in 2006.

Thus, in relation to third parties, in *Bain Pacific Associations and Kelly*,[92] the wife sought an order under s 106B of the Family Law Act to set aside a clause in an agreement made between her husband and certain groups to restrict the husband from disposing of shares, units or performance options which he owned to any person other than an affiliate of the husband. The

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85 (1994) FLC 92–498 at 81, 188.
86 (1988) 18 FCR 449 at 461.
87 (2006) FLC 93–275 at 80, 652.
88 Ibid at 80, 662.
89 Ibid at 80, 660.
90 (1966) 40 ALJR 265 at 279.
91 (2006) FLC 93–270.
92 Finally, all the relevant evidence contained in the husband's brother's affidavit had already been adduced by other sources or could be regarded as being mere allegations. Hence, rejection of the affidavit did not prejudice the husband's case.

husband and several companies sought an order that the wife's applications be summarily dismissed. The application was dismissed and the companies sought leave to appeal against that dismissal.

On appeal, the companies submitted, first, that the trial judge had either applied the wrong principle, or had failed to apply the correct principle appropriately insofar as he had excluded from his consideration incontrovertible facts which had been raised by the companies and had confined himself only to the case of the wife. Secondly, since the result of an order in terms sought by the wife would be the extinguishment of the rights of bona fide purchasers for value, such an order could not, or would not amount to a permissible exercise of discretion. Thirdly, whilst the effect of the clause in the agreement might have been to restrict the husband's capacity to deal with his shares, or even diminish their value, those effects were only temporary and it could not be said that an anticipated order had been defeated by reason of the clause. The Full Court[93] dismissed the companies' application for leave to appeal.

In so doing, Bryant CJ, who delivered the judgment of the Court, stated,[94] first, that the trial judge had not misapplied or misstated what had been said in *Beck and Beck*[95] where it was emphasised that 'an application for summary dismissal must be determined on the basis only of the material put forward by the respondent'. He had, in fact taken proper notice of the non-contentious issues of the companies' case. Secondly,[96] once it was conceded that an order was within power, the argument in support of summary dismissal is rendered extremely difficult. Thirdly, and most central, it was held[97] that the deferral of an entitlement of the wife to receive property she might receive at the time orders were made might very well defeat an anticipated order.

Similar issues arose in *Custodio and Pinto*[98] which concerned an order for summary dismissal of orders sought by the wife insofar as they affected the interests of third parties. In proceedings between husband and wife in respect of a property settlement, the wife joined her adult son and daughter and a company.

She sought a range of orders and declarations of which many would affect the interests of those three third parties. The wife sought declarations that the issue of shares to the children was a sham, that the husband had, in effect, alter ego companies, that he had de facto control over, and ownership of, companies and that the children held their shares on trust. Hence, the wife sought orders that

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93 Bryant CJ, Warnick and May JJ.
94 (2006) FLC 93–270 at 80, 577.
95 (2004) FLC 93–181 at 79, 052 per Ellis, Finn and Chisholm JJ.
96 (2006) FLC 93–270 at 80, 578.
97 Ibid at 80, 579.
98 (2006) FLC 93–279.

the husband's transfer of shares to the children be set aside pursuant to s 106B of the Family Law Act and that the transfer of properties by him ought similarly to be set aside.

Contrarily, the third parties argued, first, that the limited evidence before the court concerning the establishment of the company did not indicate that the husband and children intended that the issue of the relevant shares should have any effect other than its apparent legal effect. Secondly, given the relationship between the husband and children, the court should presume that the husband had intended the shares should be taken beneficially by the children. Thirdly, no declaration could be found that the husband had an alter ego company unless he could be said to have legal or proprietary rights in the company and any declaration that the husband had de facto control or ownership of the company would be meaningless, and of no effect, in any attempt to establish that the company or its assets were the property of the husband. Fourthly, there was no evidence to support a finding that either the children held their shares on trust or that there had been a transfer of shares by the husband to the children. Finally, that there was nothing in the material before the court which would support a claim by the wife under s 106B of the Family Law Act in relation to any of the properties and, in any event, that provision applied only to dispositions made on or after 3 August 2005.

Finn J dismissed the applications for summary dismissal on the grounds that there were limitations upon the material upon which an applicant could rely in establishing the case. Notably, the party seeking summary dismissal must show that it was clear on the face of the opponent's documents that the opponent lacked a reasonable cause of action. More substantively, Finn J held[99] that the applications of the third party should be dismissed and the declarations sought by the wife should be dismissed to the extent that those orders affected third parties.

Hence, the cases of *Bain Pacific* and *Custodio* do, admittedly, suggest that the position of third parties may, at this stage of the law's development at any rate, be that considerations affecting third parties may not wholly reduce the importance of other considerations in the making of a just and equitable order.

As regards bankruptcy issues, some essentially fundamental issues were considered by Young J in *Official Trustee in Bankruptcy v Bryan and the Estate of Gatenby (Dec'd)*.[100] In that case, in 1992 the husband had entered into a s 79 consent order. It provided, inter alia, that the husband transfer his interest in a jointly owned parcel of real property to the wife. The husband and wife knew of, but did not disclose the existence of, two of the husband's creditors to the court. The transfer did not take place initially owing to a caveat lodged against

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[99] Ibid at 80, 781.
[100] (2006) FLC 93–258.

the title by the creditors. Because of the effluxion of time, the caveat lapsed in 1997 and, despite the existence of an injunction prohibiting it, the transfer was effected when the caveat lapsed.

The husband was made bankrupt in consequence of a petition by his creditors and, after a considerable time had elapsed, the Official Trustee in Bankruptcy applied for the 1992 consent order to be set aside under s 79(1)(a). After the evidence was heard, but before the judgment was delivered, the wife was killed in a car accident. Her personal representatives took her place in the proceedings (there were bankruptcy proceedings pending in the Federal Court).

It was submitted on behalf of the Official Trustee that he was a person affected by the order and the failure to disclose the existence of the creditors to the court meant that a miscarriage of justice had occurred. It was argued that the transfer should be reversed so that the husband was in the position he was before the 1992 order had been made.

Young J granted the application, finding, first, that there had been a deliberate and intentional suppression of evidence by the husband and wife and its wilful concealment was considerably more than a failure to disclose relevant evidence. Ordinarily, a failure to make a full and frank disclosure would amount to a miscarriage of justice. There was a miscarriage of justice in the instant case.

Further, there was prejudice to unsecured creditors and the true financial circumstances and all liabilities ought to have been brought to the Court's attention in 1992. Those facts suggested that the Official Trustee should have standing in the case. There was also a requirement that the applicants demonstrate how they had been affected so as to prove a miscarriage of justice and that the s 79 order had proved to be inequitable and unfair. The Official Trustee had been affected by the consent order and was able to provide a reasonable explanation of the delay in bringing the proceedings to set aside the 1992 order.

There was, on the other hand, neither hardship nor prejudice to the husband or to the wife (or her representatives) that would result if the order were to be set aside. The wife had benefited from her use of the property, which included using it for security to raise finances for other investments.

Hence, Young J set aside the 1992 order insofar as it related to the transfer of the jointly owned real property. The judge also refused to make a s 79 order in substitution. Thus, *Bryan* clarifies some central issues relating to the position of the Official Trustee.

However, more closely connected with the new legislation is the decision of the Full Court in *Samootin v Wagner*.[101] That case concerned an application by the wife, who sought to appeal against orders at first instance where the wife had

[101] (2006) FLC 93–265.

attempted to join the respondents to property applications between herself and her husband and for injunctions restraining the respondents either from beginning or continuing bankruptcy proceedings against her. The respondents were the wife's former solicitor and the successor in title to that solicitor's practice.

The wife sought to rely on s 90AF of the Family Law Act which provides that the Court may grant an injunction under s 114 which binds a third party. The court must consider the provisions of s 90AF(3) and (4) before interfering with the rights of third parties.

At first instance, the wife admitted that the debt which was the subject of the judgment had been incurred solely by her. However, the wife had wanted the debt to be considered by the judge who would ultimately hear the property proceedings. The Full Court[102] dismissed the application.

Kay J, with whom the other judges agreed, noted,[103] first, the provisions had been introduced in 2003 by Part VIIIAA of the Family Law Act. Those provisions, the judge stated, had been introduced as part of amendments:

> '… that enable the court to deal with debts owed by third parties, by distributing effectively, the liability for those debts as between the parties to the family law proceedings, that is the husband and the wife, notwithstanding that the debts may have been incurred by one or either of them.'

In aid of that power, Kay J went on, the court could issue injunctions to restrain, effectively, the collection of the debt, either pending the proceedings or subsequent to the proceedings, but must do so by taking account of the relevant statutory provisions. Kay J found that, since the appeal by the wife was against a discretionary order, in the absence of a material error of fact or a misapplication of the law or reaching a result which was clearly erroneous, the appeal must fail. In addition, the wife's application did not meet the criteria governing the issue of injunctions as set out in s 90AF(3) and (4) of the Act. Further, s 90AE did not make provision for the joinder of parties – it provided for courts to make orders against third parties.

First, as regards developments in the law relating to superannuation in property distribution, that issue cannot be considered in some kind of financial vacuum. This is well illustrated by the decision of the Full Court of the Family Court of Australia in *McCulough and McCulough*[104] in which the parties had married in 1987 and separated in 2002. There were two children of the marriage aged 13 and 15 at the time of the hearing.

Orders had been made with regard to parenting, property and spousal maintenance. The trial judge had first considered the non-superannuation

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[102] Bryant CJ, Kay and Coleman JJ.
[103] (2006) FLC 93–265 at 80, 511.
[104] (2006) FLC 93–282.

assets (or 'tangible' assets) and divided those in the proportions of 75/25 in favour of the wife. As regards superannuation, the judge ordered that the wife should keep her own superannuation and receive 20% of the husband's by way of a splitting order. The trial judge had concluded that the superannuation should not be divided in the same way as the other assets as it would not be just and equitable so to do.

On appeal, the husband sought a 60/40 split of assets in favour of the wife. He submitted that the judge had failed to include a credit card when considering the division of assets. He further argued that the adjustment to the wife was outside the ambit of discretion given to the judge by s 77(2) and that she had failed to give adequate reasons for her decision. The Full Court[105] allowed the husband's appeal.

First, the Full Court was of the view[106] that, in her discussion of division, nowhere did the trial judge address the 'just and equitable' mix of assets – in the Full Court's words:

> '… that is, whether, in the overall division, the husband should receive more than 25 per cent of the tangible assets and the wife receive more superannuation than 20 per cent. Rather her Honour seems to have started and finished with the question of how much of his superannuation the husband ought to retain.'

Secondly, the approach to be taken in property settlement applications where there were superannuation interests was that the superannuation should be treated as property. It seemed[107] as though the trial judge had referred to superannuation as a *resource* or an *asset*, which had given rise to some confusion. The process used in such cases should be the four-step process as outlined in *Coghlan and Coghlan.*[108] In *McCulough*, the Full Court noted[109] that the trial judge had given no reasons for departing from that process. In addition, the specific provisions of s 79 should be taken into account.

Similarly, in *Trott and Trott*,[110] issues additional to the matter of superannuation were raised before Watts J. There, the husband and wife applied in respect of property, the proceeds of a sale of property and the husband's superannuation interests in two funds. The parties had married in 1992. During the course of his employment in the New South Wales Police Force, the husband sustained injuries and was medically discharged. This resulted in the realisation of superannuation and other benefits. At the time of the hearing, the value of the funds under the relevant regulations was $1,865,365.50. One fund was in the payment phase and the other still in the accumulation phase. The husband received the superannuation interest by way of periodic payment

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105 Wasnick, May and Boland JJ.
106 (2006) FLC 93–282 at 80, 824.
107 Ibid at 80, 826.
108 (2005) FLC 93–220.
109 (2006) FLC 93–282 at 80, 826.
110 (2006) FLC 93–263.

and the wife sought a percentage splitting order in relation to that payment.[111] The court was asked to decide what adjustment should be made in regard to the husband's superannuation payment.

Apart from the husband's superannuation funds, the parties had interests in property and the proceeds of the sale of property. A question had also arisen as to what adjustment should be made in relation to those interests.[112]

In making property adjustment orders, Watts J held, first, that the contribution to the net property of the parties – excluding superannuation – was 65.2% by the husband and 37.5% by the wife. Secondly, in relation to Category 1 of the husband's superannuation interest,[113] the wife's contribution was assessed at 15%.

In considering how contributions were made prior to, and during, cohabitation, Watts J specified[114] four matters which should be considered:

(1) 'even though it is neither practical nor desirable to approach cases in a pseudo mathematical way, a calculation of initial contribution does, "… provide a rough initial point of reference"';[115]

(2) '[t]he importance of initial contribution will lessen as the period of cohabitation increases';

(3) '[t]he importance of the initial contribution can be eroded over time in circumstances where there is equality of contribution during the course of the cohabitation';[116] and

(4) in *Pierce and Pierce*,[117] it was 'not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances to the original contribution'.

Watts J further emphasised that superannuation was no longer to be treated as a *financial resource* for the purposes of s 75(2) adjustments. The wife's contribution to Category 2 of the husband's superannuation[118] was assessed as being 40%. Similarly, the wife's role in the care and control of the children was a significant factor and one which was to be given weight. In addition, the wife

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111 The wife also had a superannuation fund with a value of $19,680 and it was agreed that that should be treated as property.

112 Further, the Court was asked to consider whether the parties owed the sum of $26,000 to the husband's brother and, if so, how that liability should be treated.

113 Category 1 represented: 'A non-commutable indexed pension to age 60 (that is, normal retirement age) with a partial right to commute at age 55.' *Commutable* means being able to convert the pension into a lump sum.

114 (2006) FLC 93–263 at 80, 467.

115 See *Clauson and Clauson* (1995) FLC 92–595.

116 See *Bremner and Bremner* (1995) FLC 92–560.

117 (1999) FLC 92–844 at 85, 881 *per* Ellis, Baker and O'Ryan JJ.

118 Category 2 represented: 'A commutable indexed life pension after the age of 60.'

had accepted a redundancy which had enabled her, and the children, to join the husband and that and the fact that she had assumed the primary role of the homemaker and parent had affected her ability to pursue employment during and after the marriage.

Thus, in relation to the factors to be considered under s 79(4) of the Family Law Act, an adjustment was made in favour of the wife of $94,354. Therefore, excluding superannuation, the wife received 55% of the net property. Supersplitting orders were made in the wife's favour in the same value as the contribution assessment which it had been considered that the wife had made to each category of superannuation. It is interesting to speculate as to whether these orders will give rise to an appeal and as to what any subsequent result might be.

The making of a superannuation splitting order may, in all the circumstances, be a just and equitable course and may be the subject, of itself, of judicial inquiry. In *Doherty and Doherty*,[119] a federal magistrate, in relation to competing property applications, had divided the parties' property 55% to the wife and 45% to the husband. Orders were made that, of the two major assets, the wife receive hers by retaining the family home and the husband nearly all of his by retaining his superannuation entitlements.

The husband appealed, arguing that the federal magistrate had erred when considering the justice and equity of the orders made by permitting the wife to retain all the immediately tangible assets. The Full Court of the Family Court of Australia[120] dismissed the appeal. First, the court commented[121] that:

> '… consideration of the constitution or "mix" of the assets which each party will be left as a result of proposed orders would seem a necessary, if not critical, factor in determining the justice and equity of proposed orders in each case in which superannuation interests are involved.'

Somewhat despairingly, perhaps, the court went on to state[122] that there would, no doubt, be cases where:

> '… close consideration and discussion of factors to be taken into account when deciding on division of assets, including superannuation, "in specie" is necessary. Indeed, guidance from the Full Court may be highly desirable. This is not the case for that discussion.'

The Court also took the view that, in the absence of evidence in support of the orders sought by the husband, and in the absence of submissions made on his behalf in support of such orders, the decision of the federal magistrate was open to her.

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119 (2006) FLC 93–256.
120 Warnick, May and Bland JJ.
121 (2006) FLC 93–256 at 80, 340.
122 Ibid at 80, 341.

Similar issues were considered by Moore J in *Levick and Levick*[123] where the parties had made competing property adjustment applications after a marriage of 22 years' duration. The two children of the marriage were, at the date of the hearing, under the age of 18 and, under consent orders, resided with the wife, but spent 40% of nights with the father. The husband was a well-remunerated investment banker but the wife, who had mainly worked as homemaker and parent during the marriage, had largely completed her studies as a naturopath.

It was submitted on behalf of the wife that all of her entitlement should come from non-superannuation assets because of the cost to her of rehousing. Conversely, it was argued on behalf of the husband that the wife should receive a mix of assets including superannuation to meet her entitlement because that was the import and effect of the 2001 reforms. Further, the husband, as well as the wife, needed to be able to rehouse in accommodation which was appropriate to enable the children to stay with him.

First, the judge noted that, after expending the sum necessary to rehouse, the wife would have little left to provide for contingencies or for independent living. For her to receive all of her entitlement in non-superannuation assets would leave her with little in the way of investment for her retirement.

Secondly, it was a reasonable proposition that the husband needed to rehouse himself. However, even if the wife's entitlement were met entirely by a splitting order, the husband would still have insufficient funds to permit him outright to rehouse. His capacity to borrow was noted and it was found that a mid-position would not unduly disadvantage him. Accordingly, Moore J found that a better arrangement would be for the wife to receive part of her entitlement in superannuation and part in non-superannuation assets.

Yet factual situations may be relatively straightforward or relatively complex. A case of the latter variety is *Cahill and Cahill*.[124] The parties had married in 1972 and separated approximately 25 years later. After 1995, the wife, who was, by then, resident in her native Denmark, did not contribute to any asset in Australia. For the purposes of the evaluation of contributions, the court regarded the parties' cohabitation as being of 23 years' duration. The husband was aged 62 and the wife 65. There were three children of the marriage, all over the age of 18.

There were competing property applications. The wife proposed a 55% split of the asset pool in her favour, which, in cash terms, would amount to some $950,000. The husband, though, proposed, in addition to a payment of $30,000 which he had already made to her, a sum of $510,000. Pending receiving her property settlement, the wife sought interim spousal maintenance or a partial settlement.

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[123] (2006) FLC 93–254.
[124] (2006) FLC 93–253.

The parties had agreed that the husband should keep his superannuation benefits, even though the wife had no superannuation of her own. The husband had a DFRDB pension, which was referable to his service in the Army, approximately half of which took place during the subsistence of the marriage. He had already received all of the lump sum payments to which he was entitled and would, until his death, only be entitled to income from it. He also received a DVA pension as the result of war-related injuries. In addition, he had another pension to which he would become entitled in 3 years, including a lump sum payment. He had contributed to it for 10 years prior to the separation and for some 7 years after.

The husband's mother had provided the deposits for one property just before, and one just after, marriage. The husband had received an inheritance of $60,000 some 15 years prior to separation with the benefit of the equity in the family home as security.

Coleman J made lump sum and property adjustment orders, but refused the wife's application for interim financial provision. In so doing, he considered[125] that an asset-by-asset approach towards the parties' property and financial affairs as outlined by the High Court of Australia in *Norbis* v *Norbis*[126] would be the appropriate approach, at least to certain items of non-superannuation property. Although the husband's contributions until the date of separation to the family home and contents were 5% more than those of the wife, the wife's post-separation contributions of not having the benefit of those assets for a prolonged period made the overall contributions equal. Further, taking into account the husband's post-separation contributions by way of additional superannuation pension and his greater ability to benefit from his income compared with the wife, a formulaic approach ought not to be taken. The husband's contributions were 60% as compared with the wife's 40%.

As regards the major items of superannuation, the judge was of the view[127] that the DFRDB pension was not, and never would be, capital. The value might be included in the net pool, but to distribute it as if it were an asset would be an exercise in artificiality. In addition, the court is constrained[128] by s 79(2) of the Family Law Act 'from doing things which are not just and equitable. In the court's view any contribution finding in relation to this notional value of the superannuation would be unjust to both parties, the only question being which party would be the more unjustly treated'. Hence, the court did not propose to make a contribution finding in relation to that notional asset. However, that did not mean that the DFRDB pension entitlement ceased to be relevant. A guaranteed income stream, of that kind, would always be a 'powerful' s 75(2) factor.

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125 Ibid at 80, 301.
126 (1986) 161 CLR 513. See also *Pierce* v *Pierce* (1999) FLC 92–844.
127 (2006) FLC 93–254 at 80, 303.
128 Ibid at 80, 304 per Coleman J.

In addition, the husband had been able to purchase the units post-separation because of the equity in the family home – as such, the wife had 'her foot in the door'.[129] The husband's contributions were 90% to the wife's 10%. In the event, Coleman J decided that the husband's income and earning capacity were substantially greater than the wife's, even though he was close to retirement age. The DVA pension should be treated as compensation for pain and suffering and, as such, should be excluded. He also had the DFRDB index-linked pension stream. The wife, accordingly, should receive an additional $100,000 (approximately 5% of the entire net pool) to reflect that.

The relevance of the asset-by-asset approach was also in issue in the decision of the Full Court of the Family Court of Australia's decision in *M and M*.[130] There, the parties had been married for 12 years and had three children. Some two and a half years after separation, the husband was medically discharged from the police force, with state superannuation valued at $1,081,726. It was paid to him as a fortnightly pension of $1,900 and was not available as a lump sum payment for 16 years. At trial, the non-superannuation assets were divided 52.5%: 47.5% in favour of the wife. The husband's superannuation was included in the schedule of assets and liabilities, but was not split. The wife appealed claiming, inter alia, that the trial judge had erred in the assessment of the parties' contributions in giving insufficient, if any, weight to the contributions of the wife to the husband's superannuation benefits.

The Full Court,[131] in allowing the appeal, held, first, that the trial judge was not in error in adopting an asset-by-asset approach.[132] The effect of that was that it was open for him to treat the husband's state superannuation differently from the parties' other assets.[133] In adopting that approach, it was necessary to consider the parties' contributions to the separate asset pool of the superannuation interest and then consider whether there should be any adjustments for s 75(2) matters, with a final assessment to be made as to whether the proposed orders were, overall, just and equitable.

The trial judge had assessed the wife's contribution in respect of part of the superannuation entitlement as being equal to that of the husband. However, he had made a significantly smaller award to the wife out of the non-superannuation assets on account of s 75(2) matters.[134] In exercising his discretion not to make a splitting order in respect of the superannuation, the judge took account[135] of matters such as the need to preserve the husband's income stream and the cessation of the pension were he to return to work. The Full Court was of the view that the trial judge was entitled so to do provided that he was able to make orders in relation to the other assets of the parties

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129 Idem.
130 (2006) FLC 93–281.
131 Bryant CJ, Finn and Boland JJ.
132 (2006) FLC 93–281 at 80, 812.
133 See *Coghlan and Coghlan* (2005) FLC 93–220.
134 (2006) FLC 93–281 at 80, 808.
135 Ibid at 80, 809.

which were just and equitable having regard to the matters which were referred to in s 79(4), which included the parties' relative contributions to their respective superannuation interests. The award to the wife could not possibly have done that, given her contributions to the husband's superannuation funds.[136]

The final issue addressed by the Full Court in *M* related to the relevance of the formula for distribution devised in *West and Green*.[137] The Court took the view[138] that, since the introduction of Part VIIIB into the Family Law Act, there was no need for the utilisation of such formulae or orders derived from them. Part VIIIB enabled courts to make splitting orders and the Regulations provided for a method of valuation. All that was required was that the contributions of parties be evaluated in relation to superannuation as they were in relation to other assets.

(c) Practice and procedure

One issue of interest which has sporadically occurred during 2006 has been whether an appellate court should substitute its own discretion or order a rehearing. That matter, of itself, was considered by the Full Court of the Family Court in *Brett-Hall and Brett-Hall*,[139] where the Full Court had allowed an appeal by the wife and invited the parties to make written submissions as to the consequences of so doing. The wife submitted that, in proceedings for a property settlement, a limited number of issues should be remitted for rehearing by a single judge. These were: first, the identification and valuation of the asset pool; secondly, establishing what effect the contingent liabilities for capital gains tax and the guarantee of a venture had on the value of the asset pool; thirdly, making orders splitting the asset pool as found on retrial in the proportions of 60% to the husband and 40% to the wife, and the making of consequent orders; and, finally, rehearing the application for departure from the assessment of child support and making such new orders as the trial judge deemed appropriate.

Conversely, the husband argued that the Full Court should re-exercise the discretion of the trial judge or, alternatively, remit the matter for rehearing by a single judge, though only on a limited basis. That, he further submitted, should mean that the discretion should be re-exercised only in relation to matters which had been the subject of successful complaint in the appeal. They were: first, that the guarantee liability ought not to have been deducted from the pool, but should have been adjusted under s 75(2); and, secondly, that capital gains tax and costs of sale ought not to have been deducted from the pool, but, rather, should have been adjusted under ss 75(2) and 79(4).

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136 Ibid at 80, 814.
137 (1993) FLC 93–281.
138 Ibid at 80, 816.
139 (2006) FLC 93–276.

In allowing the appeal, the Full Court,[140] first of all, emphasised[141] that a Full Court has the power to limit the scope of proceedings which are remitted for determination by a single judge. Indeed, remitting proceedings for such rehearing was the preferable and, sometimes, only option. In property matters, the overarching obligation in relation to justice and equity created by s 79(2) continued to require rehearing judges to ensure that their judgment was just and equitable, although a trial judge's discretion on a rehearing remained broad. On the facts of the instant case, the Full Court found[142] that attempting to retain the trial judge's s 75(2) adjustment, although not erroneous on the facts as found by him, might be conducive to an injustice.[143]

Another important and controversial issue which arose was the effect of a breach of order and the circumstances surrounding that apparent breach. In *Mead and Mead*,[144] the wife had appealed against an order at first instance which had resulted in her being sentenced to a term of imprisonment. She argued that the trial judge was in error in concluding that she was aware of the order and its terms and also by drawing adverse inferences as a consequence of her failing to give evidence relating to privileged communications with her legal representatives. On the other hand, the husband argued that there was evidence that the wife was, indeed, aware of the orders. By a majority, the Full Court allowed the appeal. In the majority, Coleman and Holden JJ held that, in proceedings for contempt of court under s 112AP of the Family Law Act, contempt could only be found to be proved beyond reasonable doubt if every element of the contempt was established.[145] Such could not have been the case as the wife's knowledge of the orders had not been proved beyond a reasonable doubt because the only evidence which could have established the wife's knowledge of the orders was inadmissible.[146] Further, the majority considered[147] that the wife's failure to abandon her right to remain silent was not such as to cause the hypotheses consistent with innocence to cease to be rational or reasonable. The case was, thus, not such a rare or exceptional case where the trial judge was entitled to rely upon the wife's failure to offer an explanation.

In dissent, May J was of the view[148] that it was open to the trial judge to make a finding that the wife was aware of the orders and it was an inference that the trial judge was entitled to make given that the wife chose not to give evidence and did not permit her solicitor to give evidence either. There was also no

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140 Finn, Coleman and May JJ.
141 (2006) FLC 93–276 at 80, 692.
142 Ibid at 80, 693.
143 However, the Full Court also found that the scope of the rehearing was to be limited to matters which had arisen since the completion of evidence before the trial judge for the purposes of ss 75(2) and 79(4).
144 (2006) FLC 93–267.
145 Ibid at 80, 536.
146 Ibid at 80, 547.
147 Ibid at 80, 543.
148 Ibid at 80, 544.

reason to think that the wife might not have understood the meaning of the order, the language of which was not unduly obscure or complex.

The issue of valuation which has troubled courts in Australia in the past[149] has arisen in the context of the Family Law Rules[150] in *Weatherall and Weatherall*.[151] In that case, there was an application brought by the wife for disclosure to a single joint expert (who had been instructed[152] to value a hotel complex in which the parties had an interest), the court was obliged to consider the genuineness of an offer, the circumstances in which the offer came to be made and its relevance to court proceedings.

The parties and their four children all held shares in a hotel complex which was being valued on a joint basis. An offer to purchase the complex had been made, subject to all stakeholders being committed to sell. The wife had applied to the court of the order enabling her to disclose the details of the offer to the single joint expert.

The wife argued that, first, sooner or later, the valuer would have to revisit her valuation in order to take the offer into account and that to carry out the valuation without the offer's being considered was wholly unrealistic. Reliance was placed on a note[153] dealing with the independence of expert reports, which specified that it was not for the client to determine what information the valuer might require. The wife, essentially, claimed that the offer was direct evidence of the amount a specific purchaser was prepared to pay at a particular time. The offer in question was genuine.

It was submitted on behalf of the husband that offers which did not lead to a concluded contract were not admissible.[154] The wife, it was further claimed, had failed to make a full and frank disclosure regarding the offer and, accordingly, there was a lack of evidence before the court so as to determine its admissibility. In any event, the complex was not for sale and the husband had serious doubts about the genuineness of the offer. Basically though, he argued, it was for the court to determine the relevance of the offer. A close analysis revealed that it was so vague and conditional as to have no probative value and, hence, it was inadmissible. Were the valuer to rely on it, her own evidence would either be inadmissible or carry less weight. It followed, it was argued, that the proper course was for the expert to value the hotel complex, independently of the offer and if, later, the offer were admitted into evidence, the expert could, at that point, be requested to revise her opinion.

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149 For comment, see, F Bates '"We Prize Not to the Worth" – Some Thoughts on the Valuation of Property Under the Family Law Act' (2004) 7(2) *Newcastle Law Review* 35.

150 For general comment on the Rules, see F Bates 'There Was Movement at the [Family Law] Station – Australian Family Law in 2004' A Bainham (ed) *International Survey of Family Law 2006 Edition* (Jordan Publishing, 2006) 59, 88ff.

151 (2006) FLC 93–261.

152 See Family Law Rules 2004, r 15.54(2)(e).

153 ASIC Practice Note 42.14.

154 See *McDonald v Deputy Federal Commissioner for Land Tax (NSW)* (1915) 20 CLR 231.

Guest J dismissed the application, although, at the same time, he initially noted[155] that it would be anomalous and unjust to apply a blanket rule and exclude all offers as evidence of value. An offer which led, for example, to a concluded contract might be admissible as evidence of value. However, the judge went on, although an offer may also, in a general way, be of assistance in determining value, it would require 'both cautious and guarded scrutiny before any reliance could be placed upon it'.[156]

In the present case, Guest J found, the offer was incapable of acceptance and was so vague, conditional or obtained in circumstances which had not been disclosed to the husband, that it was deprived of probative value. In the end, the single joint expert should form her own opinion as to the value to ascribe to the property in question.

One suspects, or fears, that *Weatherall*[157] represents the kind of situation that the Rules do not deal with especially well. It may be that a further imponderable is now added to the difficulties earlier noted.

IV CONCLUSION

As perhaps might have been anticipated from earlier developments,[158] the situation disclosed by Australian law as it has unfolded in 2006 is not thematically coherent. The major legislative development seems likely to be productive of its self-generated difficulties[159] and may well prove to be a new beginning, rather than the end of the shared parenting continuum.

Likewise, the case-law in 2006 seems to have demonstrated that new factual situations still, and must always, continue to be faced. In particular, despite the new Part VIIIB of the Family Law Act dealing with superannuation, courts continue to concern themselves with seeking to resolve the relationship between Part VIIB and s 79(4), which deals with contributions generally.

It is clear that none of the issues discussed as having arisen in 2006 will provide ultimate solutions – indeed given the developmental situation as represented by Australian family law since 1976 – that is probably necessary and, probably inevitable, if not desirable. Hence, the predication for ensuing years is that the 2006 developments may very well add still more imponderables into an already obscure miasma. In other words, we can look forward to intriguing developments in the future.

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155 (2006) FLC 93–261 at 80, 428.
156 Ibid at 80, 429.
157 Above n 151.
158 Above text at n 2.
159 See above text at n 33 and n 34.

England

JUDICIAL REFORM OR AN INCREASE IN DISCRETION – THE DECISION IN *MILLER V MILLER; MCFARLANE V MCFARLANE*

Mary Welstead[*]

Résumé

Dans le courant des dernières années, l'Angleterre s'est méritée le titre peu envieux de «Capitale mondiale du divorce» en raison de procès impliquant des personnes à très hauts revenus.

Plusieurs pays connaissent le régime de la communauté de biens pendant le mariage et la loi ne laisse pas dans ces cas une grande marge de manœuvre aux tribunaux lorsqu'il s'agit du règlement des affaires financières en cas de divorce; les contrats de mariage sont alors exécutés. Généralement, il y a une plus grande prévisibilité des décisions judiciaires; le partage égal des biens à caractère familial (défini de manière stricte) est souvent la norme. Les ordonnances alimentaires sont soit inexistantes soit nettement moins généreuses qu'en Angleterre et elles sont généralement assorties d'un terme visant à permettre à la créancière de s'adapter à la vie post-divorce. Les biens acquis avant le mariage, incluant l'immeuble qui deviendrait par la suite la résidence familiale, de même que les biens dévolus par succession, sont souvent légalement exclus du règlement de divorce.

À l'opposé de cela, les tribunaux anglais jouissent d'une discrétion exceptionnelle lorsqu'il s'agit des aspects patrimoniaux et financiers du divorce. De plus, il n'existe aucune garantie que les contrats de mariage, où qu'ils aient été passés, seront respectés par les tribunaux.

L'arrêt conjoint de la Chambre des Lords dans *Miller c. Miller et McFarlane c. McFarlane* ([2006] 1 FLR 1186) se penche sur la question de la discrétion judiciaire en ce qui regarde les règlements de divorce et tente de réformer le droit en la matière. Il a été tellement dit que ce jugement des Lords était d'une importance capitale, que la contribution anglaise au Survey de l'Association internationale de droit de la famille sera cette année entièrement consacrée à celui-ci ainsi qu'à son impact (pour autant qu'il en ait) sur les futurs règlements des questions financières en divorce et, par analogie, en dissolution de l'union civile.

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* Reader in Law, University of Buckingham.

I ENGLAND: THE DIVORCE CAPITAL OF THE WORLD

In recent years, the rather dubious accolade of 'divorce capital of the world' has been bestowed on England by spouses of high earning individuals. These spouses, primarily women, have placed England first on their list of jurisdictions when forum shopping in search of a generous divorce settlement. In order to bring herself within the ambit of an English court, a spouse, regardless of where the marriage took place, merely has to show that she is domiciled, or has been habitually resident, in England or Wales for the year preceding the commencement of the divorce proceedings.

The free movement of high earning spouses into England from jurisdictions which have a very different approach to ancillary relief on divorce has led to an increase in resentful respondent spouses whose partners deliberately commence divorce proceedings in England in the hope of gaining a more generous settlement than they would be able to obtain in the country of marriage. In many other countries, regimes of community of property during marriage exist, the law gives the courts less flexibility to deal with the finances of divorcing couples, and prenuptial agreements are honoured. Typically, there is greater certainty in the nature of awards; often a 50/50 split of the couple's matrimonial assets (strictly defined) is the legal norm. Awards for maintenance are either non-existent or far lower than those in England, and are limited to a short period of time to enable a spouse to adjust to a post-divorce life. Assets acquired before marriage, including a property which becomes the matrimonial home, and inheritances, are often excluded by statute from any divorce settlement.

England has two major advantages for applicant spouses. First, unlike many other jurisdictions, its courts have an exceptionally wide discretion on divorce to determine both the nature, and amount, of property and financial settlements. Secondly, there is no guarantee that prenuptial agreements, regardless of where they were drawn up, will be enforced by the courts.

Since the conjoined decision of the House of Lords in *Miller v Miller; McFarlane v McFarlane,*[1] a large number of high earning respondent spouses are worried that they risk the loss of the significant fruits of their successful careers at the hands of the English courts. The decision has been acclaimed to be of such importance that this year's contribution to the Survey is entirely devoted to the decision, and a consideration of its impact (if any) on the future of financial settlements on divorce, and by analogy on the dissolution of a civil partnership.

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[1] [2006] 2 AC 618; [2006] 1 FLR 1186.

II THE CURRENT STATUTORY PROVISIONS

Part II of the Matrimonial Causes Act 1973 (MCA 1973) contains the statutory provisions which govern financial provision on divorce; the legislation is gender neutral. It provides for an exceptionally discretionary approach to the reallocation of a couple's finances and property. Similar provisions govern civil partnerships on their dissolution (Civil Partnership Act 2004, Sch 5). Sections 21–24 of MCA 1973 list the wide-ranging categories of financial payments and property arrangements which the court may award to either spouse. Section 25(1) charges the court 'to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen'. Section 25(2) enumerates all the factors which the court must take into account in deciding whether, and in what manner, to make an award in favour of one from the other. These include:

- all the financial resources, financial needs and obligations of the spouses both at the time of the divorce and in the foreseeable future;
- the standard of living enjoyed by them prior to the breakdown of the marriage;
- their age and the duration of the marriage;
- any physical or mental disability of the spouses;
- any contributions that either of them have made or might make in the future to the welfare of the family;
- the conduct of the spouses if it would be inequitable to ignore it;
- the value of any benefit which either spouse might lose the chance of acquiring because of the dissolution of the marriage.

Section 25A imposes a duty on the court to consider ending all financial obligations between the divorcing spouses if it is just and reasonable to do so. Whilst, s 28 provides that all periodical payments must end on the remarriage or death of the recipient of the payments.

Under s 34(1) any agreement which attempts to restrict the right of the court to determine what it regards as an appropriate financial settlement will be void. If a prenuptial agreement does not attempt to restrict the court's jurisdiction, it may be taken into account under the general duty of the court to consider all the circumstances of the case. However, there is no certainty that the court will take it into account.[2] Agreements reached at the time of the divorce are

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[2] See *M v M* [2002] 1 FLR 654; *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120.

encouraged by the courts.[3] They are more likely to be honoured and incorporated into a court order if the parties have had legal advice after full disclosure of their respective financial circumstances.

III THE CLAMOUR FOR REFORM

The statute, albeit a very flexible tool for resolving financial and property disputes on divorce, is, at the same time, very paternalistic and controlling in its approach. It has been constantly criticised for its lack of fairness, its unpredictability, and uncertainty of outcome for divorcing spouses. It has no overarching objective, and the judiciary has experienced extreme difficulty in translating the demands of the statute into concrete awards. The question, which has dominated their thinking for many years, is what is the starting point for their decision-making, and how to come up with a tentative proposal of an award which may be increased or decreased once they have taking into account all the factors listed in MCA 1973, s 25. There is simply nothing in the statute which helps them in this first crucial stage of the exercise of their discretion. Many would argue that it is a case of plucking numbers out of thin air and manipulating them in accordance with the discretion granted by the statute.

From time to time, a number of judicial glosses on the statute have been developed to help overcome these difficulties and reach a satisfactory award. One of these, put forward by Ormrod LJ in *O'Donnell v O'Donnell*,[4] which endured for a considerable period of time, was the 'reasonable requirements test'. Provided the respondent spouse's resources were sufficient, the applicant spouse's reasonable requirements were assessed in accordance with the standard of living the couple had enjoyed during the marriage, and an award was made on that basis unless there were other overwhelming s 25 factors to be taken into account.

The 'reasonable requirements test' came to an end in *White v White*.[5] Lord Nicholls of Birkenhead rejected it, and stated categorically that the statute did not permit such an approach. Instead, he proposed a rather convoluted and confusing approach:

- the court would normally be expected to treat spousal contributions as equal. It was not to differentiate between paid contributions from work outside the home and unpaid domestic contribution inside the home;

- before making any order providing for an unequal division of the assets, the court should check its tentative view against the yardstick of equality of division. Equality should be departed from only if, and to the extent that, there was good reason for doing so;

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3 See *Harris v Manahan* [1997] 1 FLR 205.
4 [1975] 2 All ER 993.
5 [2001] 1 AC 596; [2000] 2 FLR 981.

- equal division should not be presumed, such a presumption would go beyond the permissible bounds of interpretation of MCA 1973, s 25;

- equality would not be the 'starting point'.

However, nowhere in his judgment is it explained how the starting point for division of assets should be assessed or what would be good reasons for deviating from equality of division.

The Government was well aware of the clamour for reform and had already decided to address the issue at the end of the 1990s. It believed in a very English compromise and stated that any reform must give spouses a greater sense of certainty without preventing the intervention of the courts where necessary to ensure, insofar as possible, a fair and just outcome. It published its White Paper Supporting Families in 1998.[6] This set out the objective that the court should 'exercise its powers so as to endeavour to do that which is fair and reasonable between the parties and any child of the family'. It also proposed a number of guiding principles, in order of precedence, to resolve the difficulties of the over-discretionary approach of the existing law, as follows:

- to promote the welfare of any child of the family under the age of 18, by meeting the housing needs of any children and the primary carer, and of the secondary carer; both to facilitate contact and to recognise the continuing importance of the secondary carer's role;

- the court would take into account the existence and content of any written agreement about financial arrangements, reached before or during marriage, which has not been enforced owing to one or more of the proposed safeguards having not been met;

- having dealt with the needs of children and the housing needs of the couple, and having taken into account any nuptial agreement, the court would then divide any surplus so as to achieve a fair result, recognising that fairness will generally require the value of the assets to be divided equally between the parties; and

- the court would try to terminate financial relationships between the parties at the earliest date practicable.

Responses were requested, and these were received by the Government in 1999 but no further action was taken to reform the law. This inertia on the part of the Government has led the higher echelons of the English judiciary, practising lawyers, academic commentators, and respondent spouses to all voice their concerns and demand reform.

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[6] Home Office, London, 1998.

Lord Mackay of Clashfern in a lecture to the National Council for Family Proceedings in 1999 favoured a move towards clarity and certainty although he accepted that it might bring about some unfairness in a limited number of cases. He explained:

> 'On the whole, I think a reasonably clear and definite set of rules will help to shorten the discussion of ancillary relief once the issues are raised and, perhaps even more important, enable people who are finding financial difficulties in their marriage, to judge whether ending their marriage will produce for them a more difficult situation than the one they are experiencing while married.'

Thorpe LJ, in *Cowan v Cowan*,[7] commented that:

> '… in this jurisdiction Parliament placed great reliance upon the exercise of judicial discretion, reasonably enough given the high calibre and acquired expertise of the specialist judiciary. Nevertheless experience led to growing professional disquiet at a number of cases in which the costs incurred equalled or exceeded the sums in dispute … Litigants seeking advice from solicitors often received no better answer than that all would depend on the judge before whom the case might be listed. If that was the state of the law how were sensible litigants to plan for the future or to settle their responsibilities by compromise? … But the trend in other jurisdictions from discretion towards predictability is general, if not universal, and I am now convinced that there is an attainable middle ground between the two extremes. However it is for Parliament and not for the judges to take us there, however uninviting the terrain may appear to the Government of the day. Of course there can certainly be no guarantee, and some will say little likelihood, of statutory reform within the foreseeable future. Therefore it will be necessary for this court, which is for many reasons effectively the final court of appeal in this field, for the time being to do what it can within legitimate limits by the practical application of the principles to be found in *White v White* on a case by case basis.'

IV THE HOUSE OF LORDS DECISION IN *MILLER V MILLER; MCFARLANE V MCFARLANE*[8]

In 2006, the House of Lords took a different view of law reform from Thorpe LJ. It finally decided that, if the Government was not prepared to take action, it would take matters into its own hands and tackle head-on the Government's inertia. Their Lordships proceeded to attempt to indulge in judicial law reform to achieve what it perceived to be an equitable approach to divorce settlements.

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7 [2001] 2 FLR 192, para 25.

8 [2006] 2 AC 618; [2006] 1 FLR 1186.

(a) The facts in *Miller*

Mr and Mrs Miller were married in 2000. At the time of the hearing in the House of Lords in 2006, they were aged 40 and 35 respectively. The couple had divorced in 2003 after a short childless marriage of less than 3 years. Mrs Miller had had a miscarriage during the marriage. Mr Miller left her to live with another woman, whom he subsequently married, and with whom he had had a child.

Mrs Miller had been brought up in the United States and worked in public relations prior to her marriage. She modified her career plans in order to marry Mr Miller, and took a post in London where she earned £85,000 per annum. She also took complete responsibility for caring for their family homes in London and France.

At the time of the marriage, Mr Miller was a successful fund manager with a high annual income in excess of £1m and assets worth £16.5m. These assets had increased to £17.5m by the time the parties divorced. Soon after the marriage, Mr Miller had joined a new company where he was paid a much lower salary of £181,000 per annum but received large annual bonuses. In 2003, this bonus was worth £3m. He had also acquired £200,000 of shares, when he changed companies, which were valued at a figure between £12m and £18m at the time of the divorce hearing. There was a restriction on their sale at that time so it was not possible to make a precise valuation.

By contrast, Mrs Miller, at the time of the divorce hearing, had assets worth £100,000, half of which were tied up in pension funds. If she had paid her outstanding legal costs she would have had a debt of over £300,000.

(i) The High Court in Miller

In the High Court Singer J allowed Mrs Miller to give evidence of her husband's conduct as a cause of breakdown of the marriage although she had previously agreed, at the financial dispute resolution appointment, not to ask for this to be taken into account. She was awarded £5m; this included the matrimonial home which was worth £2.3m, and a lump sum of £2.7m plus goods to the value of £150,000. This represented a little less than one-sixth of Mr Miller's total worth.

Singer J held that the allegations of both spouses did not even remotely constitute the type of conduct which it would be inequitable to disregard under MCA 1973, s 25(2)(g). Nevertheless, alluding to the husband's affair, he acknowledged that a significant factor in determining this substantial award after such a short marriage was that the wife had not sought to end the relationship. This approach suggested that conduct was being taken into account, albeit, via a back door route. Singer J also stated that, on marriage,

Mr Miller had given his wife a legitimate expectation that she would, on a long-term basis, be living at a much higher economic standard than that she had experienced prior to the marriage.

(ii) The Court of Appeal in Miller

Mr Miller appealed but the Court of Appeal dismissed his appeal and endorsed Singer J's conclusion relating to Mrs Miller's legitimate expectation about her long-term post-marriage style, based on the facts presented to him.

(b) The facts in *McFarlane*

The McFarlane marriage could not have been more different to that of the Millers. Mr and Mrs McFarlane had three children and had been married for 16 years. The wife had practised as a solicitor with Freshfields, a high-ranking London law firm. She gave up her career to enable her to care for the family and to help her husband advance his career as an accountant. On divorce, the husband earned an annual salary of £750,000. It was agreed by the couple that their total capital of £3m, which consisted, primarily, of three family homes, should be divided equally between them. In the context of the husband's high earnings and the wife's sacrifice of her career, it was also agreed that this was not adequate compensation for Mrs McFarlane, and that she should receive periodical payments. However, the couple disagreed over the amount of these payments.

(i) The decision in the District Court in McFarlane

Mrs McFarlane applied for, and was given periodical payments for herself of £250,000 per annum. They were to endure for the joint lives of the parties.

(ii) The decision in the High Court in McFarlane

Mr McFarlane appealed; he maintained that the purpose of periodical payments was for maintenance only and not for capital accumulation, and that the District Court's award was in excess of Mrs McFarlane's reasonable needs. The Court allowed his appeal and substituted an award of £180,000 for Mrs McFarlane.

(iii) The decision in the Court of Appeal in McFarlane

Mrs McFarlane appealed. The Court of Appeal ruled that periodical payments were not restricted to maintenance alone but could be used, where appropriate, to compensate a spouse for her contribution to the marriage. In those circumstances, payments of a sufficient amount could be ordered which would allow her to accumulate capital from them. The Court restored the award of the District Court but placed a time-limit of 5 years on the periodical payments.

(c) The conjoined judgment in the House of Lords in *Miller and McFarlane*

Mr Miller appealed the award of £5m to Mrs Miller. Mrs McFarlane appealed the decision to restrict her periodical payments to 5 years. The House of Lords decided to hear the appeals together, and Lord Nicholls of Birkenhead and Baroness Hale of Richmond gave the two leading judgments. Their Lordships dismissed Mr Miller's appeal. They restored the order of the District Court which gave Mrs McFarlane maintenance for the joint lives of herself and Mr McFarlane.

(d) The relevance of conduct and contribution to the welfare of the family

Their Lordships reiterated the long-accepted view that negative conduct should not be taken into account in assessing the size of an award unless it is of an extreme nature, normally referred to as obvious and gross.[9] They also maintained that positive conduct in the form of contribution to the relationship should not be taken into account unless it was truly exceptional. Lord Nicholls said:[10]

> 'Parties should not seek to promote a case of "special contribution" unless the contribution is so marked that to disregard it would be inequitable A good reason for departing from equality is not to be found in the minutiae of married life.'

Baroness Hale concurred and stated:[11]

> 'Only if there is such disparity in their respective contributions to the *welfare of the family* that it would be inequitable to disregard it should this be taken into account in determining their shares.'

(e) The role of periodical payments

The formerly accepted view that periodical payments are merely limited to maintenance was rejected by their Lordships. Lord Nicholls explained:[12]

> 'In particular, I consider a periodical payment order may be made for the purpose of affording compensation to the other party as well as meeting financial needs. It would be extraordinary if this were not so. If one party's earning capacity has been advantaged at the expense of the other party during the marriage, it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as

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9 See *Wachtel v Wachtel* [1973] Fam 72.
10 Para 67.
11 Para 146 (italics in the original).
12 Para 32.

> cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.'

His Lordship may be morally correct but he failed to address the difficulty arising from his view. Periodical payments automatically end on the remarriage or death of the recipient of the payments (MCA 1973, s 28(1)(a)–(b)). Unless further changes to the law are made, an applicant spouse, who receives periodical payments as compensation for her contribution to the marriage, will lose out if she remarries, and if she dies the payments will not pass by inheritance. Mrs McFarlane risks the loss of an annual income of £200,000, which was awarded to her as compensation for her contribution, should she decide to remarry.

(f) Legitimate expectation

Mrs Miller's claim to have a legitimate long-term expectation to be maintained at the standard which she had enjoyed during her short marriage was demoted from the level of principle which Singer J had accorded to it in the High Court. The House of Lords accepted that the court merely has to take into account the party's standard of living as part of its consideration of MCA 1973, s 25(2). Legitimate expectations about long-term maintenance might, in certain circumstances, fall within the ambit of the statute.

(g) The overarching principle of fairness

Baroness Hale stated that the overall aim of the court should be to set the parties on the road to independent living, and, in agreement with Lord Nicholls, centred her judgment on the concept of fairness. Both their Lordships maintained that it should be the overarching principle in the determination of any award. Nowhere in the statute is the word fairness mentioned. However, in *White v White* Lord Nicholls stated:[13]

> 'Everyone would accept that the outcome of these matters, whether by agreement or court order should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And sometimes different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder … in consequence, the legislation does not state explicitly what is to be the aim of the courts … Implicitly, the objective must be to achieve a fair outcome …'

Lord Nicholls continued with the same theme in *Miller and McFarlane*. Not surprisingly, he found the concept of fairness to be elusive:[14]

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[13] [2001] 1 AC 596, 599 and 604.
[14] Para 4.

> '… it is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning.
>
> Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.'

Given this acceptance of the relativist nature of fairness, it is interesting to note that Lord Nicholls had little difficulty in expounding, with Baroness Hale's agreement, the three elements of fairness that:[15]

- fairness requires that the needs of the spouses and their children, generated by the relationship, should be satisfied and for most couples there are insufficient resources to do more than that;

- fairness requires compensation to redress any future economic imbalance between the spouses as a result of the way in which they conducted their marriage. For instance, a husband's income earning capacity may have been increased because of his wife's supportive role in caring for the family. On divorce, the wife's earning capacity will almost certainly be less than had she worked throughout the marriage. She also loses the possibility of sharing in her husband's increased income, a possibility which may have been envisaged if and when she gave up work to help him in his career ambitions; and

- fairness requires an equal sharing of the assets acquired during the marriage unless there is good reason to do otherwise. This was a natural conclusion from the fact that marriage is an equal partnership. Special and exceptional contributions should not be taken into account unless it would be inequitable to ignore them.

All three elements, according to Lord Nicholls:[16]

> '… are linked to the parties' relationship, either causally or temporally, and not to extrinsic, unrelated factors, such as a disability arising after the marriage has ended.'

Lord Nicholl's view relating to equal sharing of the assets has changed dramatically since his judgment in *White v White* in which he stated that:[17]

> '… section 25 of the 1973 Act makes no mention of an equal sharing of the parties' assets, even their marriage-related assets. A presumption of equal division would be an impermissible judicial gloss on the statutory provision. That would be

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15 Paras 138–143.
16 Para 137.
17 [2001] 1 AC 596, 606.

> so, even though the presumption would be rebuttable. Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.'

(h) Matrimonial and non-matrimonial property and its division

Perhaps the most important and complex part of the judgment was their Lordships' approach to the categorisation of a couple's assets into matrimonial and non-matrimonial assets. The fact that the concept of matrimonial assets does not exist in English law, and each spouse retains ownership of any property acquired in his or her own name, did not deter their Lordships. Lord Nicholls defined matrimonial property as property acquired during the marriage other than gifts or inherited property given to only one of the spouses. The family home, however and whenever it was obtained, even one owned prior to marriage, was also deemed to be a matrimonial asset.

Baroness Hale's approach to matrimonial property was slightly different from that of Lord Nicholls. She based her view on Lord Denning's definition in *Wachtel v Wachtel*. He had described matrimonial assets as:[18]

> '… those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.'

Baroness Hale excluded business or investment assets, which had been solely or mainly acquired by the efforts of one of the spouses. She believed that it was difficult to prove that these latter assets had been created with the help of the spouse who stayed at home, even if that support was a valuable contribution to the welfare and happiness of the family. She viewed these assets as speculative and risky; the spouse to whom they did not belong may not have shared in that risk. However, she did include the spouses' earning capacity except perhaps in the case of certain dual career families where:[19]

> '… each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not.'

She qualified this statement in the context of dual career families where one of the spouses had also worked inside the home:[20]

> 'What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends. And there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than the one who had only or mainly worked outside the home.'

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[18] *Wachtel v Wachtel* [1973] Fam 72, 90.
[19] Para 153.
[20] Para 153.

Nowhere in the decision is the status of property acquired between breakdown of the marriage and divorce discussed.

Lord Nicholls and Baroness Hale agreed that matrimonial assets, but not non-matrimonial assets, should normally be divided equally regardless of the length of the marriage. Depending on all the circumstances of the case, non-matrimonial assets might also be subject to reallocation. A short marriage would be a good reason not to redistribute them between the spouses. Lord Nicholls had '[an] instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage'.[21]

Baroness Hale believed that there was 'a perception that the size of the non-business partner's share should be linked to the length of the marriage'.[22]

Lawyers now await with keen interest the outcome of the McCartney divorce negotiations to see whether the decision in *Miller and McFarlane* has had any effect. The singer Sir Paul McCartney, reputed to be worth £800m, has parted from his wife Heather Mills after less than 5 years of marriage.

[Editor's note: since this chapter was written, under a divorce settlement Heather Mills was to receive £24.3m from Sir Paul McCartney.]

V THE AFTERMATH OF THE JUDGMENT

The House of Lords judgment has been proclaimed variously as a significant judicial reform of the law, as a landmark decision, and as a pivotal judgment. Yet the judgment has also brought about as many cries of outrage as existed prior to its being handed down.

The imposition of the so-called 'instinctive feelings', and relativist views of the judiciary about fairness, as a gloss on the statutory discretion contained within MCA 1973, is not a satisfactory means of attempting law reform. The word 'fairness' is not included in MCA 1973 because of its relative nature.

The third strand of fairness in their Lordships' judgment – equal sharing of the matrimonial assets – is likely to lead to unrealistic expectations. For so many couples, the matrimonial assets will be insufficient even to satisfy their basic needs, unequal division will be the only way forward, unless there are non-matrimonial assets available. The principle of equal sharing may also bring about other unfair results. This will be particularly so in the case of a high earning respondent spouse; Baroness Hale viewed earning capacity as a matrimonial asset but not business or investment assets gained by the respondent spouse's own efforts. Thus high income individuals may be forced to part with 50% of their wealth because it has been deemed to have become a

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[21] Para 24.
[22] Para 147.

matrimonial asset. Such an award may be vastly in excess of the very high standard of living enjoyed by their spouses during the marriage. These spouses will receive what may only be described as the equivalent of winning the lottery.

It appears that the vow made in many marriage ceremonies 'with all my worldly goods I thee endow' may have become a serious reality for certain couples on divorce even though the vow was of no legal effect during the currency of the marriage.

The judgment leaves many issues unresolved; it fails to explain how the awards to Mrs Miller and Mrs McFarlane fall within the principles proclaimed by their Lordships. There is already evidence that spousal litigation is likely to increase rather than decrease in its aftermath. This litigation will centre on the categorisation of spousal assets into matrimonial or non-matrimonial; what constitutes exceptional reasons to depart from equal division of matrimonial assets; and the nature and relevance of contribution to the creation of non-matrimonial assets versus claims of sole creation of those assets.

It may be that the House of Lords' judgment is merely another version of 'the emperor's new clothes', and that the sensational cries that significant change has occurred are based on their Lordships' claims to have reformed the law. It seems very clear that discretion continues to rule in this area of law. The most that can be said is that the starting point for reallocation of spousal resources on divorce is a 50/50 division of the matrimonial property but it is only the starting point. The final outcome will depend on a discretionary consideration by the judges of a multitude of other factors. Spouses who wish to divorce will continue to remain in the dark about the potential size of any court-ordered settlement.

VI CONCLUSION

It is time for the Government to finally grapple with this unsatisfactory state of affairs. It is essential that English law is brought into line with those jurisdictions where married adults are treated as such, where they are permitted to make enforceable agreements and in default of such agreements, they have the certainty of knowing that matrimonial property, strictly defined as such, will be divided in a way clearly defined by statute.

Whilst it is understandable that the House of Lords is frustrated by the current state of the law relating to financial and property settlements on divorce, it is not an appropriate area for attempts at a piecemeal reform by their Lordships. Any reform, even one which is clearly long overdue, must be based on well thought out social policy. The Law Commission should be requested to conduct a thorough review of the law and produce a draft bill for enactment by Parliament.

Finland

THE RISKS AND OPPORTUNITIES OF FOREIGN CONNECTIONS IN MARRIAGES: THE PROPRIETARY RIGHTS OF SPOUSES

Tuulikki Mikkola[*]

Résumé

Dans les mariages de couples internationaux, certains éléments d'extranéité peuvent avoir un impact considérable sur le sort des biens et sur le droit de disposer librement de ceux-ci. Compte tenu du fait que le droit des régimes matrimoniaux et le droit des biens diffèrent de façon importante d'un système juridique à l'autre, les époux ont tout intérêt à déterminer à l'avance quelle loi leur sera applicable. De la même manière, il peut être utile pour les époux de ne pas perdre de vue dans quel pays un éventuel contentieux pourrait survenir entre eux et de vérifier le caractère exécutoire des décisions dans les juridictions autres avec lesquelles une des parties pourrait avoir des liens.

Le présent article entend examiner les possibilités qu'offrent aux époux les règles du droit interne et du droit international en Finlande, lorsqu'il s'agit pour les personnes mariées d'avoir une emprise sur le cadre juridique relatif aux biens matrimoniaux et de déterminer les effets qu'aura leur relation conjugale sur le sort des biens.

Je traiterai de trois perspectives, en examinant trois niveaux d'influence: le premier est celui du droit patrimonial de la famille interne, le second celui du droit international privé et le troisième s'intéresse aux effets juridiques des conventions librement négociées par des époux étrangers, dans les cas où ces ententes prévoient des mécanismes juridiques inconnus du droit finlandais. L'effet juridique que de tels mécanismes – comme la fiducie ou les comptes conjoints, par exemple – peuvent avoir, pendant le mariage ou en cas de divorce, dans la juridiction du domicile de l'un ou des deux époux, est révélateur du niveau concret de la liberté contractuelle en matière matrimoniale.

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* The author works as a researcher at the Finnish Centre of Excellence in the Foundations of European Law and Polity Research, a unit financed by the Academy of Finland (www.helsinki.fi/katti/foundations/research/RT-1.html).

I BACKGROUND

The number of international marriages is increasing steadily. Statistics indicate that between 1994 and 2003 some 30,000 Finns married citizens of other countries. The increase in international marriages can be attributed in part to increased immigration: where 15 years ago Finland had some 30,000 residents who were citizens of other countries, the latest statistics show that the corresponding figure today is 120,000. Immigration continues to intensify. However, it should be pointed out that the door swings the other way, too, with the number of Finns moving abroad rising steadily as well.[1]

Not surprisingly, one sees the question of matrimonial property rights taking on a significant international dimension in many cases. An international couple's marriage may well have a foreign connection that will have a crucial impact on questions of their property and their authority, as owners, to dispose of it. Examples of such a connection include the spouses' domicile, their citizenship or their property being located abroad. Finnish spouses who move abroad with their families are frequently surprised to find that it is domicile rather than citizenship that determines the law applicable to marital property.

International connections in marriage can thus produce surprising outcomes for those who do not know enough to anticipate them. Given that the provisions of matrimonial property regimes in particular, and property law in general, differ from one legal system to the next, spouses would do well to take the choice of applicable law into account in advance. Likewise, it would be important for married couples to give some thought to the state in which a potential matrimonial property dispute would take place and to the effectiveness of decisions made by authorities in one state in another legal system that is of importance to the spouses.

Legislators in Finland have taken steps towards addressing the challenges posed by international marriages by revising the country's international family law over the years. Of particular importance for spouses are the international provisions that have been added to Chapter 5 of the Marriage Act.[2] These came into force on 1 March 2002. However, the regulation of international marriages in Finland occurs on many levels of the legal system. In the case of international marital and inheritance law one should start by distinguishing between the Nordic and extra-Nordic regimes. The basis of regulation in the former consists of conventions that been concluded through legislative co-operation among the countries. These instruments continue to have great practical significance, for research shows that one-quarter of a million Nordic citizens are domiciled in a Nordic state of which they are not citizens. Outside the Nordic countries, international treaties play a less significant role. Although Finland has ratified some of the conventions that have followed on from the

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1 For statistics, see www.tilastokeskus.fi/index_en.html.

2 Marriage Act, 234/1929, available in English at www.finlex.fi/en/.

work of the Hague Conference on International Private Law, their direct effect, where the rules governing international marriages are concerned, is rather modest.[3]

From another perspective, one can view the legislation governing international marriages in terms of EU regulation and national regulation. Today, Europe has Community Law in force that is of direct significance for spouses. Rather than focusing on choice of law, Community Law has concentrated on international procedure, that is, rules pertaining to the recognition and enforcement of international jurisdiction and foreign judgments.[4] Community Law does not, however, relate to the division of property upon divorce, and enforcement in these matters is very difficult even within the EU countries. Therefore, the implementation of Community Law has not solved this problem, which is especially important for spouses who own property in a state other than the one where the division of property was executed.[5]

Where a dispute arises between spouses over property rights during the marriage, however, the Brussels I Regulation can be applied to determine the competent court of law and ensure the effectiveness of the judgment in another member state. In other words, if the dispute centres on the spouses' ownership of property in general or involves agreements they have made, the case may fall within the scope of the Regulation.[6] In such instances, the possibilities of

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3 The importance of the Hague Conventions is seen most clearly in Finland in questions of children's rights. On the Hague Conventions, see www.hcch.net.

4 See n 7 below.

5 There are no provisions in the Marriage Act on the recognition and enforcement of a decision relating to the division of property on divorce. The legislative drafts of the Act (Government Proposal 44/2001 session of Parliament, 28; in Finnish) states: 'Decisions related to the property of spouses may involve very diverse issues. It has therefore been deemed impossible in this project to draft a proposal on the extent to and conditions under which a foreign judgment can be recognised in Finland.' (In contrast, this problem has been solved among the Nordic countries by a convention; see Art 22 of the Nordic Marriage Convention.) In Finland recognition and enforcement of a foreign judgment requires, as a rule, relevant provisions in the law, which generally have not been enacted without a reciprocal treaty. An exception in this regard are foreign decisions on status with regard to family rights: if such matters had to be decided anew every time because there was no statutory support for their being recognised, inequitable situations could arise. This is the approach that must be taken, for example, in a case confirming paternity 40 years after the birth of the child, if paternity constitutes a preliminary question in the distribution of an inheritance in Finland. However, in practice, a foreign distribution of spouses' property has received legal effect in Finland if the application of Finnish law would have led to the same conclusion regarding the applicable law and jurisdiction as was the decision of the foreign court/authority.

6 Council Regulation EC No 44/2001. See, for instance, the web pages of the European Commission at http://ec.europa.eu/civiljustice. A regulation also has been adopted in the EU – known as Brussels IIa – on the competent court (authority) in divorce and on the effectiveness of divorce decrees made in one member state in another (Council Regulation EC No 2201/2003). The Regulation can be found at http://eur-lex.europa.eu. See also, eg, R Wagner 'Vom Brüsseler Übereinkommen über die Brüssel I – Verordnung zum Europäischen Vollstreckungstitel' in IPRax 2/2002, 75–95 and M Jänterä-Jareborg 'Unification of International Family Law in Europe: a critical perspective' in K Boele-Woelki *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003) 194–216.

applying the Regulation are, however, determined by what law is applied to the spouses' property rights and what the basic approaches in that law are to the independence of spouses' property and to their freedom to contract with one another and third parties. It is only when certain conditions are met regarding the neutrality of the relevant marital property regime that EU statutes can be applied to legal problems involving the property rights of spouses; moreover, these statutes can never solve the problem of the effectiveness in other states of decisions handed down in connection with divorces or in the distribution of matrimonial property to be carried out thereafter.[7]

With the entry into force in March 2002 of the Act on Registered Partnerships (950/2001), registered partnerships in Finland are now also covered by provisions in international private law.[8] No specific rules on property rights have been enacted in Finland with regard to forms of cohabitation other than marriage and a registered partnership; rather, property rights in such cases are decided pursuant to the relevant provisions of general civil law and of 'international property law'.

When a marriage ends with the death of one of the spouses, the provisions of the Code of Inheritance are applied. The Code contains international provisions, which have been implemented by enacting choice-of-law norms corresponding to the provisions of the Marriage Act. The aim here has been to avoid potential conflicts of laws, that is, problems stemming from the application of the laws of different states to matrimonial property and inheritance.[9]

II PURPOSE OF THE CHAPTER

This chapter examines the principal rules adopted in the Finnish Marriage Act and the normative environment for marital property rights created therein. The point of departure in the Marriage Act is the spouses' freedom of contract but this rule has its exceptions. The freedom of spouses to conclude legal transactions also occupies a central role in the choice of law pertaining to property in international marriage. Much as the Marriage Act has undergone

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7 See *De Cavel v De Cavel* (Case 120/79) [1980] ECR 731. Matters regarding spousal maintenance also fall within the scope of application of Brussels I, however, even where the decision on maintenance is made in connection with a divorce. On this, see *Boogaard v Laumen* (Case C-220/95) [1997] ECR I-1147. C Hamilton and L Woods 'Europe' in C Hamilton and A Perry (eds) *Family Law in Europe* (Reed Elsevier (UK) Ltd, 2002) 177.

8 The Act on Registered Partnerships can be found at www.finlex.fi/pdf/saadkaan/E0010950.PDF. For a brief presentation of how a partnership is registered and its legal effects, see the web pages of the Finnish Ministry of Justice at www.om.fi/text/en/Oikeapalsta/Haku/1145612057940. For provisions in international private law governing registered partnerships, see European Judicial Network in Civil and Commercial Matters, at http://ec.europa.eu/civiljustice and M Jänterä-Jareborg 'Registered Partnerships in the Private International Law: the Scandinavian approach' in K Boele-Woelki and A Fuchs *Legal Recognition of Same-sex Couples in Europe* (Intersentia, Antwerp, 2003) 137–158.

9 Code of Inheritance 40/1965 (www.finlex.fi/en/).

numerous changes in the many decades it has been in force towards a normalisation of the status of spouses in terms of property rights, the Act's international provisions have strengthened spouses' freedom to conclude legal transactions. Flexibility has come to the statutory choice of law in that it is now connected with the domicile of the spouses rather than, as before, with the citizenship of the husband during the marriage. Today, the applicable law can also be changed.

The purpose of the chapter is to examine the opportunities spouses themselves have in light of the substantive provisions and international provisions currently in force in Finland to influence how their matrimonial property is regulated and to ascertain what the legal effects of the marriage are where property rights are concerned. I will draw on three perspectives, examining three levels of influence: the first embraces national provisions on matrimonial property; the second embraces provisions of international private law; and the third level explores the legal effects of an agreement made by spouses abroad within the bounds of their freedom of contract where, for example, the agreement creates a form of legal institution unknown in Finnish law. The legal effect that such institutions – for example, trusts and joint accounts – acquired in the domicile of one or both of the spouses both during the marriage and in the case of divorce is very significant where the practical realisation of their freedom to conclude legal transactions is concerned.[10]

III THE SYSTEM OF MATRIMONIAL PROPERTY ACCORDING TO THE MARRIAGE ACT

(a) The statutory system

The Marriage Act has been revised over the years through the amendment of its provisions, and the number of provisions that emphasise the particular importance, for property rights, that married individuals are involved has been steadily reduced. Thus, the current trend, where the right to matrimonial property is concerned, has been to make provisions on spouses' property more neutral. Indeed, the law today views the spouses' relationship less in emotional than in economic terms. In some accounts, marriage is considered to be a special contractual relationship.[11] The status of the Marriage Act with regard

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[10] As the property laws pertaining to spouses also apply for the most part to persons who have registered their partnership, I will not take up the Act on Registered Partnerships separately in this chapter. Also, with a few exceptions, the provisions on inheritance must be taken up on another occasion. Spouses must nevertheless consider that the marriage may also be dissolved by the death of one of them; in such cases it is extremely important, where the status of the widow(er) is concerned, to determine the national and international legal provisions applicable to the estate. A person's right of ownership includes the right to control his or her property *mortis causa* and, within certain limits, the rules that allow him or her to do so can, pursuant to the Code of Inheritance, include the authority to determine the law applicable to the decedent's estate as well.

[11] See A Aarnio 'Äktenskapet som avtal' in C Sandgren (ed) *Utvecklingslinjer inom avtalsrätten* (Stockholm, 1993) 9–18 and S Pohjonen 'Partnership in Love and Business' (2000) 8 Feminist

to spousal property rights is that of a special law, meaning that where it is silent the situation of the spouses is determined according to the general system of property rights. The matrimonial property regime governing the relationship between spouses in fact complements the general civil law system, and an understanding of property rights as they operate between spouses requires a sound grasp of the principles underlying civil law.

During a marriage, the basis of the spouses' property rights in the Marriage Act is, in addition to their freedom to contract with one another (Marriage Act, s 33), their freedom to contract with third parties. A precondition for freedom of contract is that each spouse's assets and debts are separate from those of the other (Marriage Act, s 34). Each spouse owns his or her own property regardless of when and how it has been acquired, and each is liable for his or her own debts (Marriage Act, s 52.1[12]). Marriage does not, according to the main rule of the Act, affect the financial independence of spouses: they are economically equal and independent of one another. Marriage does not mean that spouses' property – or a particular part thereof – becomes common property, nor does it create a joint estate between them.[13]

The basic approach of the Marriage Act to property rights means that both spouses have in principle the status of fully fledged owners where their property is concerned. Yet, the marital relationship restricts this status with regard to certain types of property; this is the case with property in whose use each spouse, regardless of whether he or she owns it, has an interest and thereby an interest in taking part in any legal transactions related to that property. The Marriage Act's restrictions on the administration of property (Marriage Act, ss 38–40) have a protective function rooted in social considerations and apply to the property expressly mentioned in the Act, such as the common home of the spouses, the movable property in the home, and tools belonging to either spouse. This system of restrictions on the administration of property is not tied to a marital right to property or the spouses' assets and is thus not associated with a real need for protection. The system is in force for the duration of the marriage and does not allow discretion in individual cases, as it is an express derogation from the legal status of the owner. In conveying property that falls outside the scope of the system, one spouse can act without the other's consent.

Legal Studies 47, 49. The provisions of the Marriage Act that impose personal obligations on spouses are few in number. The most important exception here is the responsibility of one spouse to provide maintenance for the other during marriage, which ceases, according to the main principle, when a divorce becomes legally valid.

12 However, both spouses are severally and jointly liable for a debt incurred by a spouse for the maintenance of the family. This rule does not apply to a monetary loan taken out by a spouse nor if the creditor knew that the spouses were separated due to a breakdown of their marriage (Marriage Act, s 52.2 and 52.3).

13 Ownership of spouses' property is decided according to the principles of general property law and the law of obligations. However, if, when distributing matrimonial property, it cannot be proved to which spouse a particular movable object belongs, the spouses are deemed to have acquired it jointly and with equal rights (Marriage Act, s 89).

The marital relationship thus has a limited effect on the legal status of the owner during marriage. The main rule is the separation of the spouses' assets and liabilities and their freedom to contract regarding their respective property also on an inter partes basis. Today, gifts between spouses also have a binding effect in principle on third parties. Spouses form two independent subjects under property law and transactions between them usually have the same legal consequences as if they were not married.

When a marriage is dissolved, the principle of separate ownership is not applied as such, because the marital right gives each spouse a right to property of the other when the matrimonial property is distributed. The right to matrimonial property as set out in s 35 of the Marriage Act is a special property right that is enforced only when property is distributed. The section provides that in the distribution of matrimonial property upon dissolution of a marriage each spouse is entitled to receive half of the net property of the spouses that is subject to the marital right (by way of equalisation, see IV(a) below). As the marital right is enforced in the distribution of matrimonial property, it does not, in keeping with the main rule of the Act, affect the status of the owner during the marriage. The marital right to property does not create a joint estate between the spouses.

Distribution of the matrimonial assets may be carried out when there are legal grounds for it. This condition is met where the marriage is dissolved due to the death of one of the spouses, where divorce proceedings have been initiated or where the spouses have been granted a separation in a foreign country. A claim that the matrimonial property be distributed is not barred by the statute of limitations nor does it cease to be in effect if, for example, either spouse remarries. The provisions on how the property distribution is to proceed are found in the Code of Inheritance (Marriage Act, s 98, Inheritance Code, chapter 23). The distribution can be effected by an agreement between the spouses or carried out by a court-appointed estate distributor. An agreement between the spouses is the more common procedure in practice. The spouses' freedom of contract extends even to the distribution carried out by an estate distributor, because he or she is always bound by an agreement made by the spouses, regardless of which aspect of the distribution the agreement applies to.[14]

(b) Shaping the statutory regime by choice

The statutory regime governing the distribution of matrimonial property based on the marital right is an elective one. Spouses may conclude agreements through which they shape their legal relations where matrimonial property is

[14] There is little material on the Finnish Marriage Act in foreign languages (that is, other than in Swedish). The Finnish Ministry of Justice has published material on the Act on its web pages (in English), at www.om.fi/en/etusivu/julkaisut/esitteet/avioliittolaki. See also U Kangas 'Family and Inheritance Law' in J Pöyhönen (ed) *Introduction to Finnish Law* (Helsinki, 2002) 315–356 and R-L Luomaranta 'Finland' in C Hamilton and A Perry (eds) *Family Law in Europe* (Reed Elsevier (UK) Ltd, 2002) 237–239 and 242–244.

concerned such that they depart from the main rule of the Marriage Act. Two types of agreement make this possible: a marriage settlement and a marital agreement (also known as a 'divorce contract').

A marriage settlement affects the marital right of a spouse. The law allows only three alternatives: neither spouse has a right to any of the other's property; neither has a right to particular property of the other; or one of the spouses has no right to all or particular property of the other. Spouses may not agree on any other derogations from the statutory matrimonial property regime through a marriage settlement (Marriage Act, s 41). A marriage settlement can govern both property that the spouses have when they make the settlement and property that they acquire thereafter. A marriage settlement may be concluded before or during the marriage but not after divorce proceedings have been initiated.

A marriage settlement is an agreement with strict requirements of form, and it must be registered (Marriage Act, ss 44 and 66). However, in Finland, unlike in certain other Nordic countries, no examination of the agreement's validity is carried out when it is registered. The right to appeal to such a latent formal error is not time barred.

If the spouses have comprehensively eliminated the marital right of both through a marriage settlement, a separation rather than a distribution of matrimonial property is carried out following the dissolution of the marriage. In Finland, a marriage settlement may not contain provisions pertaining to the administration of property, nor does the system of restrictions on administration of property (Marriage Act, ss 38–40, see above III(a)) require the existence of a marital right to property.

Spouses may also make a marital agreement (divorce contract) governing what happens in the event of a divorce and thus influence how the matrimonial property is distributed. Usually these contracts handle the distribution of assets upon divorce and regulate in detail when and how compensation (including maintenance) to the other spouse is payable. The ambit of marital agreements is not restricted, unlike that of marriage settlements, which regulate only whether the spouses will have marital rights to each other's property. In practice, a marital agreement can render the intended effects of a marriage settlement void.

A marital agreement is free with regard to form and may contain any terms whatsoever regarding property and personal obligations; it differs in this regard from a marriage settlement, whose form and content are dictated by the provisions of the Marriage Act. Moreover, a marital agreement is not subject to the same time constraints as a settlement: it can be made before a marriage and even during it without the breakdown of the marriage having to be foreseeable.

The scope of freedom to contract is reflected further in the fact that a marital agreement can even be made when divorce proceedings have been initiated.[15]

A marital agreement is not regulated in the Marriage Act but, rather, is based on the spouses' freedom of contract. Accordingly, the effectiveness of the agreement is assessed in terms of provisions in the law of obligations. The agreement may thus be challenged on grounds pertaining to the invalidity of legal transactions, for example, if the agreement can be considered unreasonable.[16] The agreement also imposes obligations on the estate distributor whom the court appoints to carry out the distribution or separation of the spouses' property: he or she must ascertain the validity of the agreement if a dispute arises regarding it in the course of the distribution.

In 2006, some 8,000 marriage settlements were registered in Finland, whereas, according to Statistics Finland, some 28,000 marriages were recorded.[17] There are no statistics on marital agreements as they need not be registered or recorded in any official register. Views have been presented to the effect that the popularity of both marital settlements and marital agreements is on the rise.

(c) Spouses' extensive freedom of contract and a neutral legal transaction environment: artificial legal transactions

The limits of spouses' sphere of property and financial independence have been tested in practice in judgments of the Finnish Supreme Court dealing with artificial property arrangements. Chapter 4, s 14 of the Execution Act refers to artificial arrangements in which a certain legal form is used solely as a facade, 'as form without any substantive content'. The cases involve situations where evidence was presented that the title to property to be distrained belonged to a third party but that the status of that party as owner was in fact wholly specious. The purpose of the provision in the Act was to circumvent the legal effects that followed from the form of the arrangement to the extent that these arrangements prevented the enforcement of creditors' rights. If, after various measures, title has been transferred to a party that is not liable for the debtor's

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[15] The marital agreement is known in the other Nordic countries but its scope is generally more limited than in Finland. For this reason it never became the rival of the marriage settlement that it has become in Finland, where it is unfettered by any rules of content or form.

[16] Contracts Act 228/1929, s 36, available at www.finlex.fi/en/ (select Legislation/Translations of Finnish Acts and Decrees/Contracts Act). On the adjustment provision, see also J Pöyhönen 'The Law of Obligations' in J Pöyhönen (ed) *Introduction to Finnish Law* (Helsinki, 2002) 89–91. Where contracts are concerned it should be noted that the freedom of form in the Nordic countries is exceptionally extensive from an international perspective.

[17] Statistics Finland, at www.stat.fi/index_en.html (select Statistics by topic/Population/Changes in marital status). In 2006, the number of registered same-sex partnerships was 191. Of those 191, 84 were male couples and 107 female couples. In 2005, a total of 200 same-sex partnerships were registered. A total of 30 registered same-sex partnerships ended. Of them, 10 were male couples and 20 female couples. In 2005, a total of 31 registered same-sex partnerships ended. In 2006, 13,255 marriages ended in divorce, which is 128 fewer than one year previously. In 2005, the number of divorces granted was 13,383. During the past few years, the number of divorces has changed very little from year to year.

debts, the distraint procedure may go forward as if the debtor still owns the property. In this way, formal ownership and the principle that individuals own property that is in their name can be set aside in the distraint procedure and property can be distrained to pay a debtor's debts.[18]

The provision has been written in a general form that allows the legislator discretion, and its scope of application is guided primarily by the court decisions handed down regarding it. The decisions have in fact given what is said in chapter 4, s 14.1 of the Execution Act more concrete content and they allow one to draw conclusions on a more general level as to how high the burden of proof can be set in assigning ownership.

The decisions of the Supreme Court include many cases involving artificial legal transactions. In a few of them, the question is one of spouses transferring property. The decisions in these cases contain a crucial message on the scope of spouses' freedom to conclude legal transactions, based on a principle of a separateness of assets and liabilities.

Supreme Court Decision 2005:97 indicates that spouses have the chance to effect mutual legal transactions regarding the real property which they use as their common home even where a spouse who has sold his or her share of the real property to the other continues to live in the common home. The continuation of cohabitation and marriage do not give rise to an assumption that an interest in real property transferred by one spouse to the other is still, in reality, being administered by the transferor or that the transferor continues to exercise his or her authority as owner over the property. According to the grounds for the Court's decision, artificial disposal of the property cannot be proven solely by the fact that the transferor takes part in financing the interest that he or she has sold, given that the transferee has, as part of the transaction, agreed to accept liability for the debts attached to the property. In this particular case, the Supreme Court opined that because the selling price of the property was a fair market price and the transfer of liability for debts was real, factors associated with the financing did not suggest that artificial arrangements were involved. The provision of the Execution Act on artificial arrangements could have been applied had the acceptance of liability for the debts at the time of the transaction been so specious so as to make it obvious that the transferee would not have to be personally liable for repaying the debts.

Obvious caution is called for in applying the provision on artificial legal transactions. The owner is well protected. The legal literature emphasises that:[19]

> ' . . . it is more acceptable to distrain a certain part of a debtor's property than to distrain the property of an innocent third party in order to discharge the debts of

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[18] The Execution Act was replaced at the beginning of 2008 by the Code of Execution. The content of the section on artificial legal transactions has not been changed; it is s 14 of chapter 4 of the Code.

[19] T Linna 'Täytäntöönpanoriita ja omistusoikeuskollisio' in *Lakimies* (1999) 347–354.

> a debtor. This being the case, distraining and electing not to distrain property are not equal alternatives; rather, refraining from distraint would seem to be the working assumption.'

In some cases, the threshold of evidence required to prevent distraint is surprisingly low. One sees this in particular where property has been transferred between spouses and other members of the family. That caution is advised in applying the provision on artificial arrangements does not, however, mean that transferring property – or part thereof – to, for example, the spouse or other family member of a debtor cannot constitute an artificial arrangement under the Execution Act; such an arrangement may be proven if the attendant facts and circumstances show that the right of the transferee, despite what has been a valid acquisition, is not genuine.[20]

IV THE POSSIBILITY OF AGREEMENTS IN INTERNATIONAL MARRIAGES

(a) The significance of comparing legal systems in strengthening the freedom of contract

One sees a variety of matrimonial property regimes internationally. The Finnish Marriage Act cannot be compared to the systems that are based on joint property or those based on separate property. In the Finnish model, property is separate during marriage but the consequences of separate ownership are mitigated through equalisation (a distributive award) when spouses divorce.[21]

Different categorisations of legal systems aid those who apply the law to gain a grasp of the systems that have been adopted in different states.[22] When making generalisations in research in the area of comparative law, however, it is wise to

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[20] Cautious application of chapter 4, s 14 of the Execution Act does not infringe the rights of creditors or undermine their position: the Recovery Act quite effectively safeguards creditors' rights to receive payments as regards the otherwise valid transfers of property between spouses and other family members: the protection includes strikingly long recovery times and the provision in s 8 of the Act on the assumption that a transfer is a gift. When the Recovery Act 758/1991 was enacted, the prohibition on gifts between spouses was repealed. At the time, no change was effected in the criteria by which a transfer of property is deemed to be a gift from one spouse to the other. The Recovery Act thus brought no change in how the work done by a spouse at home, spouses' maintenance responsibility and the assistance provided by one spouse to the other in his or her gainful employment are taken into consideration in assessing the gratuitousness of the transfer.

[21] The Finnish system of matrimonial property – and the Nordic systems in general – have been described as systems of postponed community.

[22] On the classifications of marital property regimes, see, eg, W Pintens 'Grundgedanken und perspektiven einer Europäisierung des Familien- und Erbrechts – Teil 1' Zeitschrift für das gesamte Familienrecht (2003) 329–336, especially 333. Pintens divides the European legal systems into two broad categories: those with a system for dividing certain property of the spouses equally between them upon divorce and those with no such system. See also J Flour and G Champenois *Les régimes matrimoniaux* (Dalloz, Paris, 1995) 10–13.

remember that they apply only to similarities between the countries' basic approaches.[23] This can be seen in concrete terms, for example, in that while the basic approaches to matrimonial property in the Finnish Marriage Act correspond to those in the German system, there are nevertheless differences between the systems. In Germany, the equitable distribution of property when a marriage is dissolved applies to different property from in Finland. Moreover, the reference period for acquisitions and increase of assets in calculating the equal distribution of spouses' matrimonial property varies among legal systems.[24] There are also differences in how the distribution is carried out: in Germany the equalisation results in a debt relationship which can be discharged through a monetary payment. In Finland, the equalisation conveyance is generally made in the form of property subject to the marital right or, if the party paying so decides, a cash payment. Thus the ownership of the one obligated to pay is protected even when the distribution of matrimonial property is being carried out. The approach in the Marriage Act is rather radical from an international perspective in protecting the spouses' freedom of contract, on the one hand, and the owner, on the other: regardless of whether the distribution of property is executed by an agreement between the spouses or by an estate distributor, the owner of property essentially retains the right to choose the form of the equalisation, unless the spouses agree otherwise.

Matrimonial property systems also differ in respect of a spouse's right to possess, convey and use his or her own property during the marriage. Restrictions on the administration of property vary in terms of the time-limits these systems entail and also apply to different kinds of property. Further differences can be seen between systems in the legal consequences faced by a spouse who violates the rules of the system of restrictions on the administration of property.[25]

Given that the legal effects of property rights during marriage and upon its dissolution are determined in different ways in different legal systems, the choice of the law to be applied in international marriages has concrete significance for the spouses' financial status. The international connections of a marriage – such as the spouses' domicile and habitual residence, citizenship and

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[23] Gareth Miller warns of the dangers of conclusions drawn on the basis of generalisations: *International Aspects of Succession* (Ashgate, Aldershot, 2000) 100ff.

[24] One very good example of the differences between countries can be seen in what property is taken into account in the final determination of the spouses' financial status. In many countries, eg, Germany, pensions based on earnings are taken into account (BGB , s 1587). In Finland they are not, as they are considered part of an individual's personal social security and, being assets that are only realised later, fall outside the scope of marital property. From a Finnish perspective what is involved is a personal right, which justifies the approach in terms of marital property. In international cases, the problem is whether pensions should be taken into account or not in the calculations made in the state where the property distribution is being carried out if the applicable law is that of a state where pensions are subject to distribution. For example, if the distribution of marital property takes place in Finland and German legislation is to be applied, pensions cannot be taken into account; they are considered in a separate procedure in Germany.

[25] On the Finnish system of restrictions on the administration of property, see III(b) above. On German law, see BGB, ss 1365, 1385–1386 as well as BGHZ 77, 296.

the location of their property – take on a different meaning in different states where the applicable international private law is concerned. Legal systems also differ in whether spouses can influence the choice of law applicable to their matrimonial property regime through mutual agreements.

Designating the applicable law necessitates a comparison of legal systems. A well-argued choice of matrimonial property regime requires that the alternative systems can be made commensurate. One thing hampering research carried out to this end is that the laws on matrimonial property in many countries have provisions that leave discretion to the authority applying the law, making it difficult, for example, to compare the economic outcomes following divorce, that is, the property distribution calculations.[26] Where international marriages are concerned, additional problems arise with the poor prospects abroad of enforcing foreign property distributions and, in this connection, the extent to which a particular state observes the principle of universality.

The opportunities afforded by freedom of contract, which figures prominently in the case of international marriages, must be investigated from the point of view of both substantive law and international private regulation in all those countries having some connection to the spouses' property. This will reveal whether one stands to gain most from the matrimonial property system using agreements with a reference to the applicable law or whether one should instead make agreements that are regulated in terms of content in the substantive marital law of each country. In addition, it is necessary to consider the combined effect on the marriage of all the agreements made with regard to the relevant legal systems and, in particular, the countries where the spouses' property is located.[27]

When agreements are the parties' choice of instrument for managing the legal effects of property rights in international marriages, things are necessarily on somewhat uncertain ground. The discretion granted to authorities or other estate distributors makes full predictability and minimisation of risks impossible. A genuine comparative study of legal systems in fact has the same aim as that pursued in exclusively national situations: to establish as firm a control over the situation as is possible using the knowledge gained through the comparison and the alternatives available in international private law.

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[26] An example of such a provision in Finland is s 103b of the Marriage Act, on adjustment.

[27] A useful resource in conducting research in comparative law are web pages that bring together information on substantive civil law and the provisions of international private law in different legal systems. One such site is European Judicial Network in Civil and Commercial Matters, at http://ec.europa.eu/civiljustice, which is maintained by the European Commission in co-operation with the member states of the EU.

(b) The basic approaches to matrimonial property of the international provisions of the Marriage Act

Even if the law of another country is applied to a distribution of matrimonial property in Finland, the distribution can be carried out either by agreements made between the spouses or by an estate distributor. A property distribution is governed by the principle of universality: it encompasses all of the spouses' property regardless of its location, unless the spouses agree otherwise (Marriage Act, s 137).

The relevant legislation states that the law to be applied to a property distribution is determined by where the spouses became domiciled after marrying. Section 129 of the Marriage Act makes it possible for the applicable law to change should the spouses' domicile change, with a 5-year period of residence required in the new country. The law can be changed immediately, however, if the spouses in question are returning emigrants.

The determination of the relevant law has been detached from the citizenship of the spouses. In those rare situations in which the spouses have not established their domiciles in the same country after marrying, the principle of closest connection must be applied (Marriage Act, s 129.4). The principle suffers from certain vagueness but in practice the connection is usually rather easy to establish. In assessing the closest connection, citizenship may take on significance, as can the location where the spouses spend their time together and where most of their property is located. The assessment must take the point of view of both spouses into account.

The agreement-oriented approach of the Marriage Act was also implemented in the case of international marriages. The spouses may determine the applicable matrimonial property law if that law has proper connections to their marriage (Marriage Act, s 130).[28] The right to a choice of law is enjoyed by spouses who have or have had their domicile in another state or who were citizens of another state when making the agreement. Spouses may make an agreement on the applicable law either before or during their marriage.[29] They may choose, as the applicable law, the law determined by the domicile or citizenship of either of the spouses or the law of the state in which both spouses last had their domicile (Marriage Act, s 130.2). The choice of any other law as the matrimonial property regime renders the agreement invalid. In such a case, it becomes necessary to consider whether an invalid agreement, as a reference to the applicable law, may nevertheless have legal effects as a marital

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[28] Renvoi has been rejected and thus reference to the applicable law of a foreign state means a reference to the substantive provisions of that law, not to the provisions of international private law (Marriage Act, s 139.1).

[29] Cf the previous legal situation, according to which a reference to the applicable law could only be made before marriage in the form of a marital settlement. As the statutory matrimonial property law was determined by the citizenship of the spouse at the time the marriage occurred and that law could not be changed later, statistics show that both Finnish men and Finnish women who married foreigners opted to make use of references to the applicable law.

agreement by the spouses. With some qualifications and reservations this question can be answered in the affirmative.[30]

The validity of an agreement made by spouses entails no other requirements than for it to be in writing. Moreover, it need not be registered in order to be effective inter partes. If the parties' intention is to make the reference to the applicable law binding on third parties, the agreement must be registered in the same way as a marital settlement (see Marriage Act, s 135).

An agreement on the law applicable to matrimonial property can be amended or cancelled during the marriage but any amendments or cancellation must be effected in the same form in which the agreement was drafted. In other words, if the spouses want to cancel their reference to the applicable law, merely tearing up the agreement will not suffice as an indication of their desire to cancel it; they must cancel it in writing (Marriage Act, s 130.3). This provision is designed to avoid uncertainties.

(c) Agreements on property rights in international marriage

Section 131.2 of the Marriage Act lists the issues that must be resolved by the applicable matrimonial property law. The main rule is that it should be possible to change the applicable law for another. If the applicable law changes, the issues are to be resolved in accordance with the new law. However, it has been considered appropriate to allow for certain derogations from this main rule.

Changing the law applicable to matrimonial property does not affect the effectiveness of a legal transaction concluded prior to the change. With this provision, the legislator has sought to ensure, in keeping with the principle of continuity, that validly concluded legal transactions retain their validity also in the future. The validity of a legal transaction is to be decided in accordance with the law of the state that was applicable to the spouses' property rights when they concluded the transaction. On the other hand, if the transaction was invalid when concluded according to the applicable law at the time, it cannot become valid later through a change in the applicable law.

Marriage settlements and marital agreements have been accorded special status. Their validity is to be assessed according to the law that is applied when the question of the significance of the agreement becomes relevant. In other words, if the matrimonial property regime of a foreign state is applied to persons who have made a marital agreement, the validity of that agreement is assessed in terms of that system. The agreement must thus be applied in a concrete

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[30] There has been discussion in Finland of whether an agreement that is invalid as a marriage settlement may take on meaning as a marital agreement. No clear position on the issue has emerged as yet. Here, too, under certain conditions I would lean towards answering the question in the affirmative. I would not, however, put forward a position that a certain agreement on which the Marriage Act imposes strict formal requirements could, when invalid, always be 'salvaged' by a second type of agreement that is not bound to equally stringent requirements of form.

situation before a decision can be made on its validity and effectiveness, even where the distribution of property is being carried out in Finland and the marital agreement has been made there as well (Marriage Act, s 131.3).[31]

It is likely, however, that marriage settlements and marital agreements are in many cases drafted on the basis of a certain legal system such that the choice-of-law provision can be deemed to be incorporated in them; in Finland, a reference to the applicable law need not be an express one by any means. When spouses base their agreement on a certain legal system, it is usually a strong indication that the marriage settlement and marital agreement are valid in terms of the matrimonial property system chosen. Accordingly, it is unlikely that they will find themselves caught unawares by the agreements being invalid.

(d) Freedom of contract and third parties

The matter of spouses' ownership of property and their right to control and administer their own property is provided for in a variety of ways in the legislation of different states. Two types of systems are those based on community ownership of matrimonial property and those based on separate spheres of property. In some systems, the spouses have the power through marriage settlements to influence which national matrimonial property regime is applied to them. On the other hand, regardless of the regime applied to the spouses, the marital relationship creates various restrictions on their right to control and administer their property. In joint estates the restrictions on the owner's power to dispose of his or her property follow from the system itself. Systems based on the separation of property have what are known as restrictions on the administration of property. As these are designed to be a mandatory system of protection, they usually cannot be eliminated or circumvented altogether using general agreements made in advance. From a comparative perspective, the extent of restrictions on the administration of property, as well as the freedom that spouses have to conclude legal transactions in that regard, always differs to some degree from country to country.

In the case of an international marriage, spouses resident in Finland may find that their property rights become subject to the law of a foreign state that does not, for example, recognise the equal right of spouses to make agreements with one another or with third parties. In order to facilitate the conclusion of agreements in Finland, provisions have been included in the Marriage Act which make it easier for third parties to carry out their obligations to ascertain the content of the applicable matrimonial property law. The purpose of the provisions is to guarantee the smooth exchange of property even when the applicable law is that of a foreign state.

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[31] On the importance in Finland to a spouse's creditors of registering a foreign marital settlement, see Marriage Act, s 135.3.

The state's interest in real property located in its territory is seen in para 1 of s 135.1 of the Marriage Act. Here, the Act states that any provision in the law of a foreign state, which restricts the right of a spouse to incur debt or to administer his or her property to a greater extent than the provisions of the Act, is without effect as against a third party if the transaction pertains to real property located in Finland or the right of use to such property. Thus, buying real property in Finland does not require the buyer to ascertain the content of the relevant foreign law. Transactions involving real property are binding unless the provisions of Finnish law state otherwise. This provision in the Marriage Act facilitates the exchange of property between a spouse and a third party, as well as the recording of rights associated with real property.

Paragraph 2 of s 135.1 of the Marriage Act pertains to other legal transactions that a spouse concludes with third parties. A third party is given the protection of good faith if the spouse who concluded the legal transaction and the third party were in Finland when the transaction was concluded and the third party was not aware of, or could not be expected to have been aware of, potential restrictions in the applicable matrimonial property law. The third party has an obligation to ascertain the content of the applicable matrimonial property system only if he or she can be deemed to have had particular reason to suspect that the foreign law had a restriction on concluding legal transactions. Such a situation can arise, for example, if the party has been expressly told that the applicable foreign law contains such restrictions. There is a high threshold before one is obligated to ascertain the content of the foreign system. For example, the fact that a client's clothing indicates that he or she is from a foreign culture does not entail an obligation to determine the content of the law of the foreign state. The provision only applies to situations where both the spouse effecting the legal transaction and the third party were in Finland when the transaction was concluded. In other situations, the parties to the agreement have no reason to consider Finnish law the legal basis, meaning that such situations fall outside the scope of para 2 of s 135.1 of the Marriage Act.

In Finland, where agreements have been made not between a spouse and a third party but between spouses and may have effects on a third party (agreement on the choice of law or a marriage settlement), they must be registered in order to become binding on third parties. Where an agreement on a reference to the applicable marital property law is concerned, the requirement of registration applies to situations in which both spouses have their habitual residence or domicile in Finland. Registration does not affect the validity of the reference to applicable law in the relationship between the spouses. It only has significance when, for example, an assessment is being made of the reversal of a marital property distribution pursuant to s 104 of the marriage Act where one spouse gives the other an amount of property far in excess of that required by the equalisation. If the agreement on the choice of law has not been registered, the possibilities to reverse the distribution are assessed as if the agreement had never been made.[32]

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[32] The registering official in Finland is the local register office. Its web pages indicate that some

The validity of a marriage settlement between spouses is assessed pursuant to s 131.3 of the Marriage Act (see IV(c) above). If the spouses have their habitual residence or domicile in Finland, a marriage settlement concluded before both spouses became domiciled in Finland is without effect as against the creditors of a spouse if the agreement has not been registered (Marriage Act, s 135.3).

In order to prevent abuse of the protection afforded by registration, the law sets out requirements regarding when the claim for a debt came into being. The registration of a marital settlement or an agreement cannot work to the detriment of the debtor if the agreement is not registered until after the claim has arisen. This is a means to prevent situations in which spouses, whose property is for the most part in the name of the indebted spouse, make an agreement (and register it) to the effect that, when excessive indebtedness has arisen, the matrimonial property law of a state is applied providing that the spouses' property is common property and only a certain part of it can be distrained to pay the debts of the other spouse. This provision can be considered an expression of the principle of the Finnish legal system that the law is not to be abused. Provisions reflecting this principle have appeared in many different parts of Finnish legislation, for example, in that concerning distraint of property.

(e) Lex causae and directly applicable provisions

It is possible for the law of a foreign state to be applied to the property relations of spouses living in Finland. As domicile is a crucial connection where jurisdiction and choice of law are concerned, it is more likely that such a situation will arise through an agreement made by the spouses. If the applicable matrimonial property law is that of a foreign state, we must, on the level of application of the law, be ready to deal with provisions that differ from those of the Marriage Act. The point of departure in applying the law is respect for the foreign system, and in principle the differences between the legal provisions in the countries must be accepted.

In some situations, the application of the law of a foreign state reaches its limits, and in such cases, one speaks of directly applicable provisions. These are individual provisions of the Marriage Act that are applied alongside the applicable matrimonial property law where this is the law of a foreign state. The authority applying the law has no discretion with regard to which provisions in the Marriage Act are directly applicable, because these are expressly mentioned in the Act. This legislative solution is different from that seen in the law of obligations, where directly applicable provisions are very general in nature and leave the authority applying them discretion.

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50 registrations pursuant to s 135 of the Marriage Act were performed 2006. See www.maistraatti.fi/en/index.html. The pages contain information in English on the local register offices and their general duties but no statistics on the registration of marital property agreements.

I will illustrate two of the directly applicable provisions: the adjustment of a distribution and the system of restrictions on the administration of property.

As mentioned above, the marital right is a special right in property law that entitles a spouse to demand an equalisation of property upon the dissolution of the marriage. Within the bounds of their freedom of contract, spouses have the opportunity to eliminate the marital right to property through marriage settlements or to waive its economic consequences through a marital agreement. Within the framework of these basic approaches, authorities were allowed no discretion to adjust the outcome of a distribution before 1998, when enactment of s 103 of the Marriage Act made it possible to do so to a limited extent. Adjustment is an exception to the main rule in the Marriage Act whereby all property subject to the marital right is divided equally; its purpose was not to introduce into the system, set out in the Act, general discretion to render situations more equitable, which would mean, for example, that the effects of spouses' marriage settlements could always be adjusted. The point of departure is that spouses choose within the scope of their freedom of contract the extent of their marital right and, by extension, the economic outcome of their matrimonial property regimes.[33]

Pursuant to the provisions of international private law in the Marriage Act, adjustment of the distribution of matrimonial property is a directly applicable provision. According to s 134.1 of the Act, the distribution can, when the requirements set out in s 103b are met, be adjusted even if the law applicable to it is that of a foreign state.[34] However, this does not mean that, if the outcome of the distribution when applying the foreign law is different from that obtained when applying the Marriage Act, this constitutes grounds for an adjustment. Adjustment is only possible when the outcome of the distribution under foreign law is clearly unreasonable (from a Finnish perspective) or when one of the spouses clearly benefits at the expense of the other, gaining unjust enrichment when the marriage is dissolved. Even in international cases, the same rule applies that I noted above: in principle the spouses are to choose for themselves the economic effects of the applicable matrimonial property regime – through various agreements and/or by committing themselves to the statutory regime by the choice-of-law provisions.

When a marriage is dissolved by the death of one of the spouses, a distribution of the decedent's estate must be carried out. The international provisions in Finland embody an approach whereby matrimonial property rights and inheritance should be governed by the law of the same state in order to avoid conflicting outcomes. Spouses have the opportunity through mutual legal transactions to avoid such conflicts; in the event they have failed to conclude

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[33] It should be pointed out here that adjustment can never be based on blameworthy conduct on the part of the spouses unless this has economic implications.

[34] Section 134.1 refers only to the first subsection of s 103b. This means that the general conditions for adjustment are determined according to the Marriage Act but the means by which adjustment is carried out are not. This legislative approach leaves the choice of means to the authority applying the law.

such transactions or the transactions they have concluded do not have the desired legal effects, due to differences in the legal systems, a provision has been placed in the Code of Inheritance allowing for adjustment of the distribution of an inheritance. This provision does not allow adjustment of the distribution of matrimonial property, only of the distribution of an estate. Chapter 26, s 13.1 of the Inheritance Code reads as follows:

> 'If the decedent was married at the time of the death, the distribution of the estate may be adjusted on the request of the surviving spouse or an heir, if the result of the distribution of matrimonial property and the distribution of the estate would otherwise be unreasonable by reason of the laws of different states being applicable to the same.
>
> In the assessment of whether the distribution of the estate is to be adjusted, special attention shall be paid to what would have been the result of the distribution of matrimonial property and the distribution of the estate, had the law applicable to inheritance been the law of the same state as that applicable to matrimonial property regime.'

The right to administer one's property is a matter which spouses cannot fully influence through agreements if the property in question is located in Finland. Marriage does not, according to the Marriage Act, impose any restriction on the rights of the owner to dispose of his or her property unless the property is subject to a system of restrictions, this being in most cases the spouses' common home (see III(a) above). The system has the character of protective social norms and corresponding aims and it has thus been considered appropriate to extend the equivalent protection to marriages where the property rights of the spouses are defined by the law of a foreign state if the legal transaction being concluded has a sufficiently close connection to Finland. The social aims of the system of restrictions on the administration of property are not tied to the existence of the marital right or the law applicable to matrimonial property. For this reason, s 133 of the Marriage Act provides that even where the matrimonial property rights of the spouses are determined by the law of a country other than Finland, the provisions restricting the administration of property are nevertheless applied to their full extent to the transfer of property that is located in Finland.[35]

Restrictions on owners' rights may come into play from another source when it is a question of the spouses' common home. A request for the end of cohabitation is always admissible if the spouses' common home is located in Finland (Marriage Act, s 120). Finnish law (Marriage Act, s 24) is applied to the request, this provision, providing that a court can decide upon receipt of an application, is that the spouse with the greater need for a residence may remain in the spouses' common home and that the spouse with the lesser need is to

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[35] If the foreign state whose law determines the matrimonial property rights has restrictions on administration of property other than that protected by restrictions on administration in the Marriage Act, those provisions are to be applied in addition to the restrictions in the Marriage Act. The right to appeal to the law of a foreign state against a third party is set out in s 135 of the Marriage Act.

move out. A request for the termination of cohabitation may be presented during the marriage and even thereafter if no distribution of matrimonial property or separation of property has been carried out between the spouses.

Understanding a directly applicable provision requires a comparative study of legal systems, because it may become relevant only where the applicable matrimonial property law does not enable the desired result (preventing an unreasonable distribution and the like). Accordingly, in applying directly applicable provisions – or considering their application – one must carry out genuine comparative research, which requires an understanding of the systemic and interpretive dimensions of the system being studied. Considering that family and inheritance law has been called the most difficult field in which to compare legal systems, directly applicable provisions bring many agonising moments to the authorities called upon to apply them. Reaching any kind of a reasonable solution requires the simultaneous assessment of two legal systems. The authorities applying the law must also succeed in combining the aims of directly applicable provisions with respect for a foreign legal culture. This respect often involves, through the spouses' freedom of contract, respect for the spouses' personal autonomy.

Not surprisingly, directly applicable provisions are to be applied narrowly. The legislation differs from state to state and may lead to different outcomes. It is not permissible to repudiate all outcomes that diverge from those one's own system would yield by invoking the *ordre public* principle (as stipulated in Marriage Act, s 139.2) or using directly applicable provisions. Here we again return to the principle that foreign cultures must be respected and that we should trust in the reasonableness of other legal systems – albeit not blindly.

(f) Applying the principle of universality: problems of interpretation caused by differences between legal systems when spouses' property is located abroad

The distribution of matrimonial property is tied to the principle of universality by an express provision in the Marriage Act, s 137.1. If the spouses have property abroad, the difficulties involved in enforcement can be taken into consideration where a distribution is carried out in Finland. Thus, there is no need to designate property to be given to a spouse as part of the equalisation that he or she would have difficulty obtaining control over, because the Finnish deed of distribution is not given legal effect in the state in which the property is located. According to the express provision in s 137.2 of the Marriage Act, restrictions can be placed on the owner's power of decision that underlies the Marriage Act if the spouse who owns more property decides to designate property located abroad as part of the equalisation he or she is to pay. If the estate distributor can assume in such situations that the will of the owner would lead to difficulties in the transfer of the property in the state where it is located, he or she may disregard the will of the owner and give the other spouse

property located in Finland.[36] But not even the authorisation given in s 137.2 of the Marriage Act entitles the estate distributor to disregard a consensual decision of the spouses.[37]

If the spouses are domiciled abroad, the distribution of matrimonial property may not be carried out in accordance with the provisions of the Marriage Act. If the spouses' domicile is in a state which has not committed itself to the principle of universality, and jurisdiction over property located in Finland is transferred to Finland, problems of interpretation can arise in establishing what is reasonable when applying directly applicable provisions, as the execution of the distribution of matrimonial property is split between two states.

For example, a married couple lived for 30 years in France and most of their property was located there. However, the husband also owned a piece of real property in Finland. The spouses made a marital settlement stipulating that their property should be separated in the event of divorce. After the breakdown of the marriage, procedures were begun in France, in accordance with French law, to determine their matrimonial property rights. In this procedure, the real property in Finland was not taken into account. In such situations an estate distributor may be appointed, pursuant to s 127.4 of the Marriage Act, to complete the distribution of matrimonial property even though the point of departure in the Act is that the procedure should be carried out in the state

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[36] Protection of the owner thus has to yield in international situations more readily than in national cases, where only chicanery prevents realisation of the will of the owner in choosing the form of the equalisation. Even where an estate distributor has been appointed by the court, the party paying may decide which property he or she transfers to the other or whether he or she makes cash payment instead. As the property transferred must be property to which the other spouse has a marital right, the spouses can use a marriage settlement to influence the nature of the property transferred as compensation (equalisation). If the quality and quantity of an equalisation payment has been agreed on in a marital agreement, it is binding on the spouses as well as the estate distributor in the property distribution.

[37] There is a difficulty with the interpretation of s 137.2 of the Marriage Act as to whether the estate distributor may establish a debt relationship on the basis of the provision if nearly all of the property of the spouse who is obligated to pay equalisation is located abroad and it is clear that the recipient of the compensation will have difficulty gaining possession of that property on the basis of the property distribution deed. I consider the authority granted by s 137.2 of the Marriage Act in this respect to be extensive (in light of the aims of the provision); that is, I consider it possible to establish the debt relationship. A second question that may cause difficulties in interpretation in the future is the extent to which it is the estate distributor's responsibility to ascertain whether the requirements for applying the provision are met and the extent to which the parties can be expected to delve into the law of a foreign country. How a Finnish distribution of matrimonial property acquires legal effects in a foreign country with respect to property located there cannot realistically be considered such well-known information that it would fall under the estate distributor's obligation to ascertain the relevant law. In practice, the authorisation given to the estate distributor in s 137.2 of the Marriage Act is likely to be applied in cases where the spouse who is the recipient of the equalisation claims that he or she cannot establish title over certain property located abroad that has been designated part of the award.

determined by the spouses' domicile. In the choice of law, the estate distributor must observe the provisions of the Marriage Act and the applicable law in this case would be French law.

The estate distributor considered that the distribution resulted in an unreasonable situation for the wife and decided to apply the directly applicable provision of the Marriage Act on adjustment. The problem of interpretation that then arose was whether the estate distributor in making his or her decision was obligated to take into account the outcome of the property distribution (separation) that had been carried out in France or whether he or she had to confine any adjustment to the property to which his competence extended (the real property in Helsinki). In my opinion, sound arguments can be adduced in support of both interpretations. If I lean towards consideration of the overall outcome of the property distribution, then the directly applicable provision concerned would take the outcome of the procedure in France into account. On the other hand, if the matter is decided with a view to the scope of the estate distributor's competence, one reaches a different conclusion. The matter is unclear: there are no views on the matter to be found in the legal literature and no legal praxis on the issue either.

(g) Property law institutions of other countries and spouses' freedom of contract

Background

Internationalisation poses challenges in the area of matrimonial property rights also to the autonomy of systems of property law. States have different legal institutions where property law is concerned and if spouses are – either together or individually – subject to such arrangements, it is necessary to ask what implications this might have in terms of matrimonial property. The question may arise during marriage as a matter of the owner's power to dispose of his or her property or when distributing matrimonial property upon the dissolution of a marriage.

The purpose of creating special property arrangements in other countries may also be a conscious effort on the part of the spouses to steer legal effects in a desired direction. For example, with the appropriate ownership arrangements, property can become movable property, thereby avoiding the problems that arise when the property of spouses, that is categorised as real property, is divided among several countries. Within the scope of their freedom to conclude legal transactions, spouses may approach the property law institutions of foreign countries as if they were ripe fruit – including some exotic varieties – to be plucked and added to the basket of delicacies they have collected for their matrimonial journey together.

In what follows, the trust system that forms part of Anglo-American law is discussed. It is an unknown concept in Finnish law but in an increasing number of cases has caused problems related to the recognition and enforcement of the

arrangement. Through the example I present, I hope to clarify the impact on marital property of institutions that are unknown (and in technical terms legally impossible) in Finland but which are respectably established in other countries and are viewed through the eyes of the Finnish authorities who apply the law.

Trusts

The trust is challenging for us because it is based on dual ownership, which does not correspond to the form of common ownership recognised in Finnish law. When one compares a trust and the associated rights of the owner to the Finnish conception of ownership, the special nature of a trust comes clearly to the fore. In Finland, the authority of the owner of property includes at least the authority to convey it (the authority to effect a change of owner), to obtain credit against it, to pass it on to his or her heirs and to bequeath it in his or her will. The scope of a trustee's authority as an owner is more restricted, and the objective title of the beneficiary to his or her property does not correspond to the status of an owner in Finnish law. From the Finnish perspective, the highly developed legal status of a beneficiary in equity is both a weak and a strong right and the conception formed of it from this distance is in a way a fragmented one.[38]

We are compelled to address the legal effects of trusts in Finland generally from two perspectives. One can ask what the value of the trust property is as an asset for the person involved in the arrangement. When a marriage is dissolved and the spouses' property inventoried, a position must be taken on whether the status of trustee or beneficiary to a trust is an asset to be taken into account in the distribution of matrimonial property. In such cases it becomes necessary to familiarise oneself with the documents establishing the trust and the applicable legal provisions[39] and in this way ascertain what the aim of the arrangement is and how it has been realised. As the assessment of the legal effects of a trust is a matter of property law, specifically ownership, it cannot be carried out with reference to the law applicable to the distribution of matrimonial property: that law is chosen using its own choice-of-law provisions, and the legal effects of a property law institution established in a foreign country are assessed as a

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[38] From a comparative point of view, I agree with Jane Ball 'The Boundaries of Property Rights in English Law' in (2006) 10.3 Electronic Journal of Comparative Law 5, at www.ejcl.org/103/art103–1.pdf who states: 'An additional major problem of definition and comparison is that, in England, the distinction between the law of real and personal property is blurred by a whole category of other rights, equitable rights, which are supported by the law of equity and trusts.'

[39] Here it must be taken into consideration that, although the trust originally developed in England, there are very large differences indeed in its structure between different legal systems. For this reason, any assessment of the legal effects of a trust requires comparative legal research. Generalisations even within Anglo-American law can lead to erroneous outcomes. See D Hayton (ed) *Modern International Developments in Trust Law* (Kluwer Law International, The Hague, 1999) and D W Waters 'Institution of the Trust in Civil and Common Law' in *Collected Courses of the Hague Academy of International Law* (Kluwer, The Hague, 1999) 123–451.

wholly separate issue. In other words, the applicable matrimonial property law will not draw the line between what is possible and what is not when assessing differences between property law institutions that are specific to each legal system and ascertaining spouses' possibilities of exploiting those differences.

Questions of proprietary relationships are conventionally resolved according to the law of their location (*lex rei sitae*). The crucial law is that governing the piece of property at the time when a significant event occurs in terms of property law (the acquisition). Following the same principle, if a foreign institution that can be deemed a property law institution is taken into account in a distribution of matrimonial property conducted in Finland, the basic approach is that the institution is given the same legal effects as it has in its state of origin. In this way, foreign cultures are respected and a comparison of the legal systems is used to determine, to the extent possible, what the foreign institution entails. If spouses want to set up a trust within the scope of their freedom to conclude legal transactions, the validity of the trust will be assessed according to the law applicable to the legal transaction (*lex loci*).

The above-mentioned situations, where proprietary rights of a trust abroad are examined as part of a matrimonial property distribution in Finland, must be distinguished from situations where the trust has a connection to Finland making it necessary to determine how the arrangement can be enforced here. This is the case where, for example, spouses transfer property to Finland that has been administered abroad through a trust. Likewise, the distribution of an inheritance in Finland – and involving property located in the country – requires interpretation of a will made in England that is based on a trust.

In these situations as well, the point of departure is respect for the institution and the relevant foreign legal system. If we look at common ownership generally, the basic approach is the property law principle of permanence. If a property law institution is involved that has an equivalent in Finland, such as ownership by undivided shares, and the jointly owned property is later brought to Finland, the shares of ownership of that property do not change to conform to what they would be under Finnish law but are determined by the law applicable at the time of acquisition. If, for example, a foreign law has established shares of joint ownership with respect to financing, the joint owners retain these rights (shares) even though in Finland the shares of ownership are determined according to the purpose of the joint owners at the time the property was acquired.[40]

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[40] The relationship between the presumptions pertaining to joint ownership and provisions on presenting evidence becomes important because, if the presumptions are considered as being part of the provisions, they are always determined by the law of the court, or *lex fori*. However, it is justified to consider that the presumptions are part of the material provisions of the Common Ownership Act, whereby they would, to cite Risto Koulu, be in an area protected by the principle of permanence. See *Kansainvälinen varallisuusoikeus pääpiirteittäin* (WSOY, Porvoo, 2005) 207.

When we are dealing with a legal institution that is predicated on dual ownership, which is alien to the Finnish system and violates our mandatory principles of property law – such as occurs in the case of a trust (at least in its English form) – the principle that must be applied is not the principle of permanence but that of comparative implementation. Respect for a foreign legal system can be achieved by implementing the purposes of the trust in each case to the extent possible. In practice, an actual trust is compared to national institutions and concepts, with the ones best matching the structure and purpose of the trust chosen in each particular case. One restriction on enforcement in Finland is the mandatory provisions in force stipulating that secret ownership rights cannot be created that bind third parties; enforcement adheres to the principle of transparency in property law. In Finland, the title to property cannot be split, unlike in England, whereby it is necessary to choose in whose name the property in the trust will be recorded – either the person in possession of the property or the person who is intended to ultimately benefit from it.[41]

Where comparative implementation is concerned, the most important thing is to understand the structure of trusts and the nature of the right of those involved in the arrangement. Assessing the legal effects of trusts unquestionably requires an understanding of the institution in its original form against the backdrop of equity and common law.[42] It is only with knowledge

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[41] On the legal effects of trusts in Finland, see T Mikkola in (2002) *Retfärd 98 Nordisk juridisk tidsskrift* 29–38. On the effects of trusts in Switzerland, see H Van Mens 'The Trust and Swiss Civil Tax Law' in F Sonneveldt and H Van Mens (eds) *The Trust Bridge or Abyss Between Common and Civil Law* (Kluwer, The Hague, 1992) 46–48, where the author refers to the Swiss case *Harrison v Crédit Suisse* (RO 96 II 79) (1970). On the Hague Convention on the Law applicable to trusts see E Gaillard and D T Trautman 'Trust in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts' (1987) 35 *American Journal of Comparative Law* 307–339.

[42] I would like to emphasise that the trust system is also known outside of the Anglo-American legal systems, for example, in the so-called 'mixed' systems, where the doctrines of the core fields of law where trusts are concerned are similar to those in the corresponding continental legal systems. Thus, mixed legal systems – e g South Africa – fall on the boundary between two legal cultures with regard to trusts and it is useful to examine a trust from the point of view of continental law. By comparing mixed systems and English law one can identify the salient features of trusts in assessing the legal effects of foreign trusts on the one hand, and the chances for a legal transplant to succeed on the other. It is my understanding that technically a trust could be transplanted into Finnish national law – not in its English form but in a form distilled from a comparative study of legal systems. However, I do not consider transplanting the institution to be appropriate at this time, because the doctrines 'baked into' the trust system have equivalents in Finnish legal institutions such as a contract for the benefit of a third party and certain forms of will. See T Mikkola (2002) *Retfärd 98 Nordisk juridisk tidsskrift* 33–35. On the trusts in mixed legal systems, see M Milo and J Smits 'Trusts in Mixed Legal Systems' (2000) 3 European Review of Private Law 421–426. For a transplant to succeed it must be 'fit' from the standpoint of the receiving system – on the level of provisions as well as on a more general societal level. The number of equivalents in the receiving system is one of the most important factors in this assessment. Equivalents may also be found outside the legal provisions, in forms such as restrictions on the market. If equivalents are lacking, it is possible that the provision will be adapted to local conditions and accepted in practice by the legal actors. See H Kanda and C Milhaupt *Re-examining Legal Transplants,* Columbia Law and Economics Working Paper No 219, at http://ssrn.com/abstract=391821.

gained from a proper comparison of the relevant legal systems that the arrangement can be put in perspective when two systems of property rights collide, one of which lacks the notion of a trust on the systemic or provision level. The system of property law under common law presents us with formidable challenges in this regard. Encountering a foreign system does not immediately activate the *ordre public* principle[43] but, as a rule, neither can the principle of the permanence of proprietary rights be applied as such to cases of this nature.

Joint tenancy, another form of joint ownership unknown in Finland, has also caused difficulties – in particular as regards its characterisation for purposes of choosing the applicable law in inheritance matters. The most important question is: When the ownership share of a joint owner increases due to the death of another joint owner, is the matter (acquisition) subject to property law or inheritance law? I would tend to address the problem in terms of property law, in which case the applicable law would be *lex rei sitae*. This rule determines what types of property rights there are, how they are established and how they cease to operate. Joint tenancy is a form of joint ownership in which the law of the place where the property is located determines the conditions under which the relation is formed and how it is dissolved. In such a case, if the applicable inheritance law is Finnish Code of Inheritance, for example, it does not define what share of a joint account in, say, an English bank, belongs to the estate of an individual joint owner; the matter is decided – through the choice of property law – in accordance with English law.[44] This qualification regarding the choice of law does not, of course, mean that property arrangements abroad cannot affect certain protective provisions of Finnish inheritance law, for example, those on a lawful share of a decedent's estate (Code of Inheritance, chapter 7). The rule is the same with regard to the provisions applied to the distribution of matrimonial property that are designed to protect one of the parties, such as those on compensation.[45]

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[43] This is nevertheless possible, particularly if the legal system involved permits the establishment of trusts contrary to certain central rules and principles that are conventionally considered mandatory for the valid establishment of a genuine trust in Common Law countries with a highly developed legal system. Here, English law has special significance as the measure of a proper trust. See T Mikkola *Trust – Oikeusvertaileva tutkimus* (Forum Iuris, Helsinki, 2003) 230 ff.

[44] See European Commission Green Paper *Succession and Wills* COM(2005) 65 final. In its response to it the government of the UK states that 'any European instrument should not interfere with the use of trusts, joint tenancies or life policies' (http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_uk_en.pdf). The question was elaborated in European Commission's Green Paper *Consulting on Succession with an International Dimension* by David Hayton (http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_ls_appb_en.pdf). See also the Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons. According to the Art 2(d), the Convention does not apply to 'property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature'.

[45] Property subject to the marital right must be administered such that it does not unnecessarily decrease to the detriment of the other spouse (Marriage Act, s 37). If this provision is not

V CONCLUSIONS

As systems governing the property and the matrimonial property of spouses are national in character, the increasingly international nature of the marriage, as well as spouses owning property abroad, poses a risk that unanticipated effects will emerge that impinge on the status of the owner. This risk can be managed within certain limits through the alternative courses of action made available in both the national and international provisions of the Marriage Act. Within the rather loose framework provided by Finland's provisions of international private law, the legal effects of international marriages and foreign ownership can be controlled, for the most part, by making agreements and setting out measures to be taken in the event of death. By combining knowledge gained from the comparison of legal systems with the opportunities provided by international private law, it is possible for spouses to take matters into their own hands: they can anticipate and shape the effects of marriage on property rights and on the legal status of the owner rather than having to rely on statutory arrangements.

Yet the risks cannot be fully managed even through contractual instruments. One of the factors introducing uncertainty is that the rules of international private law are specific to each individual legal system. There are differences in the effectiveness and validity of agreements from system to system. Problems also arise due to the uncertain legal effects of matrimonial property distributions carried out in foreign countries in the states of greatest importance to the spouses; one additional complication here is that not all states have committed themselves to observe the principle of universality. Risks thus figure most prominently in cases where property is located abroad.

Another reason (from the Finnish point of view) why risk cannot be eliminated is the problem of interpretation which provisions of national law entail. The international provisions of the Marriage Act are new ones, for which no legal praxis to guide interpretation has yet taken shape in the form of decisions handed down by the Supreme Court. Moreover, the legal literature has not discussed them in any great depth. For example, the question of what is reasonable – as a measure of when to apply directly applicable provisions – cannot be decided on the basis of the provisions in the Act. The problem is that the authorities applying the law have no legal resources to appeal to but themselves. This then poses a risk of 'reasonable' being defined on a case-by-case basis, rendering it more of a moral than a legal concept.

Although foreign property law institutions and basic approaches to matrimonial property may give rise to many surprising situations and many problems, it is also conceivable that the variety of legal provisions we see in different countries offers alternatives. When considering the limits of what is possible where the property of spouses is concerned, there is good reason to

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followed during the marriage, the other spouse has a right to compensation upon distribution of matrimonial assets (see, eg, Marriage Act, s 94).

look beyond the institutions of national marital and property law. What is now an essential linkage on the national level between the rules in the areas of marital and property law is an inevitable development on the international level as well. This is the case particularly where the legislative point of departure in the legal systems involved is to make spouses' property rights neutral. That two branches of law interact on the practical level does not, however, mean that the law applicable to matrimonial property will come to include elements of foreign property law. The approximation of branches of law through the increased neutrality of spouses' property rights in fact poses particular challenges when it comes to developing the requisite expertise in the basic doctrines of international private law.

International marriage opens the door to the provisions of international private law and comparative law. Law is communication which, lacking a universal system of signs, can never achieve infallibility or perfection. One must always have previous knowledge of the state under study – some kind of a framework in which to place the information on the level of legal provisions. Hampering such comparison, however, is that this existing knowledge is always seen through rose-coloured spectacles: the researcher's view of the world, language, and cultural factors make it difficult to transform information into knowledge that would permit rationally justified choices to be made. The subjectivity of comparative law can lead to cognitive dissonance, meaning that one does not easily adopt new ideas into one's system of beliefs that are at odds with that system. With regard to legal transactions related to the laws on marriage and matrimonial property, we encounter partially the same problem: marriage is an institution which at the personal level we consider – regardless of what the legislation says – far sooner in an intimate relationship than a special contractual one. The traditional notion of marriage as an institution creating personal legal effects sometimes prevents – on the level of attitude – control of its economic elements using the contractual instruments developed for what is a new operating environment. This question of attitude, in combination with the fact that management of the economic impacts of marriage is possible only with sophisticated legal devices, creates a certain discrepancy between spouses' expectations and rational acts. I do not believe that intimacy is created by contract but nor do I think that is it destroyed by making sensible agreements on property between spouses. It is prudent to prepare oneself for the legal-economic effects that may follow from marriage – particularly when it (or the spouses' property) has international connections.

France

A NEW LAW FOR THE PROTECTION OF ADULTS

Hugues Fulchiron[*]

Résumé

Le droit français de la protection juridique des majeurs était régi depuis près de quarante ans par la loi du 3 janvier 1968. Des voix de plus en plus nombreuses s'élevaient en faveur d'une réforme. Il était indispensable d'assouplir le système, d'alléger la protection et, surtout, de permettre à la personne d'anticiper pour le temps où elle aura besoin d'assistance. La loi du 5 mars 2007 ne remet pas en cause l'architecture actuelle de mesures de protection: un régime de représentation (la tutelle), coexiste toujours avec un régime d'assistance (la curatelle) et un régime de protection qui, sans instaurer d'incapacité, fragilise les actes passés par la personne protégée (la sauvegarde de justice). À côté des mesures de protection judiciaire, est cependant créée une mesure de protection juridique laissée à l'initiative du majeur: le mandat de protection future. De façon générale, la loi du 5 mars 2007 poursuit deux grands objectifs. Il s'agit d'une part, de mettre la personne au centre de sa protection: la loi lui donne plus de liberté et, surtout, entend garantir le respect de ses droits et de sa dignité. Le législateur a, d'autre part, voulu assouplir le système de protection, tout en renforçant la sécurité de la personne protégée.

The French law for the protection of persons of full age, passed some 40 years ago, as the law of 3 January 1968, was highly innovative in its day. It was the last of the major laws enacted under the aegis of Jean Carbonnier that had remained untouched by the reform movement that has so revolutionised the French law of persons and the family over the last decade.

Lately, more and more voices were calling for its reform. The main argument was the increase in the number of court orders. According to current trends, there would have been over 630,000 people under a protective regime in 2004; in 2010 there will be over 1,126,000. The explanation for this seems to be that the French are living longer lives. The spirit of the system of protection too was changing fundamentally. Formerly seen as exceptional measures for pathological cases, in years to come it is to be more a normal part of legal support for the elderly. Seen in this light, what was required was a more flexible system with a lighter touch, above all one that allowed people to prepare for a

* Président de l'Université Jean Moulin, Lyon 3, Directeur du Centre de droit de la famille.

time when they would need help. The legislature had to respond to human and social needs, but also to economic requirements given what was at stake financially.

However, the ageing of the population was not the only cause of the increase in the number of cases. Several studies had revealed a number of issues. Faced by the impoverishment of part of the population and the problem of excessive indebtedness, resort to protective measures was turning into a way to give legal support to a form of social assistance and to finance it.

Reform had become essential to give better protection to individuals, in particular the elderly, and, in the end, to stop the system becoming insolvent. So new measures of social support are created; their articulation with legal protective measures is redefined. The financing of the system as a whole is radically overhauled.

The law of 5 March 2007 does not call into question the basic structure of protective measures.[1] A regime of representation (*tutelle*) coexists with one of assistance (*curatelle*) and one which, without involving incapacity, allows transactions entered into by the protected person to be set aside (*sauvegarde de justice*). Beside these judicial protective measures a new protective measure is created which depends on the initiative of the individual adult. This is a deferred mandate (*mandat de protection future*). In a general way, the law of 5 March 2007 has two main objectives: first, to place the individual at the centre of his or her protection, so the law provides more autonomy and above all respects his rights and protects his dignity (I); and secondly, the legislature has sought to make the system of protection more flexible, while at the time reinforcing the security of the protected person (II).

I PUTTING THE INDIVIDUAL BACK AT THE HEART OF HIS OR HER OWN PROTECTION

Under new Art 415, al 2, of the Civil Code, the protection of the person and his assets 'is established and assured by respect for individual liberties, fundamental rights and the dignity of the person. Its aim is the interest of the protected person. It favours the latter's autonomy so far as possible'.

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[1] Translator's note: for want of universally agreed terminology, and to avoid confusion, one who acts for another will here be rendered as 'agent', effects of his acts as between principal, agent and third parties as 'power', the one for whom he acts as 'principal' and the relationship between principal and agent as 'mandate' whether power originates in a voluntary act or court order. The terms are used in reference to no particular system. However, specific French titles for the personnel of the system, '*juge des tutelles*' etc, and the main institutions of the law of personal capacity are in italics in French '*curatelle', 'tutelle', 'sauvegarde de justice'* etc. This prevents confusing the *mandat de protection future* with the '*anglo-saxon*' enduring power of attorney and having to render as 'persons with a judicial mandate for the protection of adults' the '*mandataires judiciaires à la protection des majeurs*' (described in detail in the article).

(a) Respect for the person and his rights

(i) Respect for the fundamental rights of the individual

This objective is achieved in two ways.

Procedural rights

The rights of the protected person in the judicial process are reinforced. Under Art 432: 'The judge decides who is to be heard or cited.' The person concerned 'may be accompanied by an advocate or, subject to the consent of the judge, by any other person of his choice'. The hearing can only be excluded 'by a reasoned decision, on the advice of the medical practitioner mentioned in article 431' that it 'would be likely to prejudice the person's health or that the person is incapable of expressing his wishes'. Thus what the legislature has done for the procedural rights of protected adults is comparable with what the relevant laws have done for those of minors. This brings French law into conformity with the requirements of the European Convention on Human Rights. The same guarantees apply to the renewal of the measure (cf Art 442, al 4 referring back to Art 432).

The right to be kept informed

By new Art 457–1:

> 'The protected person receives from whoever is responsible for his protection, in a suitable manner for his condition, and without prejudice to information third parties are obliged by law to provide[2] all information about his personal situation, the relevant transactions, their degree of urgency, their effects and the consequences of withholding consent.'

However hard it may be to give effect to this obligation to inform, it is of vital importance in any consideration of the feelings expressed by the person concerned, even more so when taking account of his own wishes.

(ii) Giving greater protection to the person of the adult

The legislature in 2007 repeatedly affirmed that these legal protective measures for adults were intended 'to protect both their persons and their rights of property', even if the two objectives were to be kept separate (cf Art 425, al 2).

General rules: the new law differentiates between two kinds of transactions

Strictly personal transactions are governed by Art 458 of the Civil Code. They must be consented to in person, the judge having no power to authorise the curator or tutor to assist the adult, much less represent him. The law does not

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[2] Cf, in relation to medical treatment and bioethics, Arts L 1111–2, L 1111–4, L 1111–7, L 1122–2, L 3212–2, L 3212–1 and L 3212–2 of the *Code de la santé publique*.

draw up a list: it will be for the judge to decide. Article 458 specifically refers to some. These are, in particular, things the protected adult might do as a parent: the declaration of birth and recognition of a child; the declaration of choice or change of name of a child; consent to adoption; acts of parental authority in relation to the person of the child. This principle applies 'subject to particular rules provided by law' (Art 458, al 1). Similar rules apply in relation to consent to medical treatment and bioethics.

Other acts in relation to the person are governed by Art 459. In principle, the protected person alone decides. For one whose condition prevents them from making an informed personal decision, the judge or the family council, where one has been set up, can provide that he be assisted by whoever is responsible for his protection. Such assistance can be provided for acts in general, or for certain classes of acts. If this assistance is not enough, the judge or the family council 'can, after setting up a *tutell*e, authorise the tutor to represent the party' (Art 459, al 3).

Personal autonomy gives way where the protected adult would be putting himself in danger (Art 459, al 3). The most serious decisions are subject to specific rules from which no derogation is allowed except in an emergency:

> 'However, except in an emergency, the person responsible for the adult's protection cannot, without authorisation by the judge or the family council, if one has been set up, take a decision the effect of which would be seriously to prejudice the protected adult's physical integrity or the intimacy of his private life.'

This brings French incapacity law into conformity with the general principles of French law (cf Art 16–3 of the Civil Code) and above all with the requirements of the European Convention on Human Rights.

Specific rules: numerous situations are subject to particular rules

Thus, by new Art 459–2: 'The protected person chooses his place of residence.' This principle does not call into question the adult's legal domicile with his tutor (Art 1008–3) nor the provisions governing admission to hospital. It complements Art 426 which protects the home, the movables in it and the personal possessions and souvenirs of the protected adult.

The rules relating to the marriage of a protected adult have become more flexible. Whereas the old Art 506 required an adult subject to *tutelle* to obtain either the consent of his father and mother (a survival from the former *patria potestas*), or that of a family council specially convened to decide on it, the marriage will in future be authorised either by the judge or by the family council if there is one.

As for the *Pacs* (registered civil partnership), formerly forbidden to persons under *tutelle*, it is now open to all persons placed under a judicial protection regime. The adult must be assisted by his curator if under *curatelle*. If *tutelle*

has been set up, the protected adult must obtain the authorisation of the *juge des tutelles* or of the family council who decides 'after hearing the future partners and obtaining, as the case may be, the opinion of their relatives and of others close to them' (Art 452, al 1). The interested party will be assisted (but not represented) by his tutor when the agreement is signed.

Still more innovative, the law declares that: 'The protected person engages freely in personal relationships with any third parties, whether related or not, and has the right to be visited by or, as the case may be, receive hospitality from them' (Art 459–2, al 2). If difficulties arise, it is for the *juge des tutelles* to decide. The legislature thus shows its intention to defend the protected adult's autonomy.

(b) Respect for personal autonomy

In 2007, the legislature re-emphasised the 'exceptional' nature of protective regimes. More generally, it has allowed people greater freedom to organise their own protection.

(i) Necessity, subsidiarity, proportionality

As regards judicial measures, the principles set out in Art 458 of the Civil Code permeate the system as a whole.

Necessity

To check that it is really necessary to order a protective regime, the law reaffirms the requirement for a medical certificate (Art 431 of the Civil Code). Likewise, a deferred mandate can only take effect (Art 431) after production of the mandate and a medical certificate to the registry of the *tribunal d'instance.*

Above all, the new law provides that judicial protection orders can only be made for a limited time, so the temporary nature of *sauvegarde de justice* is emphasised: maximum one year, renewable only once (Art 439, al 1). In the case of *tutelle* or *curatelle*, the judge must fix the duration of the order, which can only exceed 5 years in particular cases (Art 441), renewal once for the same duration (Art 442). Limiting time in this way should lead the judge to focus regularly on the protected person's situation, in particular checking whether continuation of the order is still necessary and, where appropriate, adjusting it. The judge decides, in the light of a medical certificate, after hearing or calling the protected adults (Art 442, al 4). Failing renewal, the order loses effect (Art 443). These rules are specific guarantees for the person.

Finally, the power of the *juge des tutelles* to take up a case *proprio motu* is abolished. It seemed out of keeping with the requirements of due process that one authority could set the procedure in motion, draw up the dossier and then decide on what measures to take. To compensate, the law extends the circle of

those authorised to apply to the judge, in particular the concubine, registered civil partner and more generally any person 'having a close and stable relationship with the adult'.

Subsidiarity

The law imposes subsidiarity in two ways (cf Art 428 of the Civil Code). On the one hand, a protective order can only be made if the case cannot not be met by the rules of the general law, ie those of agency and, above all, of the matrimonial regimes (cf particularly Arts 217 and 219 of the Civil Code, which apply to all married couples). On the other hand, subsidiarity operates between the systems of judicial protection. An order can only be made if a deferred mandate, created by the protected person, would not give enough protection (Art 483 4°): 'voluntary' protection takes precedence over judicial protection. In a similar way the law reaffirms the hierarchy between the modes of judicial protection: an order can only be made if another, less restrictive, one would not adequately protect the person's interests.

Proportionality

The protection ordered must be suitable for and meet the particular needs of the person protected. The judge is to decide which system is appropriate for each specific case, respecting the gradation intended by the legislature, to match the degree to which the faculties of the person are affected.

Traditionally, the *juge des tutelles* could, when making a protection order, adjust it to the person: *sauvegarde de justice* backed up by a judicial mandate (Art 491–5); limited *tutelle* (Art 501); extended or limited *curatelle* (Art 511). This ensured that the person was adequately protected, taking account of his capacity and the therapeutic aspects of the order.[3] The judge can now make such individual adjustments using the flexibility of the protective regimes and more generous access to the judicial mandate to authorise any particular transaction or class of transactions (cf Art 437 of the Civil Code).

The introduction of measures of judicial assistance (MAJ) is a move in the same direction. These are used when administrative social support measures have proved insufficient and the health or safety of the person is compromised (Art 495). Their objective is the management of social services. They do not involve incapacity. Their inclusion in the Civil Code gives the judge a new form of protection which, moreover, excludes a protection order (Art 495–1, al 1 and 2) and avoids a much criticised result, namely the ordering of *curatelle* or of *sauvegarde de justice*, or even *tutelle*, simply to provide a framework for the provision of social services for the protected person.

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[3] J Carbonnier Les personnes (PUF, 17th edn, 2000) 296 s.

(ii) Taking account of the person's wishes in arranging protection

The most striking innovation is certainly the introduction of the deferred mandate. Other measures give the protected person more freedom to prepare for protection well in advance of need.

Choice of tutor or curator

Any person can, by a notarised act or a signed document, nominate one or more persons to exercise the functions of a curator or tutor, in the event of being placed under *curatelle* or *tutelle*. The nomination 'is binding on the judge' (Art 448, al 1) unless the person nominated refuses to act or is unable to do so, or it is necessary to set it aside in the interests of the protected person (Art 448). The chosen tutor or curator takes precedence over the partner or concubine in the new legal hierarchy (Art 449).

This facility is also available to the parents, or the survivor of them, who exercise parental authority over their minor child, or take responsibility for the care and support of an adult child. They can nominate one or more persons to exercise the functions of a curator or tutor from the day on which they die or become unable to continue to look after the person concerned (Art 448, al 2). This provision, however much it derogates from the general principles of the law of incapacity, is opportune. The agony of contemplating the future is strong for parents of seriously handicapped or mentally disturbed children. To know who will take charge is in everyone's interests, above all, those of the protected person.

Deferred protective mandate

Taking its inspiration from foreign systems, particularly that of Quebec, a deferred mandate lets a person prepare for a time when his mind succumbs to age or illness. The legislature in 2007 has made it into a completely separate form of protection (it comes under the heading of measures of judicial protection). It does not entail incapacity. The principal remains fully capable. It is intended primarily for the elderly or those seriously ill, and is a form of support for the person, as much to reassure as to protect. It must be emphasised that the protection is only relative. Necessary acts of management can indeed be performed by the agent, but the principal stays capable and able to make valid transactions. These are, however, vulnerable (see below).

Under Art 477, al 1 of the Civil Code:

> 'An adult or emancipated minor not subject to tutelle can, by a single mandate, empower one or more persons to represent him on his becoming incapable of managing his own affairs for any of the reasons provided for in article 425.'

The power may cover the protection of the person as well as of property.

A natural person chosen by the principal can exercise the power, as can a legal person chosen from a list of *mandataires judiciaires à la protection des majeurs* set up under the *Code de l'action sociale et des familles* (Art 480).

A mandate can be created in two ways. One is by notarised act (Art 498). By going to a notary, one is assured of advice and a guarantee of safe-keeping. All kinds of property transactions can be included in the power, apart from gifts, which still require the authorisation of the *juge des tutelles*. It can also be created in a private signed document (Art 492). Recognising the importance of such a document the law requires formalities: either it must be countersigned by an *avocat* (ensuring a minimum of advice) or it must follow a model defined by decree (ensuring a degree of coherence). Also, the scope of a grant on private signature is restricted: it covers only acts of administration (Art 493).

The agency 'comes into effect when it is shown that the principal can no longer look after his own interests alone' (Art 481). For this, the agent must produce the mandate and a certificate from a medical expert to the registrar of the *tribunal d'instance*. The registrar dates the mandate and returns it to the agent. The protected person is informed that it has taken effect (Art 481, al 1). The deferred mandate cannot operate without the principal's knowledge.

The agent is under the same obligations as any other agent (cf Art 1384 s), in particular, the production of an annual account of management. Different forms of control apply, according to whether the power was created by a notarised act or on private signature. Accounts are audited in the form set out in the instrument creating the power; the judge can, however, have them checked by the chief registrar who, in case of difficulty, makes a report to the judge. If the power was set up by a notarised act, accounts are sent to the notary who set it up. In case of difficulty the latter can apply to the *juge des tutelles* (cf Art 491 of the Civil Code). The notary thus looks after the protection of the grantor's interests; but this could turn out to be onerous with the notary becoming personally liable – food for thought for the profession.

The coming into effect of the mandate does not render the grantor incapable. He or she can go on acting in parallel with the agent. Such transactions are, however, vulnerable; they can not only be attacked for unsoundness of mind, but also rescinded for simple unfairness (*lésion*) or reduced for excess: this is to be decided by the judge (cf Art 488).

In the special case of a handicapped child, Art 477, al 3 provides that:

> 'The parents or the surviving father or mother who, not being themselves subject to *curatelle* or *tutelle*, exercise parental authority over their minor child or provide for the material and emotional needs of their adult child can, if the child would be unable alone to provide for his own needs for one of the reasons set out in article 425, designate one or more agents to represent him. This designation only takes effect when its maker dies or can no longer look after the person concerned.'

This mandate for someone else to act ensures the continuity of the child's protection.

II REINFORCING THE SECURITY OF PROTECTED PERSONS WHILE MAKING THE SYSTEM OF PROTECTION MORE FLEXIBLE

The legislature in 2007 undertook a fundamental reconstruction of the systems of protection of adults, while staying within the logic of the law of 1968. In so doing, it was meeting two, in many ways complementary, requirements: to make the systems of protection more flexible, the better to adapt them to individual cases and provide the best possible protection for all on the one hand; and to reinforce the guarantees offered to protected persons on the other.

(a) Increasing the flexibility of the systems of protection

The law of 5 March 2007 re-organises judicial protection regimes: it lifts, at least partially, a number of prohibitions.

(i) Reorganisation of the systems of protection

Designation of the tutor or curator

The rules have been brought up to date and made more flexible. The *juge des tutelles* designates the tutor and curator. If a family council has been set up, it makes the nomination (Art 456, al 3). In conformity with the traditional principle by which the protection of the adult is first of all a family responsibility (reaffirmed in Art 415, al 3: the protection of adults 'is a duty of families'), the judge looks to the family first for a tutor or curator: only in default of a parent or relative is a third party appointed, from now on to be called '*mandataires judiciaires à la protection des majeurs*'. But, on the one hand, the wishes of the protected person now take precedence (cf Art 449, al 1 above); on the other, the legislature has opened the way for new forms of conjugal union: if the protected adult does not nominate anyone, the judge can appoint the spouse, but also the partner or concubine (Art 449, al 1).

Operation of tutelle

Full *tutelle* with a surrogate tutor and family council, heavy to set up and even more so to operate, becomes the exception. The law of 5 March 2007 provides for three forms of *tutelle*. In principle the judge simply nominates, and controls the exercise of the functions of, the tutor. If he thinks it necessary, he can designate, beside the tutor, a surrogate tutor, parent, spouse or relative, or, in default, a '*mandataire judiciaire à la protection des majeurs*' (Art 454, al 3). The judge only establishes full *tutelle* with a family council 'if the requirements of

the protection of the person or the character of his or her property justify it and if the composition of his family and those around him allows it' (Art 456).

(ii) Partial lifting of prohibitions

The law of 5 March 2007 gives greater flexibility to the rules for a certain number of transactions. Previously, for example, a sale of an immovable or of a business had to be by auction unless the family council authorised otherwise; now the principle is sale by private treaty, but it requires the authorisation of the *juge des tutelles*. Apart from that, the legislature has lifted a certain number of prohibitions, particularly in the field of gratuitous transactions.

Gift

Previously, a person under *tutelle* could only make a gift with the authorisation of the family council and for the benefit of certain persons: his or her descendants (and then only by way of advancement of inheritance); spouse; and, after the law of 23 June 2006, brothers and sisters and their descendants. The law of 5 March 2007 removes these restrictions. Anyone can receive a gift. The adult in *tutelle* only has to get the authorisation of the *juge des tutelles* or, if one has been set up, the family council. He will be assisted or, if (but only if) necessary, represented by his tutor (or in the case of opposition by the surrogate tutor or a tutor ad hoc). This relaxation is certainly welcome: the partner, a relative or a friend who devotedly cares for the protected person, or an organisation, could also benefit.

Wills

The law of 23 June 2006 abolished the general invalidity of wills made when the testator was in *tutelle* (Art 504 of the old Civil Code). The law of 5 March 2007 goes a step further: the protected person can make a will once he has got the consent of the judge or, if there is one, of the family council. This is a strictly personal act: there is no provision for assistance or representation (Art 476, al 2).

The new rules are not risk-free. There is a real danger that the assets of protected persons will be milked. So the legislature, prudently, has extended incapacity to take gifts or legacies from someone who has nursed the person through a terminal illness, to include all 'members of the medical and pharmaceutical professions', together with 'medical auxiliaries'. The ban now also applies to the agents of judicial protection and to persons through whom they exercise their functions (Art 909 of the Civil Code). This is a wise extension, since it is truly not so much a question of demanding a bribe to look after someone as of taking advantage of the protected person's frailty.

Freedom given to individuals should not turn against the most vulnerable. So the legislature has provided stronger guarantees for protected persons.

(b) Strengthening guarantees

In a general way the law of 5 March gives stronger powers of supervision and control to the judicial authorities. The *juge des tutelles* and *procureur de la République* have general powers to supervise the protective orders they issue (Art 416 of the Civil Code). In addition, the rules relating to protective orders and those responsible for them are made more precise.

(i) A framework for transactions

Some new rules deserve emphasis.

Reopening transactions made within 2 years preceding the protective order

In principle, reopening transactions entered into before the making of the order requires proof of mental disturbance at the time of the act (Art 414–1 of the Civil Code). By new Art 464, transactions made by a protected person less than 2 years before publication of the making of the order can still be reduced or annulled (if the harm suffered justifies this) on proof only that it was notorious or known to the other party that, at the time of the transactions, the person's mental faculties were so affected as to make him incapable of defending his own interests.

Redefining the sanctions

If the transaction made by the protected person is within his capacity to make alone, unassisted by the person responsible for protecting him – transactions in the course of daily life, ones the Civil Code authorises or which are specifically authorised by the judge in the course of adjusting *curatelle* (Art 471) or *tutelle* (Art 473, al 2) – it can still be rescinded for *lésion* (unfairness) or reduced. If the protected person 'has entered alone a transaction for which he needed to be assisted' the act can be annulled on proof of damage (Art 465 2º). As for acts requiring representation, but performed by the protected person alone, they are automatically void 'without the necessity of proving damage' (Art 465 3º).

(ii) A legal framework for the protectors

A variety of people take responsibility for the protection of an adult: parents, relatives, close kin, but also third parties, associations, foundations, establishments providing health care and housing etc, as well as natural persons who exercise a profession on their own account (notaries or managers of private *tutelle*), or work professionally for health or social care establishments that employ them. The rules governing such third parties are as varied as their status.[4] To prevent problems and guarantee the protection of adults, the legislature has chosen to create a completely new status of '*mandataires*

[4] Other than family and kin, 83.8% of arrangements for the protection of adults are managed by associations.

judiciaires à la protection des majeurs'. It has also redefined the rules governing the remuneration and duties of the various protectors.

Status of mandataires judiciaires à la protection des majeurs

A *mandataire judiciaire à la protection de la personne* must be inscribed in a list drawn up by the Préfet. To be approved, he must fulfil certain conditions, age, moral character, training certified by the state and professional experience laid down in the *Code de l'action sociale et des familles* (Art L 471–4 s). This same Code now contains precise regulations for the profession, which an individual can practise on his own account (Art L 472–1 s) or in the service of an establishment providing housing for adults (Art L 472–5 s).

The law imposes various obligations on the *mandataire judiciaire à la protection de la personne*. In particular 'in order to guarantee the effective exercise of rights and freedoms, notably to prevent all risk of abuse' (Art L 471–6), he must deliver to the protected person or, if the latter's condition is such that he would not understand its effect, to a member of the family council, or failing that to a parent, relative or close kin or a person in his social circle 'an information notice to which a charter of the rights of the protected person is attached'. Such paper guarantees leave room for doubt.

Remuneration of persons responsible for protection

The law of 5 March 2007 clarifies rules that were previously particularly ambiguous.

If protection is provided by a close relative by blood, marriage or kinship, it is performed gratuitously. By way of exception, however, the *juge des tutelles* or family council can authorise 'according to the importance of the assets managed or the difficulty of executing the order, payment of an indemnity to the person responsible for the protection'. The amount of this indemnity is specified and is payable by the protected adult (Art 419, al 1).

Where a *mandataire judiciaire à la protection de la personne* is entrusted with the protection, the financing of the order is wholly or partly payable by the protected person, in proportion to his resources, and according to the manner provided by the *Code de l'aide sociale et des familles* (Art 419, al 2). Where the protected person cannot meet the whole cost of the order, it is under regulations to be made by decree. In principle, *mandataires judiciaires à la protection des majeurs* are not allowed to receive, by any title or in any form, any other sum or to benefit from any other financial advantage directly or indirectly related to their responsibilities.

Where protection is arranged under a deferred mandate, the work of the agent is in principle gratuitous unless the mandate provides otherwise.

Liability of the providers of protection

Under Art 421 of the Civil Code, 'all the organs of judicial protection bear responsibility for damage resulting from any fault committed in the exercise of their function'. The rule applies to all protective orders (*sauvegarde de justice, curatelle, tutelle, assistance judiciaire*) and to all the organs responsible for protection. If the fault that caused the damage was committed in the organisation and execution of the order by the *juge des tutelles*, the chief registrar of the *tribunal d'instance* or the registrar, the action brought by the protected person is against the state, which in turn has an action for contribution or indemnity (*récursoire*). The liability of the agent under a deferred mandate is governed by the rules of the general law of agency, as set out in Art 1992 of the Civil Code (Art 424 c of the Civil Code).

III CONCLUSION

The reform that has taken place is considerable. So it was necessary to allow practitioners already up to their necks in law reform a little time to assimilate the new rules and, where necessary, bring themselves into conformity with the new legal requirements. It was also necessary to have time to draw up the appropriate regulations. So the law of 5 March 2007 will only come into force (with certain exceptions) on 1 January 2009. It remains to be seen how the new system will be paid for. Legislature has only set out some broad principles: the costs of a protection order are to be borne by the protected person; public finance will only make a subsidiary contribution.

Even if it originated for economic reasons, the reform of 2007 bears the stamp of humanism throughout. It rejects the 'liberal' view of the protection of vulnerable persons, which would leave it to each to organise for his own, or that of those for whom he was responsible, having recourse particularly to private management organisations, in what looks like a very promising market. Some may say the traditional position is in danger of being unable to resist the increase in the number of dependent elderly people. Will families and the community be able to meet the cost? They will have to, if the protection of all is to be assured (for in the market of protection some will miss out), and to ensure respect for everyone.

Germany

STRENGTHENING CHILDREN'S RIGHTS IN GERMAN FAMILY LAW

Nina Dethloff[*] *and Kathrin Kroll*[**]

Résumé

En 2007, le droit familial allemand a été l'objet de plusieurs propositions de réforme dont l'objectif a été le renforcement des droits de l'enfant. On peut citer l'exemple des nouvelles règles en matière d'obligations alimentaires qui sont effectives depuis le 1er janvier 2008, de même que la réforme du droit de la filiation. Ces réformes ont été adoptées sous l'impulsion de deux arrêts de la Cour constitutionnelle fédérale. Ainsi, la réforme du droit alimentaire, initialement prévue pour mai 2007, a du être repensée à la suite d'une décision de février 2007 sur l'inconstitutionnalité de certaines limites de temps imposées par cette réforme aux obligations alimentaires pour le bénéfice des enfants. En ce qui concerne la filiation, un autre arrêt de février 2007 ordonnait au législateur allemand de revoir les règles du droit judiciaire en la matière afin de permettre à un homme de savoir s'il est effectivement le père biologique d'un enfant. En réponse à cet arrêt, une proposition de réforme présentée par le Gouvernement fédéral a entré en vigueur en 1 Avril 2008. En marge de cette proposition de réforme, les tribunaux allemands ont rendu en 2007 une série de jugements mettant le principe de la protection de l'enfant au cœur des décisions imposant des restrictions au droit de garde. À la suite de plusieurs décès d'enfants provoqués par une négligence parentale, le législateur allemand a également renforcé le système de protection de la jeunesse par réforme du 24 Avril 2008.

I INTRODUCTION

In 2007, several proposals to reform German family law had the intention of strengthening children's rights. Under the new rules on maintenance law as of 1 January 2008, for instance, the welfare of the child becomes the prime consideration. Since minor children are unable to support themselves, they are deemed to be very much in need of special protection. Consequently, the claims of children are given a privileged status. Moreover, it is the aim of the new law to remove any discrimination against single parents, thus placing the rights of children born in and out of wedlock on an equal footing. The reform of the law

* Prof Dr Nina Dethloff, LLM is Director of the Institute for German, European and International Family Law at the University of Bonn.

** Dr Kathrin Kroll is Academic Assistant at the Institute for German, European and International Family Law at the University of Bonn.

on filiation proceedings may serve as another example of the strengthening of children's rights, in particular a child's right to so-called informational self-determination, as constitutionally protected in art 2, para 1 in conjunction with art 1, para 1 of the German Constitution (*Grundgesetz* – GG). Also, recent case-law has focused on the protection of the child against a misuse of the parents' responsibility in the law regarding parental custody. In all these cases, courts have been confronted with the task of striking a fair balance between the competing interests of children, parents and the state. The major constitutional provisions that come into play where this issue is concerned, are as follows: the protection of marriage and the family (art 6, para 1 GG); the natural right and duty of parents for the care and upbringing of their children (art 6, para 2, sentence 1 GG); and the state's obligation to supervise the parents' responsibility for their children, if necessary (art 6, para 2, sentence 2 GG).

The above-mentioned law reforms were spurred by two decisions of the Federal Constitutional Court: the reform of maintenance law, which, originally scheduled to enter into force in May 2007, needed a radical rethink following a Court decision on the discriminatory time-limits for childcare maintenance in February 2007 (II). Regarding filiation, in another February decision, the Court asked the German legislator to establish rules on filiation proceedings, thereby giving a man the right to know if he is, in fact, a child's biological father. In response to the Court's ruling, the law on filiation entered into force on 1 April 2008 (III). In addition to these legislative initiatives, in 2007, German courts rendered several decisions on the welfare of the child as a standard for imposing restrictions on parental custody (IV). Due to several incidents involving abused children or children who died due to their parents' negligence, the German legislator, on 24 April 2008, enacted a new law in order to improve child protection (V).

II THE REFORM OF GERMAN MAINTENANCE LAW REVISED

In June 2006, a Bill regarding the reform of German maintenance law was introduced by the Federal Government.[1] However, the legislature failed to pass the final Act in May 2007, as originally scheduled. Following a decision by the Federal Constitutional Court on 28 February 2007[2] that declared the difference in the duration of childcare maintenance for divorced spouses in s 1570 and for unwed mothers in s 1615l of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB)[3] unconstitutional, the original version of the Bill, which was not about to change the law in this respect, needed to be reconsidered. A new version of the Bill was thereafter drafted by the Federal Ministry of Justice, passed by the

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1 See Kroll, 'The Reform of German Maintenance Law', in B Atkin (ed) *International Survey of Family Law 2007* (Jordan Publishing, 2007) p 85.

2 Federal Constitutional Court (BVerfG), 28 February 2007, FamRZ (2007) 965 et seq.

3 The same applies to unwed fathers (s 1615l, para 4 BGB).

parliamentary parties on 25 October 2007 and finally enacted by the German Parliament (*Bundestag*) on 9 November 2007. It was also approved by the Federal Council on 30 November 2007 and – after being signed by the President – entered into force on 1 January 2008.

(a) Discriminatory time-limits for childcare maintenance

Background

Notwithstanding continuing criticism,[4] the original version of the 2006 Bill to reform the law regarding maintenance was not about to change the limitations of a single mother's maintenance claim in s 1615l, para 2, sentence 3 BGB, whereby maintenance payments were generally limited to a maximum period of 3 years and could only be extended in cases of undue hardship. It was postnuptial solidarity between former spouses that was considered to justify that, pursuant to s 1570 BGB, a divorced spouse could claim maintenance for as long as she or he could not support her or himself, on account of having to take care of a joint child. According to case-law, in general, a divorced spouse who took care of a child was not therefore obliged to take on any work outside the home until the child was 8 years old.[5] The Bill intended no more than a minimal harmonisation of these divergent provisions.[6] It was proposed, therefore, that the hardship clause contained in s 1615l, para 2, sentence 3 BGB be modified so that it would become easier for the court to establish an additional period of maintenance for unwed parents. In July 2006, the Bill's position was confirmed by the Federal Supreme Court (BGH)[7] ruling that the durational limit of a single mother's maintenance claim in s 1615l, para 2, sentence 3 BGB does not place illegitimate children at a disadvantage relative to legitimate children. On 28 February 2007,[8] however, the Federal Constitutional Court declared the difference in the duration of childcare maintenance as provided in s 1570 and s 1615, para 2 BGB unconstitutional.

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4 See Lüderitz/Dethloff, *Familienrecht* (2007), § 11, at 88; Menne, 'Regierungsentwurf zum Unterhaltsrechtsänderungsgesetz – Sachstand und Ausblick auf die geplanten Änderungen beim nachehelichen Unterhalt und beim Verwandtenunterhalt (2 Teil)', *Forum Familienrecht* (FF) (2006), 220, at 226 et seq; K Kroll (n 1 above), at 89 et seq; with regard to the former legal situation see Puls, 'Der Betreuungsunterhalt der Mutter eines nichtehelichen Kindes', *Zeitschrift für das gesamte Familienrecht* (FamRZ) (1998), 865 et seq; Peschel-Gutzeit/Jenckel, 'Gleichstellung von ehelichen und nichtehelichen Kindern – Altfälle', *Familie und Recht* (FuR) (1996), 129 et seq.

5 As a general rule, the parent is expected to take up a part-time job when the child has reached the age of 11, and a full-time job when the child is 15 years old. For details see Kroll (n 1 above), at 89 et seq.

6 Maintenance Law Reform Bill (Bill to reform maintenance law: "Entwurf eines Gesetzes zur Änderung des Unterhaltsrechts", 15 June 2006, BT-Drucks. 16/1830).

7 Federal Supreme Court (BGH), 5 July 2006, FamRZ (2006) 1362 et seq. For a comment on the decision, see Wever, FF (2006), at 253 et seq; Kroll (n 1 above), at 90.

8 BVerfG, 28 February 2007, FamRZ (2007) 965 et seq.

Different grounds for childcare maintenance unconstitutional

The case that came up to the Court was that of a single mother claiming maintenance pursuant to s 1615l, para 2 BGB because she had to care for her child, born out of wedlock in 1997. According to a local court's (*Amtsgericht*) decision in 1998, the father had paid maintenance to the mother until the child reached the age of 3, in accordance with s 1615l, para 2 BGB. After that period, ie in 2002, the mother pleaded for judgment against the father for the continuation of payments of €451 per month. The local court rejected the applicant's request on the grounds that, under s 1615l, para 2, sentence 3 BGB, only extraordinary circumstances would justify an extension. The court considered that, in the case at hand, the claimant had failed to provide proof of exceptional circumstances as required for the application of the hardship clause.[9] Pointing to the equality of children born in and outside of wedlock as required in art 6, para 5 GG, the Court found that the difference in the time periods for the duration of maintenance in s 1570 BGB, on the one hand, and s 1615l, para 2, sentence 3 BGB, on the other, violated the prohibition against discrimination in art 6, para 5 GG and were therefore unconstitutional.[10] Note that both s 1517O BGB and s 1615l BGB do not make provision for child support, but for maintenance granted to the parent who cares for the child. The Court stated that a parent's right to childcare maintenance has, in principle, its sole focus on the well-being of the child. It enables a parent to take care of a child in person rather than being forced to take up full-time employment. The maintenance granted to the parent who cares for the child is therefore closely connected to the individual requirements of the child. The Court held that the issue of whether and how maintenance claims should be limited in time is of major importance for the welfare of the child. Since a parent caring for a child born out of wedlock is generally obliged to work full-time once the 3-year period in s 1615l, para 2 BGB has expired, he or she has no alternative but to use non-parental childcare. Unlike single parents, divorced spouses are able to obtain maintenance at least until the child has reached the age of 8 years.[11] As far as parental day care is concerned, children born in wedlock are therefore privileged. However, although the Court found that the legislator is free to determine whether or not maintenance claims regarding care of a child should be of limited duration, it considered it necessary to apply the same standards for both legitimate children and children born out of wedlock.[12]

The Court further considered neither postnuptial solidarity (*nacheheliche Solidarität*) between former spouses nor the differences in the situations of married and cohabiting partners to justify the privileging of divorced spouses as far as the duration of maintenance is concerned. Rather, the Court held that the significant variations in non-marital cohabitation do not cause any

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9 Under appeal, the question as to whether s 1615l, para 2, sentence 3 BGB is constitutional was submitted to the Federal Constitutional Court. Until the Court has reached a decision on that issue, the *Oberlandesgericht* (Court of Appeal) suspended the proceedings.

10 BVerfG, FamRZ (2007), 965, at 968.

11 Cf n 5 above.

12 BVerfG, FamRZ (2007), 965, at 969.

differences in the parent-child relationship.[13] Both parents caring for legitimate, and those caring for illegitimate, children are entitled to the natural rights and duties of parents regarding the care and upbringing of children, as provided under art 6, para 2 GG. Unlike the Federal Supreme Court in its decision of 5 July 2006, the Federal Constitutional Court is of the opinion that marriage itself – as constitutionally guaranteed in art 6, para 1 GG – may not be seen as the main reason for the differences in the durational limits of maintenance obligations between divorced spouses and unwed parents. Taking into consideration that s 1570 BGB determines the duration of childcare maintenance according to the age of the child, the Court held that the grounds for this maintenance claim are primarily the interest and the well-being of the child who requires his or her parents' personal care. Consequently, art 6, para 5 GG requires the application of the same standard with regard to maintenance for the care of children born out of wedlock.[14]

Reform of the reform of s 1615 l, para 2 and s 1570 BGB

In response to the 2007 decision of the Federal Constitutional Court, the German legislature had to modify the Maintenance Law Reform Bill.[15] Under the proposed new law, all claims by parents – whether divorced or single – for childcare maintenance will, as a general rule, have a time-limit placed upon them. As a result of the reform, the rule relating to the childcare maintenance received by a divorced spouse is, in substance, identical to s 1615l, para 2 BGB. According to the revised form of s 1570, para 1, sentence 1 BGB, a divorced spouse caring for a child born within the marriage is entitled to maintenance for a minimum period of *3 years*. In contrast to the original version of s 1570 BGB, whereby full maintenance was generally ordered until the child had reached the age of 8 years,[16] the parent will now not be expected to take up gainful employment before the child has reached his or her 4th birthday. Under the new law, both in s 1570, para 1, sentence 2 BGB and s 1615 l, para 2, sentence 3 BGB the judge is given the power to prolong the 3-year minimum maintenance period if he or she considers it just and reasonable. When exercising this discretion, first consideration must be given to the welfare of the child. Section 1570, para 1, sentence 3 BGB expressly provides that existing childcare provisions must be taken into consideration. The parent is therefore expected to use non-parental childcare, provided that the child's well-being is thereby assured. By introducing that same 3-year time period in s 1570 BGB, basic childcare maintenance for divorced spouses and single parents has been placed on an equal footing, thus properly taking into account the fact that the needs of legitimate and illegitimate children in respect of their parents' care and attention are the same.[17] However, the new s 1570, para 2 BGB allows for a further extension of childcare maintenance specifically for divorced spouses, if

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13 BVerfG, FamRZ (2007), 965, at 970.

14 BVerfG, FamRZ (2007), 965, at 972.

15 'Formulierungsvorschlag der Koalitionsfraktionen' of 25 October 2007.

16 Cf n 5 above.

17 Caspary, 'Zur Verfassungswidrigkeit der unterschiedlichen Dauer des Unterhalts für eheliche und nichteheliche Kinder', *Neue Juristische Wochenschrift* (NJW) (2007), 1741, at 1742.

such an extension is just, taking into consideration the division of tasks during the marriage and the duration of the marriage. This new provision, which was introduced as a political compromise, is expressly aimed at granting maintenance for reasons of postnuptial solidarity. Even if it thereby successfully avoids the verdict of discrimination, its effect is to grant children whose parents were once married more favourable conditions for their upbringing than those who were born out of wedlock.

Quite apart from this differentiation, it is questionable whether the approach taken by the German legislature may be considered the best option with a view to giving single parents the same rights as divorced couples in the best interests of their children. An alternative solution might have been to create a central rule applying to both divorced spouses and single parents that not only harmonizes the maintenance claim period but also eliminates the other significant differences that continue to exist: first, the amount of childcare maintenance for divorced parents will still be calculated in accordance with the spouses' standard of living during the marriage. As far as maintenance of a single mother is concerned, ss 1610, para 1, 1615l, para 3, sentence 1 BGB, in contrast, provide that this maintenance should correspond to *her* previous standard of living. Taking into consideration that both divorced spouses and single parents caring for children should be compensated for the disadvantages resulting from the fact that they are unable to be gainfully employed, the standards used in the calculation of maintenance are not convincing.[18] Where parents have lived together, whether married or as cohabitants, the amount of maintenance ought to be calculated according to their prior standard of living during cohabitation. Only by enabling the caretaking parent to maintain his or her prior standard of living is he or she able to forego gainful employment and take care of the child.

Secondly, s 1579 BGB, which provides for the limitation, termination or even denial of maintenance to the divorced spouse in cases of exceptional hardship, directs the court to consider at all times whether limiting, terminating or denying a maintenance claim would run contrary to the child's (or children's) welfare. By contrast, s 1611 BGB, in dealing with the limitation or denial of maintenance for the single parent, makes no provision for the child's well-being. It would, therefore, appear reasonable to apply s 1579 BGB *mutatis mutandis* to the maintenance claims of single mothers.[19] Finally, it is worth mentioning that the differences between maintenance claims of divorced spouses and single parents can also work the other way round, ie to the

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[18] Maier, 'Comment on the decision of the Federal Constitutional Court of 28 February 2007', FamRZ (2007), 1076, at 1077; see also Maier, 'Vom Wert des Aufstockungsunterhalts', FamRZ (2005), 1509, at 1510.

[19] For an application of s 1579 BGB to childcare maintenance for single mothers, see Peschel-Gutzeit, 'Verwirkung des Unterhaltsanspruchs nicht verheirateter Eltern', *Familie, Partnerschaft und Recht* (FPR) (2005), 344, at 347 et seq; Wellenhofer, 'Die Unterhaltsrechtsreform nach dem Urteil des BVerfG zum Betreuungsunterhalt', FamRZ (2007), 1282, at 1287; for a different opinion proposing a different interpretation of the word 'reasonableness' in s 1611 BGB, see Menne, 'Der Betreuungsunterhalt nach § 1615l BGB im Regierungsentwurf zum Unterhaltsrechtsänderungsgesetz', FamRZ (2007), 173, at 177.

detriment of a divorced spouse. To give an example, unlike divorced spouses who are – at least as a general rule – given the freedom to stipulate the economic consequences of a divorce,[20] single parents cannot agree to a waiver of their right to childcare maintenance.[21] Consequently, single parents are, in fact, protected against contracts that are essentially one-sided and thereby unreasonably place the waiving party and thus the welfare of the child at a disadvantage.[22]

To sum up, the classification of single parents' maintenance claims as an obligation to maintain relatives (ss 1601–1615 BGB) turns out to be the main reason for the remaining differences between the legal position of single parents, on the one hand, and divorced spouses, on the other. Taking into consideration the fact that s 1615l BGB as well as s 1570 BGB deal with parental responsibility for childcare, the German legislature may be criticised for stopping short of providing a *central rule* on childcare maintenance that applies to both divorced spouses and single parents. An alternative solution that has been proposed[23] would be to categorise childcare maintenance as *part of child support*, as provided under s 1610 BGB,[24] thereby giving the child a claim in their own right. Under this solution, it would no longer be the parent caring for the child who is granted the right to childcare maintenance according to s 1570 BGB and s 1615l, para 2 BGB, respectively. Rather, the debtor would, as part of his or her obligation to pay child support, also be responsible for the provision of childcare maintenance. When the amount is established according to s 1610 BGB, this solution proposes that the loss of income resulting from the fact that the parent caring for the child was not able to be gainfully employed is taken into account.[25] Such a solution would guarantee the equality of children born in and outside wedlock as required in art 6, para 5 GG. Childcare would be provided without giving consideration to the status of the child, whether legitimate or illegitimate.[26] From a psychological point of view, debtors are more willing to pay child support than to meet maintenance obligations in respect of a divorced spouse or the mother of an illegitimate child.[27] However, as such a solution would not be consistent with the general principle enshrined in German maintenance law, whereby a creditor's right to claim support is not

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[20] It should be noted that agreements waiving spousal support pursuant to s 1570 BGB are not indefinitely enforceable, following a 2004 decision of the Federal Supreme Court. For details see Dethloff/Kroll, 'The Constitutional Court as Driver for Reforms in German Family Law' in A Bainham (ed) *International Survey of Family Law 2006* (Jordan Publishing, Bristol, 2006) 217.

[21] See s 1614, para 1 and s 1615l, para 3, sentence 1 BGB.

[22] Some demand, therefore, that provisions which are considered to be disadvantageous to the spouse who has agreed to run the household and to care for the children be prohibited; cf Schumann, 'Zur Gleichbehandlung ehelicher und nichtehelicher Eltern-Kind-Verhältnisse', FF (2007), 227, at 229; Maier (n 18 above), at 1077.

[23] Maier (n 18 above), at 1077; Schwab, 'Brühler Schriften zum Familienrecht', Bd 7 (1992), at 47, 56.

[24] Maier, ibid.

[25] Ibid.

[26] Ibid.

[27] See Schwab (n 23 above), at 47, 56; Willutzki, 'Die neue Rangfolge im Unterhaltsrecht – ein Beitrag pro Reform', FPR (2005), 505, at 507.

allowed to be used to meet another person's needs[28] – as would be the case regarding child support compensating the childcaring parent for loss of income – it is unlikely to be adopted in the near future.

(b) Ranking of single parents' maintenance claims

The ranking of maintenance claims made by single parents who care for a child turned out to be one of the most contested parts of the maintenance law reform. In cases where the debtor is not able to satisfy the needs of all maintenance creditors, as is more often the case than not, the ranking of the claims is of the utmost importance. Claims in lower ranks will often not receive any payment at all. The real bone of contention here, and as it turned out, the main object of criticism, was the *equal ranking* of divorced spouses and single parents as recommended by the 2006 Bill.[29] It was proposed, therefore, to change the original version of the Bill to allow divorced spouses to take preference over single parents as regards maintenance claims. However, the decision of the Federal Constitutional Court of 28 February 2007[30] made it necessary to rethink this proposed order of priority. Note that the Court did not explicitly decide on the question as to how maintenance creditors should be ranked. But since the Court declared the distinction between married and unmarried parents with regard to the duration of childcare maintenance unconstitutional, it is suggested that, consequently, any discrimination against single parents with regard to their ranking position ought to be removed.[31] If the claims of single parents were to be ranked below those of divorced spouses, the amount awarded to them would in many cases not be sufficient to maintain them at subsistence level. In this scenario, there is the concern that the provision of care for children born out of wedlock can no longer be guaranteed and that, as a consequence, the equality principle as enshrined in art 6, para 5 GG is violated.[32] We must not forget that the decision whether to be born within wedlock or outside is not the child's. Consequently, the child should not suffer disadvantages arising from factors over which he or she has no influence.[33] Finally, since the main ground for childcare maintenance is

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[28] Martiny, 'Unterhaltsrang und –rückgriff: Mehrpersonenverhältnisse und Rückgriffsansprüche im Unterhaltsrecht Deutschlands, Österreichs, der Schweiz, Frankreichs, Englands und der Vereinigten Staaten von Amerika' (1995), 338 et seq.

[29] It was the aim of the 2006 Bill to privilege the claims of minor children, i e to rank them first. As these children are unable to maintain themselves, the expectation that they should share assets was no longer deemed to be reasonable. The Bill further recommended that creditors caring for children should come next in order of priority. This means that every spouse, former spouse, single parent or cohabitant caring for a child should occupy the same rank under the proposed new law. It was proposed to rank spouses divorced following a long-term marriage alongside those who have care of children. Any other creditor who did not fall into one of these categories should be ranked lower. For further details, c f Kroll (n 1 above), at 87 et seq.

[30] BVerfG, 28 February 2007, FamRZ (2007), 965 et seq.

[31] See Willutzki (n 27 above), at 507.

[32] Cf Born, 'Comment on the decision of the Federal Constitutional Court of 28 February 2007', FamRZ (2007), 973, at 974.

[33] Willutzki, 'Neuordnung des Unterhaltsrechts', *Zeitschrift für Rechtspolitik* (ZRP) (2007), 5, at 8.

parental responsibility, postnuptial solidarity cannot serve as a reason to justify the difference in the ranking positions of single parents and divorced spouses.[34] The responsibility that former spouses have towards each other, in contrast, can justify only some of those grounds for post-divorce maintenance, to which single parents are not entitled anyway, eg old age (s 1571 BGB) or sickness (s 1572 BGB).[35] Furthermore, post-divorce solidarity may be taken as an argument lending legitimacy to calls for the claims of spouses divorced following a long-term marriage to be ranked alongside claims of those who look after children.[36]

Reflecting these arguments, the new law as per 1 January 2008 provides for a solution that harmonizes with the Court's opinion. According to s 1609, no 1 BGB, the claims of minor children as well as those of adult children – if unmarried, not yet 21 years old, still living with their parents and attending school – are ranked first. Adult creditors caring for children – whether single parents, divorced or spouses of a new marriage – come next in order of priority (no 2). Spouses divorced following a long-term marriage are to be ranked alongside those who look after children. Any other divorced spouse who does not fall into the category mentioned in no 2 is ranked third. Any other child not covered in no 1 is ranked fourth. Maintenance claims made by any other descendant or relative of the debtor are ranked lower. What is worth mentioning is the fact that, unlike the original version of the 2006 Bill, in order to define what constitutes the 'long duration' of a marriage, s 1609, no 2 BGB refers to the factors listed in s 1578b BGB. Even though the law still leaves the problem to the court's discretion, it indicates the significant criteria the court ought to take into account. The legislative purpose behind this is to allow maintenance creditors – mostly women – who during their marriage have taken care of the children and household to be compensated for the disadvantages resulting from the fact that they are unable to support themselves after divorce.

III FILIATION

(a) Protecting the child's right to 'informational self-determination'

In its decision of 13 February 2007,[37] the Federal Constitutional Court asked the German legislator to establish rules on 'proceedings to verify biological filiation' thus giving a man the right to find out whether a child is his or not. It was the Court's opinion that art 2, para 1 GG in conjunction with art 1, para 1 GG requires that the biological parent of a child be determined without

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[34] For a different opinion, see Kirchhof, 'Förderpflicht und Staatsferne', FamRZ (2007), 241, at 246.

[35] Cf Schwab, 'Koinzidenz – Zur gegenwärtigen Lage der Unterhaltsrechtsreform', FamRZ (2007), 1053, at 1055; Born (n 32 above), at 974; Klinkhammer, 'Die Rangfolge der Unterhaltsansprüche in der gesetzlichen Entwicklung', FamRZ (2007), 1205.

[36] See the information for practice ('Praxishinweis'), FuR (2007), at 316.

[37] BVerfG, FamRZ (2007), 441 et seq.

establishing any of the legal consequences that are inherent in this status. In this regard, paternity proceedings in s 1600 BGB et seq that allow a father to seek a rebuttal of paternity are not deemed an appropriate means of meeting a man's right to know whether a child is his or not.[38] The reasons are as follows: first, the knowledge of his biological fatherhood is not the primary aim of a father challenging his paternity in paternity proceedings. Rather, a man who is presumed to be the legal father of the child according to s 1592 BGB, ie the husband of the woman giving birth to the child (no 1) or the man who has acknowledged his paternity (no 2), is thereby intending to cancel his legal status as father if it is proven that he is not the biological parent of the child.[39] Secondly, if the presumed legal father is not actually the biological parent of the child, a court order will have far-reaching consequences for the child. It cuts off the line of filiation and therefore terminates any parental obligation as regards child support payments, custody or visitation, for instance. Due to these consequences, in order to protect the welfare of the child in particular, a paternity suit needs to meet strict requirements: an action must be brought within a 2-year time-limit (s 1600b BGB). Moreover, according to s 1600c BGB, the father must rebut the presumption of fatherhood as provided under s 1592 BGB. In order to initiate proceedings he is therefore obliged to prove the existence of circumstances that are weighty enough to give rise to his doubts concerning fatherhood (*Anfangsverdacht*). Thirdly, if there is a close parent-child relationship, it may well be that a father who finds out that he is not the child's progenitor may nevertheless prefer to uphold his status as legal father according to s 1592 BGB. Here one might also think of a father wishing to exclude all possible doubt regarding fatherhood before thinking about taking legal action. Under all of these aforementioned circumstances, a father might want to know about his fatherhood without being forced to file a paternity suit.

According to the Court's ruling, the legislator is free to choose how the father's right to know whether a child is his or not is realised. However, in doing so, the legislator is barred from allowing medical expertise to be obtained covertly in order to determine who the biological parent is. The Court ruled that proving paternity by DNA testing made without the consent of both the child and the mother violates the child's right to 'informational self-determination' as protected by the Constitution.[40] It thereby confirmed two 2005 judgments of the Federal Supreme Court, which ruled against the admission of covertly gathered DNA evidence in paternity suits.[41] Note that according to art 2, para 1 GG in conjunction with art 1, para 1 GG, it is a person's exclusive right to dispose of personal data, ie inter alia, information about one's genetic make-up.[42] However, since the father's right to know if a child is his is also constitutionally protected, the Court was confronted with a considerable

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38 Cf BVerfG, FamRZ (2007), 441, at 446.
39 Cf BVerfG, FamRZ (2007), 441, at 445.
40 Cf BVerfG, FamRZ (2007), 441, at 443.
41 For a comment on these judgments, see Blauwhoff 'Motherless Paternity Tests and Minors in Europe' [2005] International Family Law Journal (IFLJ) 146.
42 BVerfG, 14 December 2001, NJW (2001), 879, at 880.

dilemma: determining the biological parent of a child necessitates the use of genetic evidence obtained from the child, thus making a violation of the child's right to informational privacy inevitable. Hence, absolute protection of the child's constitutional rights would make it impossible for a man to verify his fatherhood. Moreover, the mother, in her position as the child's legal representative, would be given the opportunity to deny the father his right to know whether the child is actually his. Bearing these factors in mind, the Court concluded that the only appropriate solution to the diverging interests of mother, child and father would be the establishment of rules for 'proceedings to verify biological filiation'.[43]

(b) Determination of Paternity Act

In response to the Court's decision, on 16 May 2007 a Bill regarding the genetic examination of children in order to establish filiation[44] was introduced by the Federal Council of Germany (*Bundesrat*). The main aim of the Bill was to entitle the man who is presumed to be the father of a child pursuant to s 1592 BGB to bring an action against the child in order to obtain the child's consent to DNA testing. At the same time, the father can claim his right to know whether the child is his or not in the context of a paternity suit. Irrespective of the proposals made by the *Bundesrat*, on 11 July 2007 a different Bill regarding rules on 'proceedings to verify biological filiation' was brought in by the Federal Government (*Bundestag*).[45] Both proposals were discussed during a hearing on 12 December 2007 by a panel of experts. Since the latter goes beyond the proposal of the *Bundesrat* and is said to correspond to the Court's ruling, it was taken as a basis for the new law as enacted on 26 March 2008.[46] It will also be the version to be discussed in the following.

The new law's main purpose is to allow parents as well as children to obtain a declaration of filiation from the court without being forced to meet the strict requirements of a paternity suit in s 1600 BGB. Henceforth, in doing so, thanks to the new law it will no longer be necessary for men to procure medical expertise that has been illegally obtained by DNA testing without the consent of the child. The law provides for a statutory basis for the determination of filiation but without establishing any legal consequences that are inherent in this status. According to s 1598a, para 1 BGB, the father (no 1), the mother (no 2) and the child (no 3) are entitled to have their consent requested for a blood test[47] in order to confirm or establish parenthood. If these proceedings would cause exceptional hardship to the child, such as worsening an illness the child is suffering from or advancing suicidal tendencies, they could be suspended for a

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43 BVerfG, FamRZ (2007), 441, at 444.

44 'Entwurf eines Gesetzes über die genetische Untersuchung zur Klärung der Abstammung in der Familie', BT-Drucks. 16/5370.

45 'Entwurf eines Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren'. The text of the Bill (in German) can be found in FPR (2007), 403 et seq.

46 'Gesetz zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren', BGBl. I 2008, 441.

47 In exceptional cases, a buccal swab may also be taken.

given period of time (s 1598a, para 3 BGB). If a person listed in s 1598a, para 1 BGB withholds their consent, the consent may instead by supplied by the family court if so requested (s 1598a, para 2 BGB).[48]

Other than those already mentioned, the Bill provided for further modification of the rules on paternity proceedings in s 1600 BGB et seq. Since a rebuttal of the presumption of paternity by the father has far-reaching consequences for the child, it was the aim of the Bill to make the initiation of paternity claims more difficult, thus protecting the welfare of the child. Hence, the Bill's purpose was to offer a father who entertains considerable doubts concerning his fatherhood the incentive to bring 'proceedings to verify biological filiation' instead of initiating a paternity suit. Therefore, s 1600 BGB in its original version was proposed to be extended by para 5 providing for a hardship clause on behalf of the child. If a judgment decreeing that the claimant was not the legal father of the child seemed to be unreasonable with regard to the well-being of the child (*erhebliche Beeinträchtigung des Kindeswohls*), the father's claim according to s 1600, para 1 BGB should be dismissed (s 1600, para 5, sentence 1 BGB-E). Where extraordinary child-related circumstances were of a temporary nature only, the father would be free to initiate, once more, paternity proceedings at such a time when the child was no longer expected to suffer bodily or mental harm as a result (s 1600, para 5, sentence 2 BGB-E). However, in the cause of the final legislative proceedings, the introduction of such a hardship clause was not deemed necessary. With regard to the welfare of the child, it should be noted that the application of the hardship clause in s 1600 para 5 BGB-E would have required the taking, in court, of extensive evidence regarding possible threats to the child's health.[49]

As far as the time-limit prescribed in s 1600b BGB is concerned, attention should be paid to the proposed amendment of para 7. Note that according to s 1600b, para 1 BGB, a suit to challenge paternity must be filed within 2 years of the father learning of circumstances that would seem to argue against his paternity. According to the Bill, the statutory 2-year period for the initiation of a paternity suit should recommence if the father or the child established, as a result of DNA testing that the claimant was not the father of the child. However, the proposed recommencement of the time-limit required that the rebuttal of legal paternity did not run contrary to a minor child's best interests. The question as to when a paternity suit would be unreasonable was said to be left to the court's discretion. It would have been up to the judge then to take the individual parent-child-relationship as well as the child's emotional stress into consideration. However, it is appreciated that the proposed recommencement of the statutory 2-year time limit eventually did not become law. If it had entered into force the father would have been given the right to seek the rebuttal of paternity for an unlimited time. Consequently, paternity proceedings themselves would have run contrary to the welfare of the child, as they would

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48 Each of the persons listed in s 1598a, para 1 BGB is entitled to demand such a replacement of consent.

49 Cf Klosinski, 'Ist der Anspruch auf Abstammungsabklärung und anschließender Vaterschaftsanfechtung dem Familienwohl förderlich?', FPR (2007), 385, 389.

have jeopardised an existing parent-child relationship.[50] Note that the child's interest in preserving his or her social and personal environment is constitutionally guaranteed in art 6, para 1 GG.[51] It is difficult to understand why a father who, due to the existence of substantial evidence, doubts that the child originates from him should not be asked to comply with the 2-year time limit set for the filing of a paternity suit.[52]

Providing for rules on 'proceedings to verify biological filiation' that enable a party to obtain a declaration of filiation without facing any of the legal consequences that are inherent in this status is unique in Europe.[53] There is one aspect here open to criticism: under the new law the court is only allowed to determine whether the man who is presumed to be the father of the child according to s 1592 BGB is the genetic father or not. However, if the man is not the father, the question as to who is the biological father of the child remains unanswered. Satisfying the interests of the legal father but not the legitimate interests of the child regarding parentage is, therefore, considered one-sided.[54] In addition, some critics suggest that apart from the parties listed in s 1598a, para BGB, other persons, in particular the genetic (but not legal) father ought to be entitled to file filiation proceedings.[55] Note that the Bill explicitly emphasised that the biological father is barred from claiming filiation, and thus directed him to initiate a paternity suit (s 1600 BGB et seq). Some critics have argued, however, that denying the man who considers fatherhood possible the right to obtain a declaration of filiation according to s 1598a, para BGB forces him to obtain a covert – ie illegal – paternity test.[56] It was therefore proposed that the genetic father should at least be entitled to file filiation proceedings if the court has dismissed the legal father's claim according to s 1598a, para 1 BGB.[57]

IV PARENTAL CUSTODY

(a) Welfare of the child as standard for restrictions

Under German law, the family court is entitled to take the measures required to fend off threats to the child's physical and mental welfare that are caused by a

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[50] Cf Frank/Helms 'Kritische Bemerkungen zum Regierungsentwurf eines "Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren"', FamRZ (2007), 1277, at 1278; Klinkhammer, 'Der Scheinvater und sein Kind – Das Urteil des BVerfG vom 13.2.2007 und seine gesetzlichen Folgen', FF (2007), 128, at 130.

[51] Cf BVerfG, FamRZ (2007), 441, at 445.

[52] Cf Frank/Helms, (n 50 above), at 1280; Willutzki, 'Heimliche Vaterschaftstests – Anstoß für den Gesetzgeber', ZRP (2007), 180, at 184.

[53] See Frank/Helms, (n 50 above), at 1278.

[54] For a critical opinion, see Frank/Helms, ibid.

[55] Cf Muscheler, 'Die Zukunft des heimlichen Vaterschaftstests', FPR (2007), 389, at 391; Frank/Helms (n 50 above), at 1279.

[56] Cf Muscheler, ibid.

[57] Another requirement would be that the genetic father's paternity claim according to s 1600, para 1 BGB be dismissed due to the existence of a close relationship between the legal father and the child (s 1600, para 1, no 2 BGB). For details see Frank/Helms (n 50 above), at 1279.

misuse of parental custody, whether through neglect of the child, through a failure that cannot be attributed to the parents or through the conduct of a third person if the parents are not willing or able to avoid the aforesaid threats (s 1666, para 1 BGB). Consequently, according to art 6, para 2, sentence 2 GG, whereby the state is constitutionally obliged to ensure that the parents' right and duty to care for the child is properly exercised, the court is – as a last resort[58] – entitled to restrict parental custody.[59] It is therefore up to the court to determine whether the interference with the parents' right to custody is an appropriate means to protect the well-being of the child.[60] However, in exercising its discretion the court is only permitted to entail a separation of the child from the parents if the danger may not be otherwise averted, ie through public aid for instance (s 1666a, para 1 BGB). Pursuant to s 1666a, para 2 BGB, before the decision is made to deprive parents of their custody, it must be shown that other measures have turned out to be unsuccessful or, with due regard to the best interest of the child, insufficient. Where the parents had joint custody but only one of them is deprived of custody, the other parent will have sole custody of the child unless he or she is not deemed able to cope with the responsibility.[61] If neither maintains custody, the care for the child is entrusted to a curator appointed by the family court.[62]

(b) Schooling

In recent years, courts have repeatedly had to deal with parents who did not allow their children to attend a public school but preferred to home-school them for religious reasons. In this respect, the Federal Supreme Court in its decision of 17 October 2007 regarded such behaviour as a misuse of parental custody according to s 1666, para 1 BGB. The Court stated that, in order to protect the welfare of the child, the parents must be deprived of their joint custody and the care for the child entrusted to a curator. The case that came up before the Court was that of believing Baptists coming to Germany as late repatriates from Eastern Europe who did not allow their two children to go to elementary school in Germany. By judgment of the trial court, the parents were deprived of their custody as far as the schooling of their children was concerned, and a curator was entrusted with their care in this regard. According to the Supreme Court's reasoning, the parents' right to care for their children as constitutionally guaranteed in art 6, para 2, sentence 1 GG ranks behind the interests of their children in the matter of school attendance. In this respect, the Federal Constitutional Court has already ruled that the public interest requires the state to prevent the creation of parallel societies.[63] Practising tolerance is considered to be one of the main tasks elementary schools must perform. The Court held that this interference with the parents'

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58 For further measures the court can take, see Lüderitz/Dethloff (n 4 above), § 13 at 103.
59 Cf Lüderitz/Dethloff, ibid, at 102.
60 Cf Palandt/Diederichsen, 'Bürgerliches Gesetzbuch' (annotated) (67 edn, 2008), § 1666 at 31.
61 Cf Schwab, *Familienrecht* (2007), at 643.
62 For details concerning curatorship, see Schwab, ibid.
63 Cf BVerfG, 29 April 2003, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 2003, 1113; decision of 31 May 2006, FamRZ (2006), 1094, at 1095.

right to care for their children was necessary in order to promote the formation of responsible and emancipated citizens at school. Members of denominations or other religious groups must therefore accept that, in school, their children are exposed to the dominant ideal of a pluralistic society in Germany. Unless attending school causes mental harm to a child, the Court found that parents do not have the right to home-school their children.

On a European level, the restriction of parental custody with regard to compulsory schooling can be seen as an interference with the parents' right to have their family life respected, as guaranteed by Art 8(1) of the European Convention on Human Rights, unless this interference is 'in accordance with the law', in pursuance of an aim or aims that are legitimate under para 2 and can be regarded as 'necessary in a democratic society'. The European Court of Humans Rights (ECtHR) considered, in its decision of 5 February 2007, the last-mentioned requirement to be fulfilled:[64] the case that came up to the Court was that of a German mother claiming that restrictions on her parental custody and the separation from her daughter by force violated the Convention, Art 8 in particular. Unlike the cases regarding home-schooling, it was the mother's aim to secure her daughter's attendance at an ordinary nursery school. However, the competent German authorities were of the opinion that the child, who displayed behaviour that was clearly autistic, should be sent to an institution capable of meeting her needs, though this decision restricted the mother's custody in respect of these issues according to ss 1666, 1666a BGB. The ECtHR held that the contested interference with the mother's right to have her family life respected, as guaranteed by Art 8(1) of the Convention, was 'necessary in a democratic society'. In determining what constitutes 'necessary in a democratic society', the Court held that the best interest of the child is of crucial importance. Moreover, the Court considered its task to be a review, in the light of the Convention, of the decisions taken by the domestic authorities. In applying these standards, the Court found that the German courts' decisions based on the consideration that the mother was endangering her daughter's mental welfare, could be understood to have been made in the child's best interest. The separation of mother and child and the placement of the daughter in an institution individually educating children with autistic behaviour were considered to be a 'measure of last resort' that became necessary on account of the mother's insistence on sending her daughter to an ordinary nursery school. The Court came to the conclusion that in the circumstances of the present case the German courts based their decisions, which interfered with the mother's right to have her family life respected, on relevant and sufficient grounds and struck a fair balance between the competing interests.

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[64] ECHR, 5 February 2007 (*Köhler v Germany*), no 1628/03.
The decision is available in English at http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=k%F6hler&sessionid=7880766&skin=hudoc-en.

(c) Breaking off life-supporting measures

Regarding restrictions of parental custody, one final case is worth mentioning. On 24 May 2007, the Court of Appeal in *Hamm* had to rule on the parents' decision to discontinue the life-supporting measures for their severely disabled child, who was in a coma, thus letting the child die.[65] The trial court, in restricting the parents' custodial right to decide on their child's health care and appointing a special curator to deal with these issues, was of the opinion that the parents were endangering the child's welfare and misusing their right to care for the child. The Court of Appeal, on the contrary, held that in light of the fact that the child was not expected to ever regain consciousness or to communicate with other persons, the parents had come to a responsible decision by stopping the life-supporting measures. The Court stressed that no other reasoning was required since the parents' decision would probably cause the child's death. Taking into account a person's right to humane medical treatment, the Court considered the parents' decision to be in the child's best interest. However, despite the Court's clear ruling it seems at least questionable whether parents ought to be allowed to decide on the termination of life-supporting measures.[66] First, many parents may not be deemed competent to correctly assess the full medical situation. Secondly, from a psychological perspective, parents who have to make a decision about the life or death of their child are often thrown into a mental crisis and consequently not able to reach a rational decision that is in their child's best interest.[67] Thirdly, taking into account the Supreme Court's judgment on the custody of persons of full age, it has to be asked whether the Court's considerations do not also apply to the case at hand. On 17 March 2003,[68] the Federal Supreme Court ruled that a curator's refusal of life-supporting measures needs to be confirmed by a guardianship court, unless such measures are no longer indicated, possible or reasonable. The Court considered the guardianship court's permission necessary to uphold the cared-for person's decision as completely as it possibly can. Although the approach in cases concerning minor children should take into account the fact that such cases do, in fact, differ from those involving incompetent adults, its reasoning should aim to be consistent with that used in such cases.

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65 Cf OLG Hamm, NJW (2007), 2704 et seq.

66 For an opinion supporting the parents' competence on this issue, see Palandt/Diederichsen (n 60 above), § 1626 at 14.

67 See Balloff, 'Zum Teilentzug der elterlichen Sorge für ein im Koma liegendes Kind', NJW (2007), 2705.

68 BGH, 17 March 2003, NJW (2003), 1588 et seq.

V ACT ON THE IMPROVEMENT OF CHILD PROTECTION

On 24 April 2008, a new law on the improvement of child protection was adopted by the German legislature.[69] It is based on a Bill that was introduced by the Federal government in August 2007. The aim of the law is to protect the welfare of children who are neglected, abused or disturbed. To that end, family courts are given the power to act at an early stage. Under the new law, in cases where the welfare of a child is in jeopardy, family courts will be able to exert their influence over parents in the matter of requesting public aid. The restriction of parental custody is expressly considered to be a last resort with regard to the protection of children. In order to improve child protection, the law modifies s 1666, para 1 and para 3 BGB. Unlike the original version of para 1, the new law no longer requires that threats to the welfare of the child be caused by a misuse of parental custody. Since proving the parents' failure to care for their child tended to be highly difficult, the Bill proposed to reduce the obstacles to the family court's intervention by cutting the relevant requirements. The new legal situation may be explained using the example[70] of a mentally disturbed child on whom the parents no longer have any educational influence. The question as to whether (and how) the threat to the child's welfare was caused by the parents' failure or was due to health reasons is often impossible to answer. Finding a reasonable solution for those cases is considered to have been rendered easier under the new law. However, it is open to doubt whether the new version of s 1666, para 1 BGB is an appropriate means of allowing family courts to act at an early stage. One criticism that could be levelled is that the other requirements in s 1666, para BGB, for example the parents' unwillingness to avert threats to their child, are not deemed a matter for modification.[71]

Moreover, s 1666 BGB ought also to be modified as far as the legal consequences are concerned. Note that under current law, the family court is allowed to take the measures necessary to avert any threats to the well-being of the child. However, until the reform, s 1666 BGB did not define which measures the court was empowered to take. That is the reason why courts in most cases opted for a restriction on parental custody. According to the Bill, the revised form of s 1666, para 3 BGB exemplifies the further steps that may be taken to avert a threat to the child. Under the new law, the court is entitled to order the parents to request public aid, ie child and youth welfare services or health services, for instance. Furthermore, the court is entitled to order the parents to observe compulsory schooling. If deemed necessary, it may also restrict parental custody. If the court has refrained from ordering a specific measure

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[69] 'Gesetz zur Erleichterung familiengerichtlicher Maßnahmen bei Gefährdung des Kindeswohls'. The text (in German) is available at http://www.bmj.de.

[70] Example taken from a press release of the Ministry of Justice dated 11 July 2007. The text (in German) is available at www.bmj.de.

[71] Cf Röchling, 'Neue Aspekte zu Kinderschutz und Kindeswohl? – Zum Entwurf eines "Gesetzes zur Erleichterung familiengerichtlicher Maßnahmen bei Gefährdung des Kindeswohls"', FamRZ (2007), 1775, at 1777.

pursuant to s 1666 BGB, according to the new s 1696, para 3, sentence 3 BGB, it is obliged to regularly reconsider its decision. Another important aspect favoured by the Bill was the introduction of a 'round table', thus motivating parents and the competent court to discuss threats to the welfare of the child and to consider possible solutions (new s 50f FGG). The child as well as the competent Youth Office (Jugendamt) should also participate. The court is confronted with the task of coordinating the meeting, of indicating any relevant problems, of working towards solutions and encouraging co-operation between the parents and the Youth Officer. Another aim of the Bill was to expedite proceedings where children are involved. The new law therefore provides that the family court should hold an early hearing to avoid a conflict between the parents from culminating. However, despite all of these proposals the Bill avoided redefining the 'threats' to the welfare of the child according to s 1666, para 1 BGB. The wording of s 1666, para 1 BGB has therefore been criticised for ignoring the latest research findings as regards the question of when the child's well-being can be assumed to have been placed in jeopardy.[72]

VI CONCLUSION

In view of the 2008 law reforms as well as of recent case law, there is no doubt that children's rights in Germany are becoming increasingly important and are being consequently strengthened by law. Several incidences of abused children or children who died due to negligence and abuse by their parents have provoked an ongoing discussion concerning how children could be protected against the failure and incompetence of their parents. Due to the fact that children's rights do not appear in the Constitution, a constitutional amendment is currently under discussion. While some recommend the introduction of specific fundamental rights for children, others want to give children rights that may be claimed against their parents.[73] Yet others do not agree that the Constitution needs to be amended, but deem the application of art 6 GG a sufficient means to protect the well-being of children. Whatever solution is eventually adopted, a fair balance between the competing interests of children, parents and the state must be struck. Even if the law is not about to be changed at all, an alliance at federal, state and municipal level has already been built, which seeks to provide for the better protection of children in Germany.

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[72] Cf Röchling, ibid, at 1779.

[73] For a critical view of the different positions, see Kirchhof, 'Kinderrechte in der Verfassung – zur Diskussion einer Grundgesetzänderung', ZRP (2007), 149 et seq.

India

INTER-COUNTRY PARENTAL CHILD REMOVAL AND THE LAW

Anil Malhotra and Ranjit Malhotra[*]

Résumé

Le monde est beaucoup plus petit qu'il ne l'était il y a dix ans. Les voyages internationaux et intercontinentaux sont plus faciles et abordables que jamais. Il en résulte une augmentation des relations entre personnes de nationalités et de cultures différentes. Le monde dans lequel nous-mêmes et nos enfants vivons, est devenu terriblement complexe, rempli de possibilités mais aussi de risques. La mobilité internationale, l'ouverture des frontières, la migration transfrontalière et la disparition de certains tabous interculturels, représentent des avantages mais ils créent aussi un nouveau type de risques pour les enfants en situation transfrontalière. Pris dans le feu croisé de relations brisées avec leur lot de disputes sur la garde et le déménagement, les risques de l'enlèvement international planent lourdement, en contexte international, sur les problèmes chroniques du maintien du droit d'accès et de contact, sans compter les batailles difficiles pour garantir le paiement des aliments pour les enfants qui sont dans de telles situations. Sur une population de plus d'un milliard d'Indiens, vingt-cinq millions sont des non-résidents qui, en émigrant vers d'autres juridictions, ont engendré une nouvelle génération de conflits conjugaux et familiaux.

Avec le nombre sans cesse croissant d'Indiens résidant à l'extérieur du pays et l'augmentation des problèmes qui se traduisent en conflits familiaux, le déplacement international d'enfants vers l'Inde doit désormais se régler avec une plateforme internationale. Ce n'est plus un problème local. Le phénomène est global. Des mesures doivent être prises de concert afin de résoudre ces conflits par la collaboration entre les tribunaux. Tant que l'Inde ne devient pas signataire de la Convention de La Haye, cela pourrait bien être impossible. Le temps est maintenant venu de constater que les tribunaux ne peuvent plus étirer leurs limites pour s'adapter à l'infini aux décisions des nombreux tribunaux étrangers. Pour en arriver à une approche juridique uniforme, il est important que l'Inde se dote d'une législation claire, authentique et universelle en matière de droit de garde et que celle-ci adhère aux principes de la Convention de La Haye. Les vues et les interprétations opposées en la matière, pourraient bien devenir un obstacle au règlement efficace du nombre croissant d'affaires d'enlèvement international. En

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* Anil Malhotra has been a practising Advocate in India since September 1983. On 29 January 2007, Ranjit Malhotra was the first Indian lawyer to be awarded the prestigious Felix Scholarship to read for the LLM degree at the SOAS, University of London. He specialises in private international law. Both authors were elected to the International Academy of Matrimonial Lawyers on 29 January 2007.

> Inde, nous souhaitons donc une adoption et une mise en œuvre rapide des principes de la Convention de La Haye en matière de déplacement illicite d'enfants. Ne tardons pas à ouvrir la voie qui permettra de résoudre ces conflits.

I INTRODUCTION

The world is a far smaller place now than it was a decade ago. Inter-country and inter-continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross-border migration and dismantling of inter-cultural taboos are all positive developments but are nevertheless fraught with a new set of risks for children caught up in cross-border situations. Caught in the crossfire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross-frontier child support. In a population of over a billion Indians, 25 million are non-resident Indians who, by migrating to different jurisdictions, have generated a new crop of spousal and family disputes.

(a) Definition of child removal

Families with connections to more than one country face unique problems if their relationship breaks down. The human reaction in this already difficult time is often to return to one's family and country of origin with the children of the relationship. If this is done without the approval of the other parent or permission from a court, a parent taking children from one country to another may, whether inadvertently or not, be committing child removal or inter-parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of the person with whom the child normally lives.

A broader definition encompasses the removal of a child from his or her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980, with 80 contracting countries today as parties, however, defines removal or detention wrongful in the following words:

'Article 3

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

Child removal does not find any specific definition in the Indian statute books and, since India is not a signatory to the Hague Convention, there is no parallel Indian legislation enacted to give the force of law to the Hague Convention. Hence, in India, all interpretations of the concept of child removal are based on judicial innovation in precedents of case-law decided by Indian courts in disputes between litigating parents of Indian and/or foreign origin.

(b) Global solutions and remedies

The Hague Convention on Civil Aspects of International Child Abduction came into force on 1 December 1983 and now has 80 contracting nations. The objects of the Convention were:

(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and

(b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

It operates as an effective deterrent providing a real and practical means of restoring the status quo prior to the abduction, prevents abductors from reaping the benefits of an act opposed to the interests of children, upholds the right of the child to maintain contact with both parents and introduces harmony where previously chaos prevailed. The Permanent Bureau of the Hague Conference on Private International Law at The Hague, Netherlands, renders a superb service by monitoring and helping the development of services to support effective implementation and consistent operation of the Hague Conventions and review their operations. Since there is no centralised system of enforcement or interpretation, the Secretariat of the Hague Conferences guides nations in post-Convention services. In terms of the Hague Convention on Civil Aspects of International Child Abduction, the Secretariat has published guides to good practice in three parts, namely Central Authority Practice,

Implementing Measures and Preventing Measures which are all approved by contracting states. The Secretariat thus helps to create an international medium of consenting states who contract with each other to return children who are wrongfully removed.

(c) Why should India be interested in joining the 1980 Convention?

The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on child protection policies in much of the world. In a civilised society, where globalisation and free interaction is part of a rapidly changing set up, India is emerging as a major destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems on the family law front are largely unresolved. Times have changed but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India are in need of reform. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. Therefore, from an international perspective, four major reasons can be identified to establish and support the necessity of India's signing the Convention.

First, India is no longer impervious to international inter-parental child removal. In the absence of the Convention principles, the Indian courts determine the child's best interest by dealing with any child removal like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The overpowering parent wins by establishing his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

Secondly, such a determination in India plays into the hands of the abducting parent and usurps the role of the court which is best placed to determine the long-term interests of the child, namely the court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of the Hague Convention approach is that it quickly restores the position to what it was prior to when the wrongful removal or retention took place and supports the proper role played by the court in the country of the child's habitual residence. The correct law to be applied to the child would be that of the country of the child's origin and so would be the court of that country. In India, determination of rights as per the Indian law of a foreign child removed to India by an offending parent may often be clouded, may not be in the best interest of the child and ought to be determined by the law and the court of the child's origin.

Thirdly, the fact that India is not a party to the Hague Convention may have a negative influence on a foreign judge who is deciding whether a child living with a parent in a foreign country should be permitted to spend time in India to enjoy contact with an Indian parent and extended family. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle, membership of the Hague Convention will bring the prospect of achieving the return to India of children who have their homes in India but have been abducted to one of the 80 states that are parties to the Convention.

Fourthly, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in courts of different countries who are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the country where the child was habitually resident before removal.

It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above.

(d) The UK judicial initiative

In January 2005, Lord Justice Thorpe at the Royal Courts of Justice, London was appointed Head of International Family Law for England and Wales (a newly created title within the UK judicial system). The appointment confirms the increasing importance attached to the development of international instruments and conventions in a field of family law and to the value of international judicial collaboration, particularly in the extension of the global network of liaison judges specialising in family law. This may prompt some other jurisdictions in the world, whether or not they are signatories to the Hague Convention on Civil Aspects of International Child Abduction 1980, to make similar appointments. In relation to wrongful removal or retention of children, as between the UK and Pakistan, a protocol has been agreed between the President of the Family Division of the High Court of London and the Chief Justice of the Supreme Court of Pakistan for co-operation between the judicial authorities of the two countries and providing agreed procedures for dealing with such cases. India, however, has not taken any steps in such regard.

II GENERAL POSITION OF INDIAN LAW ON THE PROPOSITION OF INTER-PARENTAL AND INTER-COUNTRY CHILD REMOVAL

(a) Introduction

International child abduction law in India stands substantially modified as a result of the Supreme Court judgment in *Dhanwanti Joshi v Madhav Unde*[1] handed down on 4 November 1997. It deals with the provisions and case-law analysis relating to the Hindu Minority and Guardianship Act 1956, read with the Guardian and Wards Act 1890. The two enactments principally govern the law relating to child custody in India.

Under Indian law, the prime consideration is the welfare of the child, though s 6(a) of the Guardian and Wards Act 1890 says that the custody of a minor who has not attained the age of 5 shall ordinarily be with the mother.

The Court held:[2]

> 'So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the Court to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration as stated in *McKee v McKee,*[3] unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in *Re L.*[4] As recently as 1996–1997, it has been held in *Re P (A minor) (Child Abduction: Non-Convention Country)*[5] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence – which was not a party to the Hague Convention, 1980 – the Courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established …'

From the above mandate of law, it is clear that courts in India now would not exercise a summary jurisdiction only to return the children to the foreign country of their habitual residence.

It was also held (at para 21) that orders relating to the custody of children are by their very nature not final, but interlocutory in nature, and subject to modification at any future time upon proof of a change of circumstances requiring change of custody; but such change in custody must be proved to be in the paramount interests of the child. This was the position of law laid down

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1 JT 1997 (8) SC 720.
2 Ibid 733–734, para 31.
3 [1951] AC 352.
4 [1974] 1 All ER 913, CA.
5 [1996] 3 FCR 233, CA by Ward, LJ, 1996 (Current Law) (Year Book) 165–166.

by the Supreme Court of India in *Rosy Jacob v Jacob A Chakramakkal*,[6] which has since been explicitly reaffirmed in the above-mentioned 1997 ruling.

It was further held that the custody order of a foreign court is only one of the factors which will be taken into consideration by a court of law in India. The court will draw up an independent judgment on the merits of the matter with regard to the welfare of the children. Lastly, superior financial capacity cannot be a sole ground for removing children from their mother's custody.

(b) Further case-law

The tenor of law laid down in the above-mentioned judgment of *Dhanwanti Joshi*[7] has more recently been reaffirmed by the Supreme Court of India in *Sarita Sharma v Sushil Sharma*.[8] The facts of this case are outlined in brief below.

The parents of the children were living in the United States. The children were placed in the custody of their father, while their mother was given visiting rights. In exercise of her visiting rights, on 7 May 1997 the mother picked up the children from the father's residence. She was to return the children next morning. The next morning, the father discovered that the children had not been brought back to school. Eventually, the mother, without obtaining any US court order, flew to India with the children. The father filed a petition for the issue of a writ of habeas corpus at the Delhi High Court on 9 September 1997. To seek the release of any individual in illegal custody, a habeas corpus petition can be filed in any High Court in India under Art 226, or under Art 32 of the Constitution of India if the jurisdiction of the Supreme Court of India is to be invoked directly. The wife's contention was that, by virtue of the orders dated 5 February 1996 and 2 April 1997 passed by the courts in the United States, both she and the father were appointed as possessory conservators. Hence, both the children were in her lawful custody.

The Delhi High Court held that, in view of the interim orders passed by the United States Court, the wife had committed a wrong in not informing that Court and not seeking its permission to remove the children from the jurisdiction of that Court. The Delhi High Court took note of the fact that a competent court having territorial jurisdiction had passed a decree of divorce and had ordered that only the father should have the custody of the children. The Delhi High Court allowed the petition and directed the wife to restore the custody of the two children to the father. It was also declared that it was open to the father to take the children to the United States without any hindrance. The wife appealed to the Supreme Court of India.

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6 1973 (1) SCC 840.
7 JT 1997 (8) SC 720.
8 JT 2000 (2) SC 258.

The Supreme Court (at 263, para 4) noted from the record that there were serious differences between the two warring spouses. The husband was an alcoholic and had been violent towards the wife. The conduct of the wife was also not very satisfactory. The Court framed the following issues:

> 'The question is whether the custody became illegal, as she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission. After she came to India a decree of divorce and the order for the custody of the children have been passed. Therefore, it is also required to be considered whether the mother's custody became illegal thereafter.'

The Court held (at 264 and 265, para 6):

> 'Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from [the] USA despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in [the] USA respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in [the] USA they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about five years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than the daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in [the] USA it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to [the] USA. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held …'

Furthermore, the Supreme Court (at 264, para 5) reaffirmed para 31 of the judgment in *Dhanwanti Joshi's* case[9] (reproduced above). *Sarita Sharma's* case is the second ruling of its kind handed down by the Supreme Court of India altering the earlier dicta on child abduction law.

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[9] 1997 (8) SC 720.

Much more recently, the Supreme Court of India dismissed a habeas corpus petition instituted by a mother seeking custody of her two minor children, where earlier contested custody orders had been passed by the Family Court awarding custody to the paternal grandmother of the minor children in question. In this particular case, *Saihba Ali v State of Maharashtra*,[10] the wife directly filed the habeas corpus petition in the Supreme Court of India under Art 32 of the Constitution of India. The facts of the case are as follows.

The father of the minor children was serving a jail term in the United States. The mother contended that, under the terms of an order of a competent court of the United States, she being the mother and natural guardian had been granted the custody of her two minor children. Consequently, the mother petitioned for custody of her minor children along with their passports and travel documents.

The fourth respondent, the paternal grandmother of the children, by virtue of her defence, brought to the apex court's notice that the children were in her custody under the terms of an order passed by the competent Family Court in Nagpur. The Court also noted the fact that the writ petitioner, ie the mother, was a party to the said Family Court proceedings. Subsequently, the mother preferred an appeal before the Nagpur Bench of the Bombay High Court, which was later withdrawn. Counsel for the respondent grandmother contended that the Family Court order had assumed finality as to the custody of the children. Hence, the habeas corpus petition was not maintainable. She also contended that the Family Court, while granting the custody of minor children to her, had held the US custody order to be one without jurisdiction and not a decree; due notice of it should have been taken by the Indian courts under s 13 of the Civil Procedure Code 1908.

The court accepted the submissions of the respondent paternal grandmother. The apex court held that the Indian Family Court order was an order passed by a competent court of jurisdiction. The apex court further held that the children were in legal custody, until the order was set aside by the superior courts. The court firmly concluded that the habeas corpus petition was not maintainable. The court was sympathetic to the mother, who had led a 5-year sustained campaign to reaffirm the visiting rights initially given to her by the Nagpur Family Court. But it also recognised the fact that the petitioner mother had remarried, and had had another child from the remarriage.

However, the Supreme Court, in order to carry out complete justice, passed orders in the interest and welfare of the minor children by liberalising the visitation rights of the petitioner mother earlier granted to her by the Court, to enable her to take her children out for an extended period of time on every weekday and at weekends. The tenor of the law laid down in this ruling is identical to that laid down in the above-mentioned cases of *Dhanwanti Joshi*[11]

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[10] JT 2003 (6) SC 79.
[11] JT 1997 (8) SC 720.

and *Sarita Sharma*.[12] Though there is no mention at all of these two judgments or the earlier position of relevant case-law, in essence, the welfare of the minor children seems to be the paramount consideration in deciding custody rights of children in cases of broken marriages.

Clearly, in the above case, scant regard has been given to the foreign court custody order obtained by the mother, as it was held to be without jurisdiction. This ruling yet again fortifies the view that the courts in India will independently come to their own judgment in the given circumstances of the case, irrespective of foreign court child custody orders.

Before the above-mentioned 1997, 1999 and 2003 rulings were handed down by the Supreme Court of India, there was case-law to the contrary allowing enforcement of foreign court custody orders on the principle of comity on a case-by-case basis. Such orders were normally enforced by initiating habeas corpus proceedings in the High Court under Art 226 of the Constitution of India where the child was located within the territorial jurisdiction of the High Court or directly in the Supreme Court of India under Art 32 of the Constitution of India.

It is pertinent to mention that Art 137 of the Constitution of India provides for review of judgments or orders made by the Supreme Court of India. Further, Art 141 of the Constitution of India mandates that the law declared by the Supreme Court of India shall be final and binding on all courts within the territory of India.

Hence, the Supreme Court of India from time to time may change the law on any aspect of judicial interpretation, and this will bind all other courts in India. Therefore, the above recent views of the apex court lay down the current position of applicable law in matters of enforcement of foreign court child custody orders when sought to be implemented in India.

(c) Earlier contrary case-law

There is ample earlier case-law contrary to the law recently laid down in *Dhanwanti Joshi* and *Sarita Sharma*. One such Supreme Court of India ruling, *Surinder Kaur Sandhu v Harbax Singh Sandhu*,[13] as noted in *Sarita Sharma* (262, para 5), read:

> 'We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which

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12 JT 2000 (2) SC 258.
13 AIR 1984 SC 1224.

> has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the Courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (*See International Shoe Company v State of Washington*[14] which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy.'

In *Sarita Sharma* the Supreme Court also noted the earlier law laid down in *Elizabeth Dinshaw v Arvand M Dinshaw*.[15] In this ruling the apex court had exercised summary jurisdiction regarding the return of the minor child. In *Dinshaw* it was also stressed that the interest and the welfare of the minor child is the predominant criterion in child custody matters. The earlier law laid down in *Sandhu*[16] and *Dinsha*w[17] stands substantially modified with the recent mandate of law in *Dhanwanti Joshi*,[18] *Sarita Sharma*[19] *and Sahiba Ali*.[20]

Thus, it can be safely concluded that the exclusive emphasis of the apex court's verdict now is to safeguard the welfare of the children. Mere mechanical implementation of an order of the foreign court is no longer the final response of the court. Hence, irrespective of the dictate of a court of overseas jurisdiction, the Supreme Court of India still rightly insists on a proper evaluation of the best interests of the children of a broken marriage.

(d) Visiting rights cannot be denied

The Supreme Court of India, in a recent ruling in *N Nirmala v Nelson Jeyakumar*,[21] held that depriving a mother of visiting rights was not justified.

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14 90 L Ed 95 (1945): 326 US 310.
15 AIR 1987 SC 3.
16 AIR 1984 SC 1224.
17 AIR 1987 SC 3.
18 1997 (8) SC 720.
19 JT 2000 (2) SC 258.
20 JT 2003 (6) SC 79.
21 JT 1999 (5) SC 223.

This appeal was about the custody of a minor daughter. The respondent father was permitted to retain custody as legal guardian. A single judge of the High Court confirmed the custody of the minor daughter with the father but gave visiting rights to the appellant mother.

Against this order, passed by the Single Bench of the High Court, the appellant mother, in search of an order of custody, went on a further appeal before a Division Bench of the High Court, which by the impugned judgment dismissed the appeal and deprived the appellant mother of her visiting rights, to which there were no cross-objections on the part of the husband respondent. The matter went on further appeal to the Supreme Court on this judgment being questioned by the mother.

The apex court held in the above-mentioned judgment (at 223–224, para 3) as follows:

> 'In our opinion, such a further adverse order against the appellant was not justified. The interest of justice will be served if the order of the learned Single Judge continuing the custody of the minor child with the respondent and as confirmed by the Division Bench is maintained subject to the modification that visiting right which was denied to the appellant by the Division Bench be continued ….'

Consequently, the apex court held that depriving the mother of her visiting rights was not justified. Hence, the spirit of the final judicial view is again in the best interest of the child, who was held entitled to receive the love and care of both parents.

(e) Orders relating to custody of children are interlocutory in nature

Justice Mukul Mudgal of the Delhi High Court, in the case of *Leeladhar Kachroo v Umang Bhatt Kachroo*,[22] reiterated the earlier position of law as follows:

> 'In Jaiprakash Khadria v Shyam Sunder Agarwalla & Anr,[23] it was held as under:
>
> > "Orders relating to custody of children are by their very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of the child."'

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[22] 2005 (2) Hindu Law Reporter 449, 457 para 21.
[23] II (2000) CLT 212 (SC); (2000) 6 SCC 598.

(f) Habeas corpus can also be issued by a person who is not a citizen of India

It is well established that a writ of habeas corpus can be issued to secure the custody of a minor child. This can be sought even by a person who is not a citizen of India, as was recently held in *Miss Atya Shamim v Deputy Commissioner/Collector, Delhi (Prescribed Authority under Citizenship Act)*.[24] The Jammu and Kashmir High Court in this ruling reaffirmed *Dinshaw*[25] where the Supreme Court of India had issued a writ at the instance of a person who was not an Indian citizen.

III RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

As far as the forum for securing the return of the children is concerned, it is important to mention that India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Art 226 of the Constitution of India, a parent whose child has been abducted can petition the State High Court to issue a writ of habeas corpus against the abducting spouse for the return of the child. Alternatively, a habeas corpus petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Art 32 of the Constitution of India.

With respect to the relevant legislation, the mother could well seek recourse to the provisions of the Hindu Minority and Guardianship Act 1956 (HMGA 1956), which is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of HMGA 1956 are supplemental to the earlier Guardians and Wards Act 1890. HMGA 1956, like the Hindu Minority Act 1955, has extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir. Under s 4(a) of the HMGA 1956, 'minor' means a person who has not reached the age of 18 years. A 'guardian' in s 4(b) is defined as a person having the care of the person of the minor or of his property or both and includes a natural guardian, a guardian appointed by will of the minor's natural parents, a guardian appointed or declared by a court and a person empowered to act as such under any enactment.

(a) India and the Hague Convention on Civil Aspects of International Child Abduction 1980

Currently, India is not a party to the Hague Convention on Civil Aspects of International Child Abduction 1980. Other than the statutory provisions of law quoted above in which matters of child custody are argued in different courts in

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[24] AIR 1999 J&K 140.
[25] AIR 1987 SC 3.

different proceedings, the principles of the Hague Convention cannot be enforced in Indian courts. Different recent decisions indicate a trend that Indian courts generally tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare of the child and the best interest of the child. A foreign court custody order is only one of the considerations in adjudicating any such child custody dispute between parents. Foreign court orders of child custody are no longer mechanically enforced and normally the courts go into the merits of the matter to decide the best interest of the child irrespective of any foreign court custody order. Hence, the position of law in India varies from case to case and there is no uniform precedent which can be quoted or cited as a universal rule.

(b) The position of Indian law on child abduction

Under Art 214 of the Constitution of India, there shall be a High Court for each state in India and under Art 124 there shall be a Supreme Court of India. Under Art 141, the law declared by the Supreme Court shall be binding on all courts within India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions. Part III of the Constitution secures 'fundamental rights' to citizens, which can be enforced directly in the respective High Courts of the states or directly in the Supreme Court of India by issue of prerogative writs under Arts 226 and 32 respectively of the Constitution of India.

The High Courts and the Supreme Court in India entertain petitions for issuance of a writ of habeas corpus for securing the custody of the minor at the behest of a parent who lands on Indian soil alleging violation of a foreign court custody order or seeks the return of children to the country of their parent jurisdiction. Invoking of this judicial remedy provides the quickest and most effective solution.

Different High Courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction has been invoked by an aggrieved parent seeking to enforce a foreign court custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past three decades. A quick summary of Indian law laying down this position is as follows:

(1) In *Surinder Kaur v Harbax Singh Sandhu*,[26] it was held that the provisions of HMGA 1956 cannot supersede the paramount consideration as what is conducive to the welfare of the child while exercising summary jurisdiction in returning the minor children to the foreign country of their origin.

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[26] 1984 Hindu Law Reporter 780, Supreme Court.

(2) In *Elizabeth Dinshaw v Arvand M Dinshaw*,[27] the Court again exercising summary return of a removed child upheld the right of a foreigner mother to directly invoke the jurisdiction of the Supreme Court to seek the custody of a minor child from his father on the principle that the matter is to be decided not on the considerations of the legal rights of the parties but on the sole and predominant criterion of the best interest of the minor child.

(3) In *Kuldeep Sidhu v Chanan Singh*,[28] in a criminal writ petition exercising summary return, it was held that the welfare of the children who were Canadian citizens would override any consented custody arrangement and the children have a right to be brought up in the culture and environment of the country of their birth.

(4) In *Amita Gautam v Ramesh Gautam*,[29] following the above decisions, it was held that the orders of the Canadian Court granting interim custody to the mother must be honoured by restoring forthwith the custody of the minor to the mother who had been removed from Canada to India by the father without authorisation.

(5) In *Sarvajeet Kaur Mehmi v State of Rajasthan*,[30] the custody of the minor child was given to the mother without hearing the father in view of the orders passed by the High Court of Justice (Family Division), UK, requesting the courts in India to pass necessary orders and issue directions seeking the return of the minor back from India to the UK.

(6) In *Kala Aggarwal v Suraj Prakash Aggarwal*,[31] despite the children being brought to India from the United States in violation of US Court custody orders, the Court upholding the petition only granted access but declined to grant custody to the mother by concluding that the children's welfare was with the father until they attained majority.

(7) In *Jacqueline Kapoor v Surinder Pal Kapoor*,[32] following earlier precedents, the Court upheld the mother's petition seeking custody of her minor daughter in accordance with the orders of the competent court in Germany and directed that the child be handed over to the mother as the judgment of the German Court was binding on the father who had removed the child to India by deceitful means.

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27 All India Reporter 1987 Supreme Court 3.
28 All India Reporter 1989 Punjab & Haryana 103.
29 1989 (2) Hindu Law Reporter Punjab & Haryana 385.
30 1987 (2) Hindu Law Reporter Rajasthan 607.
31 1993 (1) Hindu Law Reporter Delhi 145.
32 1994 (2) Hindu Law Reporter Punjab & Haryana 97.

(8) In *Atya Shamim v Deputy Commissioner/Collector Delhi,*[33] a habeas corpus petition by a person who was not a citizen of India was held to be maintainable to secure the custody of a minor.

(9) In *Dhanwanti Joshi v Madhav Unde*,[34] the Supreme Court observed that the order of the foreign court will only be one of the facts which must be taken into consideration while dealing with child custody matters and India being a country which is not a signatory to the Hague Convention, the law is that the court within whose jurisdiction the child is removed will consider the question on its merits bearing the welfare of the child as of paramount importance. It is in this case that the Supreme Court changed the earlier view and did not exercise summary jurisdiction in returning the removed children to their parent country.

(10) The above observations by the Supreme Court of India were followed in its later decision in *Sarita Sharma v Sushil Sharma*.[35] Thereafter, in *Sahiba Ali v State of Maharashtra*,[36] the Supreme Court declined to grant the custody of her children to the mother but at the same time issued directions for the grant of visitation rights in the interest and welfare of the minor children.

(11) In *Paul Mohinder Gahum v State of NCT of Delhi*,[37] upholding a habeas corpus petition, the High Court held that the orders passed by foreign courts granting custody take a back seat in preference to what lies in the best interest of the minor rather than what a foreign court has directed.

(12) In *Eugenia Archetti Abdullah v State of Kerala*,[38] upholding the right of the US citizen, ie the petitioner mother before the Court in a habeas corpus petition, the custody of the children was handed over to the mother after holding that the High Court can exercise such jurisdiction under Art 226 of the Constitution of India.

(13) In *Leeladhar Kachroo v Umang Bhat Kachroo*,[39] upholding the order of a Canadian Court granting custody to the mother of her younger son and allowing him to go back to Canada, the Court held that it has the jurisdiction to order the travel out of the country of the minor child with one of the parents and the mere possibility of losing jurisdiction would not dissuade the Court from permitting the departure of the child with the parent in the interest of the child. Hence, the Court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child.

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33 All India Reporter 1999 Jammu & Kashmir 140.
34 1998 (1) Supreme Court Cases 112.
35 Judgments Today 2000 (2) Supreme Court 258.
36 2004 (1) Hindu Law Reporter 212.
37 2005 (1) Hindu Law Reporter 428.
38 Hindu Law Reporter 2005 (1) (Kerala) 34.
39 2005 (2) Hindu Law Reporter, Delhi 449.

(14) In *Paul Mohinder Gahun v Selina Gahun*,[40] it was held that, where the wife, husband and the minor girl child were all Canadian citizens and where the wife had stealthily come to India with the minor daughter, the Indian Guardian Court at Delhi had no jurisdiction to try and decide the petition of the mother for a guardianship order as their matrimonial home was in Canada where the child was ordinarily resident.

(15) In a judgment dated 3 March 2006 of the High Court of Bombay at Goa, reported as *Mandy Jane Collins v James Michael Collins*,[41] between a 62-year-old American father and 39-year-old British mother resident in Ireland were litigating over the custody of their 8-year-old minor daughter said to be illegally detained in Goa by the father, the Court declining to issue a writ of habeas corpus held that the parties could pursue their remedies in normal civil proceedings in Goa. The Court dismissing the mother's plea for custody concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa was not possible and directed that the status quo be observed. This in effect meant that the 8-year-old minor girl must continue to live in Goa without her mother or any other female family member in the father's house. In a challenge to this decision by the mother before the Supreme Court of India, the appeal was dismissed on 21 August 2006, leaving it open to the parties to move the appropriate forum for the custody of the child, which if done, was directed by the Supreme Court to be decided within a period of 3 months with earlier visitation rights continuing for the mother.

(16) In another matter reported as *Ranbir Singh v Satinder Kaur Mann*,[42] the Punjab and Haryana High Court declined to issue a writ of habeas corpus to the petitioner father residing in Malaysia who was seeking release of his 5-year-old son and 3-year-old daughter from their mother's custody in India. The High Court of Malaya at Kuala Lumpur had held that the petitioner was entitled to the legal guardianship of the said minor children. However, the High Court in India, declining to enforce the foreign judgment of the Malaysian High Court, held that the matter could be re-argued before the appropriate forum with regard to the custody of the children on the basis of evidence to be adduced by parties. The habeas corpus petition was dismissed with the observation that it would be open to either party to move for custody of the minor children under appropriate law before an appropriate forum.

The above is the consolidated case-law summary on inter-parental removal of children from foreign jurisdictions to India and the decisions in different courts in India as a non-Convention country.

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[40] 2007 (1) Recent Civil Reports (Civil), 129.
[41] 2006 (2) Hindu Law Reporter Bombay 446.
[42] 2006 (3) Punjab Law Reporter 571.

(c) Position of foreign court orders in India

The principles governing the validity of foreign court orders are laid down in s 13 of the Indian Code of Civil Procedure (CPC). The CPC is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. The principles in s 13 of the CPC have been affirmed in relation to the guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments.

It is reiterated, as discussed above, that Indian courts would not exercise summary jurisdiction to return the children to the country of habitual residence. The courts consider the question on the merits of the matter, with the welfare of the children being of paramount importance.

Section 14 of the CPC talks of a presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

(d) The position of Indian law on shared residence orders

Under the relevant Indian statute law pertaining to child custody matters, that is HMGA 1956 supplemented with the provisions of the Guardians and Wards Act 1890, there exists no concept of shared residence orders. However, there is one recent judgment of the Kerala High Court, *Eugenia Archetti Abdullah v State of Kerala*,[43] where on the facts and circumstances of the case the Court handed down an order, which was close to a shared custody order. This was in a case where divorce and custody proceedings were pending in the United States and the mother was held to be entitled to custody of the children until a final decision was announced by the courts in the United States. The facts of the case are outlined below.

The petitioner wife, the respondent husband and the children were all US citizens. The petitioner wife had approached the Court with a habeas corpus petition seeking a direction that the respondents numbers 2 to 4 produce two infants named Roshan and Nishant before the Court and to hand over their custody with their passports to the petitioner, their mother. The two infant twins were less than 3 years old.

The petitioner and the respondent got married while in the United States after which they moved to Bahrain where the petitioner gave birth to the two children. Because of the shift of employment they went back to the state of Texas in the United States and settled there. According to the petitioner, their married life was not happy which led to domestic violence by the second

[43] 2005 (1) Hindu Law Reporter (Kerala) 34.

respondent (the husband). This resulted in a criminal case. Finally, the matter was settled. The respondent lost his employment in Texas and both of them with their children visited India and came to Kozhikode in the state of Kerala where the second respondent had his roots. While there, according to the petitioner, there was again ill-treatment by the second respondent and the petitioner was thrown out of the residential house and was forced to fly back to the United States without the children. According to her, the custody of the children by the respondent was an act of illegal custody and hence they were illegally detained. The petitioner wife had already moved a petition for custody of the children as well as for the dissolution of the marriage with the second respondent, in accordance with the family law applicable in the state of Texas in the United States.

In light of the facts and circumstances of the case, the Court, while granting custody of the children to the petitioner wife, laid down rigorous conditions, one of which was shared custody/visitation rights for a period of 7 days from the time of the court order to the time the petitioner wife left India. In this regard it is necessary to refer to para (e) of the guidelines, mentioned below, laid down in the judgment. Secondly, the judgment is relevant to the facts of the case in hand, because it allowed continued access/visitation rights to the respondent spouse to meet up with his minor children for 3 hours everyday, although quite limited and laying down contingency measures in the event of violation of the said conditions by the petitioner wife.

Paragraph 24 at 41 of the judgment above, stipulating the guidelines, reads as follows:

> ‘(a) The petitioner shall furnish a bank guarantee for 7,500 US dollars before she takes the children to the United States. The bank guarantee shall be in the name of the Registrar of the Court.
> (b) She shall also execute a bond for another amount of 7,500 dollars, undertaking to produce the children before this Court as and when ordered.
> (c) The petitioner shall also obtain an undertaking from the US Embassy or US Consulate in Madras that whenever this Court requires, with a notice of 15 days, she shall be present and shall produce the children at her own expenditure, and that in case of her failure, the Texas/US Administration including the Embassy will see that the directions of this Court in this regard are complied with and the children be produced before this Court.
> (d) She can take the children to Texas only on fulfillment of the aforesaid conditions and on expiry of the period mentioned (1) below.
> (e) The petitioner, shall, from tomorrow onwards, for 7 days, stay in Kozhikode so that the 2nd respondent shall have frequent visit to the children between 10 a.m. and 1.00 p.m. during the said seven days. Until she leaves India, the children shall be regarded as in the joint custody of both, so that the 2nd respondent shall have visitorial rights on the children.
> (f) The 2nd respondent shall entrust the passport of the children and their birth certificates with the Registrar of this Court within a week from today and the Registrar shall give appropriate receipt to him.

(g) The petitioner shall send bi-monthly reports about the health of the children from the Senior Pediatrician of at least 20 years of practice, duly attested by a notary or the Indian Embassy/Consulate in US.
(h) The petitioner shall not remove herself or the children from her present address shown in this petition, ie:
[address deleted by authors for confidentiality]
(i) She shall not, except to take the children to India as per the order, if any, to be passed by this Court, take them beyond the State of Texas.
(j) In case of any default or violation of any of the conditions in this judgment by the petitioner, or in case of any emergency in respect of the children the second respondent is free to fly to Texas and for that he can obtain sufficient amount from out of the bank guarantee provided by the petitioner.
(k) Whenever the second respondent goes to Texas, the petitioner shall provide him the visitorial rights always to see the children and shall put them in his company.
(l) Even if the petitioner complies with all the conditions, we make it clear that she shall not take the children out of India for a period of three weeks from today.
(m) A copy of the passport of the petitioner and the children, duly attested by the Registrar of this Court with the seal of this Court, shall be regarded as a duly original passport for the purpose of their travel inside India.
(n) If the petitioner complies with the aforesaid conditions, the petitioner's passport as well as the passports and the birth certificate given to her as mentioned in direction (m) shall be returned to the Registrar.
(o) If the petitioner happens to leave without complying with the above directions, necessarily, she shall leave the custody of the children to the 2nd respondent.
(p) The petitioner shall not, except for going to Calicut and Chennai, leave her present address in Ernakulam.
(q) This arrangement in terms of this judgment will be in force until the Family Court at Texas, where the petitioner has instituted a lis, passes any interim or final order, as the case may be, regarding the custody of the children. We make it clear that any such order passed by the Court at Texas will override the directions contained in this judgment.

Writ petition is disposed of as above.'

In another reported case of the Delhi High Court, *Leeladhar Kachroo v Umang Bhat Kachroo*,[44] upholding the order of a Canadian Court granting custody to the mother of her younger son and allowing him to go back to Canada, the Court upheld the contention that it has jurisdiction to order travel out of the country of the minor child with one of the parents and the mere possibility of losing jurisdiction would not dissuade the Court from permitting the departure of the child with the parent in the interest of the child. Hence, the Court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child.

In the above mentioned case, the custody of the older son, who was residing with the father, was not in question and the case was confined to determining

[44] 2005 (2) Hindu Law Reporter Delhi 449.

the custody of the younger son. However, it must be noted here that this is a particular reported case, looking in the round at the custody of two children, between the husband and the wife in two different countries. But, it does not talk of a situation looking at shared custody with respect to the same child.

In view of the fact that there is no statutory concept of a 'shared residence order' under Indian legislation, the Indian courts would view interpreting any such order of a foreign court in the light of the principle of the best interest of the child, maintaining the welfare of the child as of paramount consideration. Undoubtedly, access rights of the father can be enforced on the basis of a shared residence order and if such rights are violated, they can be enforced in an Indian court of law. However, this would be viewed as an enforcement of a private contractual arrangement between the parents. The court would still go into the welfare of the child to determine the rights of the child. Hence, the position would vary from case to case and there is no uniform principle which can be quoted as a universal rule.

(e) Value attached by the court to the wishes of the child

The court shall certainly consider the wishes of the parents and the minor child, but it is at the discretion of the court. As is evident from the case-law analysis, the paramount consideration is the welfare of the minor child.

Justice Mukul Mudgal of the Delhi High Court in the case of *Leeladhar Kachroo v Umang Bhatt Kachroo*[45] analysed some of the decided cases taking into consideration the wishes of the children in child custody matters. At 454, para 14 of the judgment, he reiterated the earlier position of law as follows:

> '(b) In *Indira Khurana v Prem Prakush*,[46] the learned Single Judge of this Court held as under:-
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> > "10 . . . It goes without saying that when the grant of custody is concerned, ascertainment of wishes of the children, especially when they are at an age to make an intelligent preference is a relevant and germane consideration. In none of the cited cases, the question of visitation rights only was involved. In the cited cases, the Court was considering the grant of custody and while doing so, had also made provision for visitation rights. It is also significant that in these cases visitation rights were granted to the spouse who did not have the custody. This is because there should be very strong reasons to deny visitation rights to any of the spouse. These could be cases say where the grant of visitation rights could be injurious to the mental and physical health of the children.
> >
> > 11. The Guardian Judge while exercising his judicious discretion in granting visitation rights can ascertain the wishes of the children by meeting them. In fact, it would be desirable to do so. However, omission to do so in case of

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[45] 2005 (2) Hindu Law Reporter 449.
[46] 60 (1995) DLT 633.

> visitation rights cannot be fatal especially when there is sufficient material on record available otherwise, supporting grant of visitation rights. This is so in the instant case. The memorandum of understanding had been entered into on the 6th day of December, 1993. The petitioner has not pointed out anything attributable to respondent after 6.12.1993, which would render grant of visitation rights to the respondent injurious to the mental and physical health of the children. The petitioner in terms of memorandum was willing to share the vacation and visitation rights to the respondent. Moreover the expression of wishes of children is very often conditioned by the persuasion of the party in whose exclusive custody the children have been. The Court, therefore, while ascertaining the mind of the children, has to be conscious of the fact that what the children say could be the reflection of the views of the estranged spouse induced by him/her."

(c) In *Shyam Sunder Trikha v Sunita*,[47] a learned Single judge of this Court held as under:-

> " . . . The Court can only reiterate that the Guardian Judge, while ascertaining mind of the child during a meeting has been conscious and cautious of the fact that what the child is saying could be reflection of the views of the estranged spouse and as induced by him/her."

The above judgments in the cases *of Indira Khurana* (supra) and *Shyam Sunder Trikha* (supra), in fact refer to the desirability of ascertaining the wishes of the children, I have also not discounted the possibility of the child being influenced by the parent he last stayed with. But even then in view of the overall circumstances of the case and taking into account the factors discussed hereinabove the impugned order has to be sustained except in relation to the enhancement of the amount of personal bond from Rs.2 lakhs to Rs.3 lakhs.'

In view of the position of the law quoted above, it is significant to note that the Indian courts would definitely ascertain the wishes and the feelings of the child before deciding on the issue of the custody of the child.

(f) No provision for mirror orders in India

In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is only a concept known to the English and not to the Indian legal system. Since foreign court custody orders cannot now be mechanically enforced, it is suggested that, in the event of any litigation in the foreign country of habitual residence, a letter of request be obtained from the foreign court in which litigation is pending for incorporating safeguards and conditions to ensure the return of the minor child to the country of normal residence.

This letter of request should be addressed by the foreign court to the Registrar General of the High Court within whose jurisdiction the estranged spouse is residing with the minor child. It should also be specifically mentioned that the

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[47] 67 (1997) DLT 619; 1997 IV AD (Delhi) 198.

passports of both the parent and the child should be deposited with the Registrar General of the State High Court to ensure that the child is not taken away from the jurisdiction of the court where he or she is confined.

(g) A possible solution

With the increasing number of non-resident Indians abroad and multiple problems leading to family conflicts, inter-parental child removal to India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of courts interacting with each other. Until India becomes a signatory to the Hague Convention, this may not be possible. It is no longer possible for the Indian courts to adapt to different foreign court orders arising in different jurisdictions. It is equally important that, in order to create a uniform policy of law, some clear, authentic and universal child custody law is enacted in India by adhering to the principles laid down in the Hague Convention. Divergent views emerging at different times may not be able to cope with the rising number of such cases, which appear from time to time for interpretation. We in India require an expeditious acceptance and implementation of the international principles of inter-parental child removal which are couched in the Hague Convention. Let us not delay the resolution of these disputes.

IV LAW IN THE MAKING: AN AFTERMATH

Borders divide jurisdictions but families reunite them. The chain to this link is the global citizen. However, this inter-nation cross-flow has, with the passage of time, generated a new crop of legal issues in the realm of private international law which comprises rules a court would apply whenever there is a case involving a foreign element. Such legal dilemmas of the diaspora baffle systems of law but do not defy solutions if nations make conscious efforts to resolve such complications.

As Reuters reports, while the British Parliament is working its way through the Human Fertilisation and Embryology Bill to legalise parentage from in vitro fertilisation births and recognise same-sex couples as legal parents of children conceived through the use of donated eggs, sperm or embryos, India has still to enact any concrete law arising from the surrogate tourism industry generated here.

A fugitive non-resident Indian (NRI) parent, declared a proclaimed offender in matrimonial proceedings in India, cannot even see or talk to his children removed to India. A foreign court refuses to permit NRI children to be taken to India and likewise local courts decline to implement foreign court orders directing the return of NRI children. These occurrences find daily mention but no straightforward resolution for the NRI in any Indian law. International

parental child abduction, defined as the removal or retention of a child across international borders by one parent which is either in contravention of court orders or is without the consent of the other parent, is sadly an increasing phenomenon which causes acute emotional distress to the abducted child.

The Indian diaspora is 30 million and swelling. The acute problems associated with this have fortunately led the Government to begin the process of acceding to the Convention. However, before that is done and India becomes a member of about 80 contracting Convention nations, appropriate Indian legislation will have to be enacted for its implementation. In this way children removed to and from India will be reunited with their aggrieved parent and India will no longer be a sought-after destination for placing removed NRI children from foreign jurisdictions. Also, foreign courts will be encouraged to permit NRI children to freely visit India without fear of abduction.

The draft of the Indian Civil Aspects of International Child Abduction Bill 2007, meant to secure the prompt return of children wrongfully retained or removed to India, proposes to ensure that the rights of custody and access under laws of contracting states are respected by providing for prompt removal of wrongfully removed children. The salient and salutary features of this proposed law are as follows.

- The proposed law seeks to create a Central Authority for performance of duties under the Hague Convention for securing the return of removed children by instituting judicial proceedings in the relevant High Court.

- The appropriate authority or a person of a contracting country may apply to the Central Authority for the return of a removed child to the country of habitual residence.

- The High Court may order the return of a removed child to the country of habitual residence but may refuse to make such an order if there is grave risk of harm or if it would put the child in an intolerable situation. Consent or acquiescence may also lead to refusal for the return of a child by the Court.

- The High Court may refuse to return a child if the child objects to being returned upon the Court being satisfied that the child has attained an age and degree of maturity to take into account his views.

- The High Court before making an order of return may request the Central Authority to obtain from the relevant authorities of the country of habitual residence a decision or determination as to whether the removal or retention of the child in India is wrongful.

- The High Court upon making an order of return may direct that the person who has removed the child to India pay the expenses and costs incurred in returning the child to the country of habitual residence.

The creditable sacrosanct feature in recognising and retaining the jurisdiction of the High Court to protect the paramount consideration, ie the best interest and the welfare of the child, by carving out exceptions for grounds of refusal has upheld the majesty of law vested in the Indian courts. But at the same time, this proposed law will be a big relief to the children who have been removed from their parents. The temptation to wrongfully remove will also be deterred. The cruel abduction of NRI children for the purposes of forced marriages will also be checked.

Republic of Ireland

PARENTAL LAW ISSUES IN THE TWENTY-FIRST CENTURY

Paul Ward[*]

Résumé

Depuis 2006, les cours supérieures de la République d'Irlande ont rendu des décisions importantes sur des questions nouvelles et parfois difficiles dans le domaine des droits et des obligations parentales. Cette jurisprudence met en lumière la nécessité de légiférer sur certains aspects contemporains de la parentalité à la lumière des avancées de la recherche et des pratiques médicales et scientifiques. Ces décisions montrent également que les tribunaux disposent d'un pouvoir réel lorsqu'il s'agit de répondre à des problèmes nouveaux mettant en jeu le bien-être des enfants. Ce texte présente une description et une analyse de cette jurisprudence et de ses conséquences possibles.

I INTRODUCTION

Since 2006 there have been a number of important interesting cases in the superior courts dealing with some novel and difficult issues relating to parental rights and obligations. These cases highlight where legislation is needed to deal with modern parenting issues that can arise owing to advances in medical and scientific research and procedures. The cases also demonstrate the considerable authority the courts possess to deal with novel problems where the welfare of a child is threatened. This chapter is a description and analysis of these cases and the potential implications that the cases have revealed.

II FAILED FOREIGN ADOPTION

Formal adoption was introduced in the Republic of Ireland on 1 January 1953 with the enacting of the Adoption Act 1952. From the 1960s through to the mid-1980s there were in excess of one thousand adoptions of children born to Irish parents. For example, in 1970 there were 64,382 births of which 1,709 were non-marital and there were 1,414 adoption orders made that year.[1] A decade later there were 74,064 births of which 3,723 were non-marital and there were

* Senior Lecturer, School of Law, UCD, Dublin.

1 Report of the Adoption Board 2006.

1,115 adoption orders made that year.[2] By 1990 the national birth rate had fallen to 53,044 of which 7,767 were non-marital with 648 adoptions orders made that year.[3] The most recent figures for 2006 indicate that there were 64,237 births of which 21,295 were non-marital and only 222 adoption orders made.[4] Of the 222 adoption orders made these were equally divided between male child and female child adoptions. What is most interesting about the adoption orders made is that only 69 were non-family adoptions.[5] The remaining 153 adoptions in 2006 were by family members.[6] By contrast the Register of Foreign Adoptions shows that between 1991 and 2006 there have been 4,254 foreign effected adoptions registered.[7] The statistics clearly demonstrate a sharp decline in the number of children born to Irish parents becoming available for adoption and the growing trend of potential adopters going overseas to adopt foreign children.

Ireland has signed the Hague Convention on Intercountry Adoption and legislation is said to be at an advanced stage of preparation. In addition to the domestic adoption laws[8] the Adoption Act 1991 and the Adoption Act 1998 legislate for the recognition and registration of foreign adoptions. Where a person or persons were domiciled, habitually resident or ordinarily resident in the place where the adoption was effected, such an adoption is deemed to be a valid adoption order for the purposes of Irish adoption law.[9] Section 5 of the Adoption Act 1991 enables persons ordinarily resident in Ireland to effect a foreign adoption and have that adoption deemed a valid adoption and duly registered in the register of foreign adoptions.[10] The Adoption Act 1998 made important amendments enabling the adoption of foreign children effected in or recognised under the law of a place where either or both the adopters were ordinarily resident for a period of not less than one year ending on the date on which the adoption was effected to be deemed a valid adoption order.[11] In addition, a foreign adoption effected in a place in which neither of the adopters was domiciled, habitually resident or ordinarily resident, but not recognised under the law of the place in which either or both of the adopters were on that date domiciled, habitually resident or ordinarily resident, as the case may be, solely because the law of that place did not provide for the recognition of the adoptions effected outside that place, shall be deemed to be a valid adoption order made on that date.[12] Once a foreign adoption is registered in the Register

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2 Ibid.
3 Ibid.
4 Ibid.
5 That is an adoption by someone other than a family member.
6 That is an adoption by the natural mother and her husband (149 or 67%), by grandparents (3 or 1%) or by other relatives (1 or 0%). There were no adoption orders made in favour of the mother alone, the natural father and his wife or the natural father alone.
7 Report of the Adoption Board 2006.
8 The Adoption Act 1952 as amended.
9 Sections 2, 3 and 4 of the Adoption Act 1991. Section 2 sets out a number of criteria which must be met before the foreign adoption can be deemed a valid adoption order.
10 Section 6 of the Adoption Act 1991.
11 Section 4 of the Adoption Act 1998.
12 Section 4A of the Adoption Act 1998.

of Foreign Adoptions it is deemed to be a valid adoption order[13] under Irish adoption law. The consequence of this is significant in Irish law as not only is the adopted child deemed to be a child born naturally to the adopters, the child becomes a member of the constitutionally preferred unit of society,[14] namely, the marital family.[15] Both the child and the parents of the child[16] are afforded considerable protection and autonomy by Art 41 of the Constitution.[17] In the event that parents fail in their parental duty towards the child, the state is authorised and constitutionally obliged to take the place of parents.[18]

These international and domestic advances have facilitated the current trend of potential adopters seeking to adopt foreign children. To ensure that the adoption process works as best it can, the Adoption Act 1991 obliges potential adopters to be assessed[19] for their suitability for adoption before a foreign adoption can be registered and deemed to be a valid adoption order. Support services are also available to assist adopters in their new role as adoptive parents. These safeguards and services are obviously intended to promote the adoption of children resident in the Republic of Ireland. The case of *Dowse v An Bord Uchtála*[20] is an interesting case on how the legal system responds to a failed adoption where the foreign effected adoption of a child duly registered in the Register of Foreign Adoptions is resident outside the jurisdiction. Joseph and Lala Dowse were a married couple, the former an Irish citizen and the latter Azerbaijani. The couple married in June of 2000 and the wife brought to the marriage a daughter from a previous marriage. The child at the centre of the case, Tristan, was born on 26 June 2001 and was of the Muslim faith. The

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13 Section 6(7)(a) of the Adoption Act 1991.

14 See Ward, 'Republic of Ireland: The Child and the State' in A Bainham (ed) *The International Survey of Family Law 2003 Edition* (Jordan Publishing, Bristol, 2003), 217 at 231–238.

15 Article 41 of the Constitution confers extensive protection to the family and its members. The relevant provisions state: '41.1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. 41.1.2 The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.'

16 Article 42.1 provides: 'The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.'

17 See *The North Western Health Board v HW and CW (NWHB v HW and CW)* [2001] 3 IR 622, where the parent's decision to refuse their child a PKU test was upheld on the basis of the constitutional right of a parent to make a decision concerning a child's welfare. (A phenylketonuria (PKU) test is done to check whether a newborn baby has the enzyme needed to use phenylalanine in his or her body. Phenylalanine is an amino acid that is needed for normal growth and development). And see also *In re Article 26 and the Matrimonial Property Bill 1993* [1994] 1 IR 305 where legislation purporting to confer on spouses a joint interest in the family home was declared unconstitutional as an unwarranted interference with the family in its decision-making authority.

18 Article 42.5 of the Constitution provides: 'In exceptional circumstances, where the parents for physical or moral reasons fail in their duty towards their children, the State, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.'

19 Section 8 of the Adoption Act 1991.

20 [2006] 2 IR 507.

couple were unable to conceive a child and decided to adopt in Indonesia. By an order of the South Jakarta District Court, Tristan was adopted in accordance with Indonesian law by the couple on 10 August 2001 and resided with the couple until May 2003. Mr Dowse sought to have the adoption registered in the Register of Foreign Adoptions which was confirmed in writing by An Bord Uchtála (the Adoption Board) on 26 September 2001. The confirmation entitled Tristan to an Irish passport. Shortly thereafter, Lala Dowse discovered that she was pregnant and gave birth to a daughter in May 2002. The couple claimed that Tristan failed to bond with them, in particular with Lala Dowse, notwithstanding their efforts in engaging a psychologist who recommended the re-adoption of Tristan. This proposal it was alleged was in accordance with Indonesian law and could be swiftly arranged. An application was again made to the South Jakarta District Court for an order relinquishing the care of Tristan to a nominated third party.

Tristan was then removed to an orphanage in South Jakarta where he was visited by a senior social worker with An Bord Uchtála in May and July 2005. Tristan was observed as unsettled, crying a lot, withdrawn and did not engage. Tristan had to adapt from speaking English to Indonesian on arrival at the orphanage. The facility was well equipped and child-orientated, providing reasonably well for the needs of the children resident there. Around the time of May 2003 a potential re-adoption of Tristan by an American Christian family arose but then disappeared as recent Indonesian legislation prohibited inter-religious adoptions. In May 2005 Tristan was moved in accordance with Indonesian state policy to a state run orphanage catering exclusively for children of the Muslim faith. In July 2005, Tristan was observed as being hurt, confused and somewhat bewildered.

In April 2004 the Dowses' solicitor wrote to An Bord Uchtála requesting that Tristan's registering in the Register of Foreign Adoptions be deleted owing to the fact that the South Jakarta District Court had accepted a petition that Tristan be handed over to another couple for re-adoption. Tristan's passport was also returned to the passport office in Dublin. The High Court was highly critical of this statement in the letter as it was clearly at odds with the actual facts of the case and in particular that Tristan was placed in an orphanage and not with new prospective adopters.[21] In any event, enquiries revealed that the registering could not be deleted as the adoption order of the South Jakarta District Court had not been revoked. In 2005 the Dowses commenced proceedings in the South Jakarta District Court to legally surrender Tristan to a named Indonesian couple for the purpose of caring for Tristan until a new adoptive family could be found. The order of the South Jakarta District Court specifically noted that the Government of Ireland was firmly of the view that the surrendering of Tristan to the Indonesian couple did not constitute a cancellation of the adoption and that Tristan remained an Irish citizen.

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[21] [2006] 2 IR 507 at 516 indicating that the order of the South Jakarta District Court did not authorise the placing of Tristan in an orphanage but with an Indonesian couple. Oral evidence was given to the High Court that the South Jakarta District Court was aware that Tristan was to be placed in an orphanage.

Owing to information supplied anonymously to the Irish honorary counsel in Jakarta, investigations were conducted into Tristan's circumstances which caused the Irish embassy in Ankara to question Mr Dowse as to Tristan's circumstances. This correspondence prompted the request to have Tristan's entry in the Register of Foreign Adoptions cancelled. In addition to visits by a senior social worker, both the Irish ambassador to Singapore and Indonesia and the deputy legal adviser in the Department of Foreign Affairs conducted enquiries into the legal position concerning Tristan. The possibility of Tristan being adopted by a Muslim couple residing in Ireland was discounted owing to the lack of such a couple being available and that a move to Ireland was not in the interests of Tristan. This meant that the only real opportunity for Tristan was adoption within Indonesia.

At the request of the High Court a further visit to Tristan was made in October 2005 by the Irish ambassador to Singapore and Indonesia who was accompanied by a number of senior officials of the Indonesian Ministry of Social Affairs. By this time and for no reason or explanation offered, Tristan had been re-united with his natural mother. Evidence was given as to the area, location and living conditions of Tristan. These facts as accepted by the Court[22] are important in the context of the final orders made in favour of Tristan by the High Court. Tristan was living with his natural mother in his great-grandmother's house along with his grandmother, great-grandmother and a step-brother. Tristan's mother was estranged from her husband who was not the father of Tristan whose birth arose from a relationship Tristan's mother had with a man in Jakarta while she was working there. The father abandoned Tristan's mother when he discovered she was pregnant. The living conditions were described as being above the poverty line but could not be described as being well-off. Tristan's mother was not in employment but sourced sewing work for $0.70 per day while Tristan's uncle worked as a cook at a food stall which provided extra food for the extended family. The current education costs of Tristan at kindergarten were $40 enrolment fee and a monthly cost of $1. Formal schooling is free but in reality it costs $7 enrolment fee and $1 monthly fee which increases by 10% to 15% per grade. The average monthly income is $100.

The case initially came before the High Court by way of a plenary summons issued on 30 May 2005 by the Attorney General in his constitutional and legal capacity to protect the interests of an Irish citizen, Tristan Dowse. The Attorney General sought a declaration that the defendants, the Dowses, had failed in their duty under Arts 42.5 and 40.3 of the Constitution to care and provide for their son Tristan. Article 42.5, if satisfied, obliges the state to provide for a child whose parents have failed in their duty towards the child. Article 40.3 obliges the state to safeguard the personal rights of the individual. The consequences of a declaration to this effect would have enabled the state to intervene and place Tristan in state care facilities. The Attorney General also

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[22] The Irish ambassador to Singapore and Indonesia swore an affidavit as to what he observed on his visits in March 2004 and October 2005.

sought specific orders directing the Dowses to fulfil their constitutional duty in relation to providing education and vindicating the personal rights of their son by: providing suitable and appropriate accommodation; period or lump sum payments for his support and maintenance; suitable care and facilities to receive religious, moral, intellectual, physical and social education and to take such steps as the Court might consider appropriate. In addition the Attorney General sought an order directing that Tristan be brought to the jurisdiction so that accommodation facilities and care appropriate to his needs could be provided. The Attorney General made an application in relation to these proceedings on 29 July 2005 and a further set of proceedings were initiated by the Dowses on 5 August 2005 in which directions concerning the entry in the Register of Foreign Adoptions were sought, including a cancellation of that entry and such order as the Court thought appropriate in the best interests of Tristan. A final direction relating to the guardianship, custody, maintenance and citizenship was sought.

What is interesting at this juncture in the proceedings is what might be called a catch-22 situation. The Attorney General's proceedings as issued would only be actionable if properly served upon the defendants. As the defendants were outside the jurisdiction, it is doubtful whether the Attorney General's proceedings could have been maintained. A similar problem arose in the infamous 'X' case,[23] in which a 13-year-old rape victim who was attempting to have her pregnancy terminated in the UK was injuncted by the High Court from so doing on application by the Attorney General.[24] The Supreme Court in the 'X' case cast considerable doubt as to whether X, who was outside the jurisdiction at the time the application was made, was obliged to succumb to the application. At the same time, unless the Dowses instituted proceedings in Ireland to rectify the Register of Foreign Adoptions, the future of Tristan's welfare could not be achieved whilst still registered as a foreign adopted child and would thus remain the child of the Dowses. The authority to delete an entry in the Register of Foreign Adoptions is provided for in s 7(1)(b) of the Adoption Act 1991. The section enables a person to apply to An Bord Uchtála for the cancellation of an entry in the Register. The court may then direct An Bord Uchtála to cancel the entry which has the effect of deeming that no valid adoption order has been made. Save for the right of the Attorney General to make submissions to the court in the hearing of the application to cancel the entry[25] the court possesses no jurisdiction to order directions in relation to the cancellation. This defect was cured by s 15 of the Adoption Act 1998.[26] As

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23 *Attorney General v X* [1992] 1 IR 1.

24 See Ward, 'Ireland: Abortion: "X" + "Y" =?!' (1994–95) 33 University of Louisville J, Fam Law 385–407.

25 Section 7(2)(b) of the Adoption Act 1991.

26 The relevant provisions state: '(1A) The Court shall not give a direction under paragraph (b) of subsection (1) by reason of the fact that an adoption has been set aside, revoked, terminated, annulled or otherwise rendered void under and in accordance with the law of the place where it was effected unless the Court is satisfied that it would be in the best interests of the person who was the subject of the adoption. (1B) Where the Court gives a direction under paragraph (b) of subsection (1), it may make such orders in respect of the person who was the subject of the adoption as appear to the Court to be necessary in the circumstances and in the best interests

indicated earlier, the application sought by the Dowses had significant legal and constitutional implications. A cancellation of the entry in the Register of Foreign Adoptions would have the effect of terminating the parent and child legal relationship whereby the parents of Tristan would have no statutory obligation toward him. More significantly, Tristan would be stripped of his constitutional rights in terms of the obligations owed to him by his parents. Article 42.5 describes the rights of the child in the context of parental duty and obligation as being natural, inalienable and imprescriptible. In addition, Tristan as an individual possesses personal rights which his parents are constitutionally obliged to provide for and which extend beyond just the obligation to educate him.[27] MacMenamin J was of the view that, before he could direct the cancellation of the entry in the Register, he must first be satisfied that the Dowses had failed in their constitutional obligation as mandated by Art 42.5. To put this another way, the Court felt that before it exercised the jurisdiction conferred upon it by statute, it had to be first mindful of the consequences of the exercise of that jurisdiction on not only the legal rights but also on the constitutional rights of the child. MacMenamin J was satisfied that the Dowses had duly failed in their duty, simply on the basis of failing to provide for Tristan's day-to-day care.[28] Pivotal to the Court directing the cancellation was a finding that it was in the best interests of Tristan to do so. The Attorney General successfully argued that it would only be in the best interests of Tristan to end his parents' constitutional obligation to him if appropriate and commensurate alternative arrangements were in place to provide for what he would be constitutionally entitled to expect from the Dowses' according to their means. The Court indicated that the acknowledged constitutional rights of a child to religious and moral, intellectual, physical and social education must be catered for.[29] MacMenamin J contrasted the prospective advantages with the Dowses which would result in a high standard of living in superior and conformable accommodation with a high standard of education to third level. Tristan was likely to be given a good start in life with assistance in purchasing a home and the prospect of acquiring capital assets from inheritance. In Tristan's current circumstances and into the future, his prospects were the polar opposite to that with the Dowses. The Court also noted that the cost of rearing Tristan would fall to his natural mother and that at the same time the Dowses would be relieved of this financial burden.

In light of the above considerations, the Court made a number of orders in Tristan's favour. Owing to the uncertainty of the effect of cancelling the registration, the High Court granted sole guardianship and custody of Tristan to his natural mother, which position in Irish law coincided with Indonesian law. The Court also made a number of financial relief orders. In assessing the level of the award, the Court specifically noted that the standard and cost of

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of the person, including orders relating to the guardianship, custody, maintenance and citizenship of the person, and any such order shall, notwithstanding anything in any other Act, apply and be carried out to the extent necessary to give effect to the order.'

27 *The Adoption (No 2) Bill 1987* [1989] IR 656.

28 *Northern Area Health Board v An Bord Uchtála* [2002] 4 IR 252.

29 [2006] 2 IR 507, 528.

living in Indonesia should not be taken into account but the factors set out in s 20 of the Family Law Act 1995[30] should be taken into consideration to the extent that they could be. The Court was of the view that light regard should be had to the maintenance contribution made to date.[31] MacMenamin J directed that a lump sum of €20,000 be payable within one month, periodical payments of €350 per month being €175 payable to Tristan's mother and the other €175 payable into a capital account for the benefit of Tristan and the amount to be increased in accordance with the consumer price index. A further lump sum of €25,000 was to be paid when Tristan reached the age of 18. The lump sum was directed to be paid into the High Court. To ensure that the periodical payments and lump sum payable at the age of 18 were safeguarded, the Court directed that an insurance policy be put in place to the value of $120,000 in the event that Mr Dowse dies. The Court also directed that Tristan remain entitled to his inheritance rights under the Succession Act 1965 with the express entitlement to bring a s 117 application in such event.[32] The Court also directed that Tristan retain his Irish citizenship.

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[30] The following factors are resorted to by a court in divorce proceedings to determine what ancillary reliefs should be made: (a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise);(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be; (d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another; (e) any physical or mental disability of either of the spouses; (f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family; (g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family; (h) any income or benefits to which either of the spouses is entitled by or under statute; (i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it; (j) the accommodation needs of either of the spouses; (k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring; (l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.

[31] [2006] 2 IR 507, 532.

[32] Section 117 of the Succession Act 1965 entitles a surviving child to petition the court where the child is of the opinion that the deceased parent has failed in their duty toward the child. The court can direct a payment to the child from the estate of the deceased parent.

III REGAINING CUSTODY OF AN ADOPTED CHILD BY THE NATURAL PARENTS

N v Health Service Executive[33] contrasts remarkably with the *Dowse* case. The case concerned a habeas corpus application under Art 40.4.2 of the Constitution directing the production of the child, the centre of the application. The child, Ann, was born in July 2004. At the time of her birth her parents were unmarried and considered placing Ann for adoption and she was placed with the prospective adopters in November 2004. An open adoption was to occur whereby both the natural father and mother of the child would have contact with Ann at least once a year and they would be informed of her development. Subsequent to an access meeting with Ann in August of 2005, the natural mother and father decided not to proceed with the adoption and the natural mother wrote to the adoption board seeking the return of her child. At this juncture relationships between all the relevant parties became strained and the natural parents became suspicious of the authorities and the delay and attitude towards the return of Ann. On foot of legal advice the natural parents married in January 2006 which legal relationship fundamentally altered the position of both the parents and the prospective adopters. The parents then sought the return of Ann on 6 February 2006. Ann had been some 18 months with the prospective adopters. The case took 21 days in the High Court and 3 days in the Supreme Court with the combined judgments running to 218 pages.

The case is of considerable importance regarding the rights of the marital family and the rights of the child as a member of that family as well as the right of a child to have his or her welfare provided for. In the High Court, MacMenamin J directed that Ann remain with the prospective adopters. The Supreme Court unanimously overruled that decision and directed that Ann be returned to her natural parents on a phased basis.

The case is unusual for a number of reasons but most notably for the nature of the proceedings utilised by the natural parents. The habeas corpus application is a declaratory procedure enquiring into the lawfulness of the detention of a person and most commonly brought against the police or prisons. Owing to the seriousness of the enquiry such applications are heard promptly and avoid the otherwise lengthy delays in ordinary litigation and a strategy that ultimately was crucial to the result in this case. Ordinarily the most appropriate application would be under the Guardianship of Infants Act 1964 in which the court could make directions as to the welfare of the child. This is important as the prospective adopters argued that if the natural parents were successful in their application then Ann would have to be immediately handed over with no phased reintroduction to her natural parents and the adopters also suggested that they would not co-operate with any phased reintroduction. In this regard, habeas corpus proceedings prevented the court from making any order other than that the detention was lawful or unlawful and if the latter then custody must be immediately relinquished. On this point the Supreme Court

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[33] [2006] 4 IR 374.

unanimously rejected outright that it did not possess any such jurisdiction. The Court stated it could make any order to protect the welfare of a child particular of such a young age.[34]

The initial High Court decision was seen as an attempt to take a child-oriented approach in custody disputes between parents and third parties.[35] Had the decision stood, then it would have had considerable ramifications for the adoption process. Both the fact finding and legal reasoning were highly dubious and indeed the Court seemed to disregard clear and existing Supreme Court authorities on the issues in dispute in this case.[36] Once the natural parents married, they automatically attracted the protection afforded by Art 41 of the Constitution and more importantly in this case the express right to educate their child.[37] The combined effect of both Art 41, which protects the family in its authority and autonomy, and Article 42, in relation to the right to education, was to create a constitutional presumption in favour of the natural parents that the welfare of their child was best secured by being raised within the marital family. The only way in which this presumption could be rebutted was if there were compelling reasons why the welfare of the child could not be so achieved within the family or there was some failure on the parents' behalf within the context of Art 42.5 of the Constitution. Compelling reasons in this respect required coercive reasons as to why the child's welfare could not be provided for within the natural family. The High Court had skewed the test set out *in Re JH*[38] by enquiring whether there were compelling reasons why the child should not remain with the prospective adopters. There was considerable psychiatric and psychological evidence as to the effect a transfer of custody would have on baby Ann. All agreed that there was a risk to the child's welfare if there was an immediate transfer. They all also agreed that phased transfers of custody could be successful and was not necessarily a risk to the child's welfare. The manner in which the Supreme Court addressed the appeal is quite interesting. Hardiman J approached the appeal from a strictly legal analysis of the High Court interpretation of the law and issues in the case and concluded that the High Court had misinterpreted the law. Fennelly J, having endorsed Hardiman J's approach, then proceeded to analyse the findings of fact in the High Court which he in turn found to have drawn incorrect conclusions from the evidence presented. What is interesting from the approach is that there was some risk to the child's psychological welfare even with a phased transfer of custody, but this risk, in light of the considerable constitutional position and protection afforded by the family unit, was insufficient to rebut the presumption in favour of the parents as the constitutionally appropriate persons to provide for a child's welfare. In relation to the claim that the parents

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34 [2006] 4 IR 374.

35 Ibid at 504, Hardiman J is particularly critical of this concern of the so-called disregarding the rights of children.

36 *In Re JH (inf)* [1985] IR 375.

37 Article 42 of the Constitution.

38 [1985] IR 375.

had failed in their duty under Art 42.5, the only possible evidence of this was the initial decision to place baby Ann with the adopters. This concept was wholly rejected by the Supreme Court.

In light of the authorities the result in the Supreme Court was unsurprising and really confirmed the recent jurisprudence of the Supreme Court on the elevated constitutional position of the family in Irish law.[39]

IV ARTIFICIAL INSEMINATION AND FROZEN EMBRYOS, DISPUTES AND DISAGREEMENT

Two recent decisions highlight how the legal system lags behind medical and scientific advances in artificial reproduction. In particular, the cases demonstrate how the lack of regulation in this area poses potential problems for the system to address by the application of first principles of the law to resolve the disputes that arose. The first case, *MR v TR*,[40] involved a dispute between a married but separated couple over whether three frozen embryos could be implanted to enable the estranged wife to carry a pregnancy and potentially give birth. The second case, *JMcD v PL and BM*[41] concerned whether a child born by artificial insemination could be removed from the jurisdiction without the consent of the sperm donating father of the child.

In *MR v TR*,[42] the plaintiff wife married the defendant husband in March 1992. Following some fertility advice and treatment between 1994 and 1996, the plaintiff became pregnant and gave birth to a son in October 1997. As a result of surgery for an ovarian cyst, the plaintiff received in vitro fertilisation treatment in October 2001. In January of 2001 the plaintiff signed consent forms for the removal of eggs from her ovaries and for the mixing of her husband's sperm with her eggs. Both parties also signed a consent form for the freezing of the embryos and for the ongoing responsibility of them. The defendant also signed a form acknowledging that he was the husband of the plaintiff and that he would become the legal father of any child born of the process. The plaintiff also signed a consent form for the implantation of three embryos into her uterus. The remaining three embryos were frozen. The implantation was successful and the plaintiff gave birth to a daughter in October 2002. Towards the end of the pregnancy, the marital relationship deteriorated and the parties separated.

Subsequently the plaintiff decided that she wanted to become pregnant again and the husband refused his consent to have the remaining three frozen embryos implanted into the plaintiff's uterus. The plaintiff commenced

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[39] *NWHB v HW and CW* [2001] 3 IR 622 discussed in Ward 'Republic of Ireland: The Child and the State', in A Bainham (ed) *The International Survey of Family Law 2003 Edition* (Jordan Publishing, Bristol, 2003) 217.

[40] [2006] 3 IR 449.

[41] [2008] 1 ILRM 89.

[42] [2006] 3 IR 449.

proceedings in June 2004 claiming that the defendant had consented to the implantation of all the embryos into the plaintiff's uterus, a claim that the defendant expressly denied. The Court noted that the various consent forms submitted to the parties by the fertilisation clinic did not avert to the course of action in relation to the three frozen embryos to be taken by the parties or clinic in the event that the plaintiff became pregnant from the first implantation or a change of circumstances such as the death of one of the parties or divorce.[43] The case was pleaded in a particularly complex fashion which included a claim, inter alia, of the right of the plaintiff to vindicate the right to life of the three frozen embryos, the right to family life of both the plaintiff and the frozen embryos, the return of the frozen embryos to the plaintiff and an order preventing the destruction of the three frozen embryos. In the context of Irish constitutional law, these claims in relation to vindicating the right to life of the unborn have troubled the superior courts in the past but in the context of a conflict between the right to life of the mother where at risk from suicide which must override the right to life of the unborn.[44] The Irish superior courts have never been called upon to deal with the residual claims of vindicating the right to family life in the context of enabling the plaintiff to become pregnant and give birth. This claim would have called upon the Court to determine when life begins and whether a frozen embryo falls within the protection afforded under the Constitution. For the purposes of the dispute at hand, the Court decided that the matter could be dealt with by first determining the private law issue that arose. That issue, essentially, was whether there was an agreement, express or implied, between the plaintiff and the defendant as to what should happen to the frozen embryos in the circumstances that arose. The Court analysed the various consent forms signed by the parties[45] and concluded that the plaintiff consented to an implantation of three unfrozen embryos which resulted in a successful pregnancy. In relation to the three frozen embryos, the first defendant stated that there was no agreement as to what was to happen to the three frozen embryos in the event of a successful pregnancy. The plaintiff claimed that the frozen embryos would be used at a later date in the event that the couple remained happily married. In light of the fact that the consent forms were silent on specifically what was to happen in the event of a marriage breakdown between the parties and the defendant's adamant averment that there was no agreement as to what would happen in the event of marriage breakdown, the Court concluded that there was no express agreement as to what would happen in the circumstances that arose and that the defendant did not consent to the implantation of the remaining embryos in the plaintiff's uterus. Further, the defendant did not sign the consent to the transfer of the embryos to the plaintiff's uterus, which was signed by the plaintiff alone, and that consent as signed could not be interpreted as consent to the implantation of the three frozen embryos and thus there was no express consent given by the defendant to the implantation of the frozen embryos.

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43 Ibid at 454.

44 *Attorney General v X* [1992] 1 IR 1 and See Ward, 'Ireland: Abortion: "X" + "Y" =?!' (1994–95) 33 University of Louisville J, Fam Law 385–407.

45 The Court specifically noted that the forms were vague in certain important aspects and that they did not cover contingencies which might arise [2006] 3 IR 449 at 454.

The Court then had to consider whether there was an implied consent given by the defendant to the implantation of the frozen embryos. Here the Court noted that a term may be implied into a contract by reason of the presumed intent of the parties or where the term can be implied from the very nature of the contract itself.[46] The Court was of the view that, on the evidence of the parties and the consent forms, it could not be the presumed intention of the parties that the frozen embryos would be implanted in the event of a successful pregnancy and subsequent marriage failure.[47] As regards implying the term from the nature of the contract itself, the Court was of the view that the only inference to be drawn from the parties' conduct and the signing of the consent forms was that if the first implantation failed the frozen embryos would be implanted. In this regard there were other possibilities that might arise subsequently to a failed implantation such as death of one of the parties, marital separation or divorce. To imply a term into a contract by virtue of the very nature of the contract itself, the Court held that the term must be capable of being formulated with precision and one which both of the parties would have agreed to. With frozen embryos there were a number of possibilities as to what should happen to them and, more importantly, the evidence was very clear that the parties would not have agreed to implantation in the event of marriage breakdown. In these circumstances it was not possible to imply the necessary consent which disposed of the matter before the Court.

In *JMcD v PL and BM*[48] the Supreme Court encountered the first dispute concerning a child born from artificial insemination. The case concerned more the issue of whether to grant an interlocutory injunction than issues relating to parental rights arising from artificial insemination births, but the Court nonetheless shed some light on how such a dispute might be resolved. The plaintiff in this case agreed to donate sperm for the conception of a child given birth to by the first defendant, the natural mother of the child. The child, the subject of the proceedings, HL, was born in May 2006. The plaintiff had entered into an agreement with the first and second defendants, a cohabiting lesbian couple who entered into a civil union ceremony in January 2006. The agreement between the parties was signed on 11 September 2005 in which the plaintiff acknowledged that the defendants were the parents of HL. The agreement also provided, however, that it would be in the HL's best interests to know his biological father and the identity of his biological father. The agreement provided that the plaintiff would be viewed as favourite uncle with the opportunity to visit HL at mutually convenient times. In the event of the

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[46] Citing *Sweeney v Duggan* [1997] 2 IR 531 Murphy J citing MacKinnon LJ in *Shirlaw v Southern Foundries (1936) Ltd* [1939] 2 KB 206 at 207: '*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying: so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course"'.

[47] [2006] 3 IR 449 at 455.

[48] [2008] 1 ILRM 89.

first defendant's death, the plaintiff would continue to have uninterrupted visiting rights and have an input into the best guardianship arrangements for HL.

Subsequently to the birth the plaintiff had regular contact with HL and tendered items to assist with the arrival of HL. Offers of financial assistance with the cost of the birth and the day-to-day costs of rearing HL were refused but the plaintiff did open a trust account for the benefit of HL into which monthly payments were made. By September 2006, the attitude of the defendants had altered and they indicated that they wanted some distance between HL and the plaintiff who had two further visits in October and November 2006 before an injunction was sought restraining the removal of HL from the jurisdiction for a period of one year. The dispute arose when the plaintiff discovered that defendants were planning to visit Australia for a 14-month period commencing in March 2007. The proposed visit was restrained by injunction granted by the High Court on 23 March 2007.

The core issue for the Supreme Court was whether the balance of convenience lay with the applicant in granting the injunction but this issue was examined in light of the legal framework surrounding the position of the single or unmarried father. The law relating to the single father may be briefly summarised[49] as the father having no legal or constitutional right to guardianship, custody or access. Indeed, the single or unmarried father is not even considered, in law, to be a relative of the child. The only right the father possesses is the right to apply to be appointed a guardian of his child[50] and the right to be consulted in any proposed adoption of the child.[51] This starkly contrasts with the position of the unmarried or single mother who possesses an unenumerated constitutional right[52] to the custody and care of her child in addition to specific statutory rights rendering her alone the sole legal guardian of her child.[53] Where an unmarried father applies under s 6A of the Guardianship of Infants Act 1964, the Supreme Court has identified the legal principles applicable in the determination of such an application. Hamilton CJ in *W O'R v EH*[54] stated that the above section does not confer a right to be appointed a guardian of his child or equate him with the position of a married father who enjoys automatic joint custody rights with the mother, but merely entitles the unmarried father to apply to be appointed a guardian of his child. The application is primarily governed by reference to the welfare of the child as the first and paramount consideration. The Court did acknowledge that, in certain circumstances and in the interests of the child's welfare, it may be desirable for the child to enjoy the society, protection and guardianship of his

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49 See Ward 'Republic of Ireland: Judicial and Legislative Family Law Developments' in A Bainham (ed) *The International Survey of Family Law 2000 Edition* (Jordan Publishing, Bristol, 2003) 189 at 198–202.

50 See *G v An Bord Uchtala* [1980] IR 32, *JK v VW* [1990] 2 IR 437 and *W O'R v EH* [1996] 2 IR 248 and s 6A of the Guardianship of Infants Act 1964.

51 Section 4 of the Adoption Act 1998.

52 *G v An Bord Uchtala* [1980] IR 32.

53 Section 6A of the Guardianship of Infants Act 1964.

54 [1996] 2 IR 248.

father as a relevant factor. The extent and nature of any rights in the father arise from the father/child relationship and, where the child is born of a stable relationship and the child is reared by the mother and father in a situation bearing nearly all the characteristics of a constitutionally protected family, such rights would be very extensive.

In the case at hand, Denham J set out the law in relation to the single father and narrowed the issues to whether an injunction should be granted and whether there should be appointed an assessor to prepare a welfare report under s 47 of the Family Law Act 1995. Denham J noted that the High Court was of the view that the balance of convenience issue in granting the injunction had to be addressed by consideration of the child's welfare as the first and paramount consideration. The High Court found as a fact that a bond had developed between the plaintiff and HL which was strongly formed by the plaintiff and likely to be reciprocated by HL. Whilst the injunction would cause inconvenience to the defendants in terms of the employment and accommodation plans that they had made, the balance of convenience favoured the granting of the injunction in that HL could remain in proximity with his father for the purpose of developing the relationship between father and child. Notwithstanding the terms of the contract which did not mention either the superior constitutional or legal position of the mother, the loss of a year's contact with the father was considered critical just as a bond was about to develop between father and child. Denham J's approach was to view the balance of convenience issue as one involving the assessment of factors which cause least injustice to the parties. Denham J stated that, where the risk of injustice to the parties was evenly balanced, there was merit in preserving the status quo. In certain cases, however, there may be special circumstances and factors to consider, and in this application the welfare of the child was such a special factor. Denham J then identified the relevant respective factors presented by the parties.[55] The critical factor, however, was the welfare of HL. On this issue, Denham J, with whom Finnegan J agreed, noted that there was no expert assistance to guide the court on the welfare issue and the matter had to be determined by 'the fulcrum of justice' in seeking the balance of convenience.[56] The 'weighty' factor of HL's welfare satisfied the Court that the injunction should be granted restraining the removal of HL from the jurisdiction.

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[55] In relation to the natural mother these were: HL's welfare was best served being in the custody of the first defendant natural mother; the natural mother has a constitutional right to the custody of her child; the first defendant is Australian and wishes the child to know her extended family; the parties had entered into a written agreement; the first defendant is the primary carer of HL; the defendant's relocation to Australia is a temporary one for a period of 14 months which was a reasonable and proportionate plan; the second defendant is the breadwinner and has taken leave of absence for a year and had secured temporary employment in Australia and the defendants had let their home in Ireland. In relation to the plaintiff, the relevant factors were: he is the natural father of the child; he entered into a written agreement; he has the right to apply for guardianship, access and joint custody; that application was before the High Court; HL is at a formative age.

[56] [2008] 1 ILRM 89 at 98.

Fennelly J dissented on a strongly logical and procedural basis. Fennelly J was of the view that the granting of the injunction would have the effect of determining the outcome of the s 6A application for guardianship in that the status quo would be reserved pending the hearing of the application. The legal analysis of the respective parties was noted and the position of the first defendant was starkly contrasted with that of the plaintiff who possessed no legal or constitutional rights in relation to HL and the second defendant's position as partner of the first defendant was not considered in any way relevant. In relation to the plaintiff, Fennelly J contrasted his factual position with that of the father in *JK v VW*[57] where the conception of the child was a planned pregnancy arising from a long and stable relationship whereas the plaintiff in this case was a sperm donor.[58] Further, Fennelly J noted that the High Court had erred in considering that there was a fair issue to be tried in granting the injunction. The trial judge incorrectly stated that the plaintiff had a right to be appointed a guardian of his child. Fennelly J correctly noted that s 6A of the Guardianship of Infants Act 1964 merely allows an application be brought to be appointed a guardian as opposed to conferring a right to be appointed a guardian of a child. In refusing the injunction, Fennelly J relied upon the statement of Sachs LJ in *Poel v Poel,*[59] the relevant portion being:

> 'The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results.'

Fennelly J's approach is much in line with a strict interpretation of the very limited rights that unmarried fathers possess. The line of authority from *G v An Bord Uchtála*,[60] *JK v VW*[61] to *W O'R v EH,*[62] clearly defines the precise nature of the unmarried father's position. In addition, the case of *HI v MG*[63] is the most recent Supreme Court position in the context of the Hague Convention on child abduction. In that case, the parties went through a Muslim marriage ceremony and a child was born of the relationship. As the marriage was potentially polygamous, it was void according to New York state law thus rendering the father an unmarried father for the purposes of the law. The mother removed the child to Ireland before the father could formalise visitation and paternity rights. The Irish Supreme Court was of the view that New York law was identical to Irish law in this respect and that the father possessed no right whatsoever in relation to the child and no rights could arise from the de facto family life and relationship of the parties. In that regard, as the father was deemed to have no rights of custody for the purposes of the Hague Convention, no order directing the return of the child was granted.

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57 [1990] 2 IR 437.
58 [2008] 1 ILRM 89 at 99–101.
59 [1970] 1 WLR 1469 at 1473.
60 [1980] IR 32.
61 [1990] 2 IR 437.
62 [1996] 2 IR 248.
63 [1999] 2 ILRM 1.

In Fennelly J's view the issue for determination was whether it was normal and reasonable for the sole legal guardian of HL to take the child to Australia for a year. Fennelly J was critical of questioning the necessity of the first defendant in the decision to go to Australia at all, indicating that the decision to go or not was of no concern of the plaintiff who enjoyed no rights whatsoever in relation to HL.[64] The fundamental approach of Fennelly J is one of weighing the respective legal positions of the parties where the defendant possessed all the legal and constitutional rights by comparison with the plaintiff who possessed none. That said, Fennelly J did acknowledge that the welfare of the child had to be the paramount consideration and on this issue it was accepted by all that there was no evidence before the Court as to the effect a year's absence in Australia would have on HL. In the absence of such evidence, Fennelly J could not restrain the lawful guardian from taking her child to Australia.

Notwithstanding the fact that the case does not deal directly with disputes concerning artificial insemination births, particularly in a jurisdiction where such conceptions are not governed by legislation,[65] the case nonetheless highlights a number of issues that need addressing. The first of these is the legal position of the sperm donor. As the case amply demonstrates, such a donor is treated by the application of first principles to his factual reality. This results in placing the sperm donor in the same position as an unmarried father who fathers a child irrespective of the circumstances surrounding the conception and birth. Secondly, the case highlights how agreements entered into between sperm donor and mother who will give birth to the child need to be addressed. The Court gave no particular indication of how it would view such agreements. Fennelly J stated that the Court must attach importance to the agreement but noted that the agreement in this regard was difficult to reconcile with the notion of the plaintiff becoming a guardian of HL.[66] This reference indicates that the contents of the agreement will be scrutinised to ascertain what legal rights are conferred upon the parties. Denham J in her judgment merely noted that the agreement was a factor to consider in the totality of the application and where the balance of convenience lay.[67] A third issue is that of whether the welfare of a child in these circumstances is best served by being brought up by a same-sex female couple one of whom is the natural mother of the child or by such a person with access to another person whose only relationship to the child is that of sperm donor. On this critical issue, Fennelly J expressly declined to give any guidance.[68]

Of the four judges involved in the hearing of the first instance and appeal to the Supreme Court, three[69] of the four were mindful of the fact that some bond had developed between the plaintiff and HL and were at least prepared to infer that damage to that bond might occur if a period of 14 months was to elapse

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64 [2008] 1 ILRM 89 at 103.
65 See Human Fertilisation and Embryology Act 1990 in the UK.
66 [2008] 1 ILRM 89 at 102.
67 Ibid at 98.
68 Ibid at 104.
69 Denham, Finnegan and Abbot JJ.

without contact between plaintiff and child. Fennelly J was not prepared to infer such and wanted expert evidence to assist him in determining that issue and, in the absence of such evidence, the plaintiff had failed to discharge the burden placed upon him seeking the injunction. From this stance by the other three judges, one can identify a child-orientated approach to the issue. The three judges clearly felt the status quo should remain until the issue of guardianship was determined. Fennelly J's logical analysis in this regard is convincing and could only be defeated by a strong child welfare orientated approach whereby the Court was prepared to avert any potential threat to the child's welfare whether proven to the Court's satisfaction or not.

V ADVANCING THE POSITION OF THE UNMARRIED FATHER

Notwithstanding the above clear position on the unmarried father in Irish law, a major development in the recognition of some form of parental rights has occurred in the case of *T v O*.[70] The case involved a number of courts in both the Republic of Ireland and the UK and was in essence a child abduction issue for determination under the Hague Convention. The case concerned twin boys born in October 2004 of an Irish father and a mother who held both Irish and British citizenship. The couple met in late 2003 and set up home together in early 2004. By February 2004 the mother was pregnant and gave birth to the twin boys in October 2004. After some temporary work placements in Wales and the Isle of Man where the twins were born, the couple returned to Ireland in July 2005 with the twins until the mother left with the boys in January 2007.

The father commenced proceedings in the District Court in February 2007 seeking to be appointed a guardian of the children, joint custody and access. Those proceedings were adjourned on a number of occasions. In July 2007 the father instituted High Court proceedings in England and Wales seeking the return of the children under the Hague Convention on Civil Aspects of International Child Abduction and under Council Regulation 2201/2003. The English High Court adjourned the proceedings seeking a determination from the Irish High Court as to whether the removal or retention of the children was wrongful within the meaning of Art 3 of the Convention or Art 2 of the Regulation. The answer to that question was that the removal and retention was wrongful. There is nothing remarkable in the conclusion but how it was reached is significant in providing protection to unmarried fathers who until now fell foul of the strict application of the case-law[71] on the Convention and the interpretation of it.

Significant reliance was placed upon the incorporation of the European Convention on Human Rights into Irish law by the European Convention on

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[70] Unreported, High Court, 10 September 2007.

[71] *HI v MG* [2000] 1 IR 110, *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, *B v UK* [2000] 1 FLR 1.

Human Rights Act 2003. McKechnie J rejected that the interpretation by the Supreme Court of the legal and constitutional position of the unmarried father could be altered by the coming into effect of the 2003 Act whereby the Convention case-law[72] could be superimposed upon the existing Irish jurisprudence to achieve a result that for Hague Convention purposes the unmarried father possessed rights of custody thereby rendering the removal or retention wrongful. In any event, the applicant father in this case had not sought a declaration of incompatibility regarding his position in Irish law.

The manner in which the removal and retention were found to be wrongful was by virtue of Council Regulation 2201/2003, or Brussels II as it is commonly referred to. The core issue was simply whether under Art 2(11) the applicant father in this case exercised rights of custody. The existing case-law under the European Convention on Human Rights is very clear on the position of the unmarried father whose right to respect for family life has been acknowledged and reiterated on many occasions.[73] Article 6(2) of the Treaty of the European Union expressly incorporates the European Convention on Human Rights thereby giving effect to the case-law and protection for the unmarried father's right to respect for family life. In this regard the protection afforded by Art 2(11) of Council Regulation 2201/2003 obliged the Court to interpret the concept of rights of custody in accordance with the jurisprudence of the European Court on Human Rights on Art 8. The Court was satisfied that the applicant father had performed duties and undertaken responsibility towards his children and such should be recognised as rights of custody for the purposes of Art 2 of the Regulation.[74] The Court also found that the removal of the children in January 2007 and their retention in the UK in February 2007 was an unlawful retention and a breach of rights of custody vested in the District Court. The Court was of the view that the children were still habitually resident in the Republic of Ireland as of that date and the application to the Court concerning guardianship, custody and access was a breach of the Court's rights in relation to the children.

It has taken some 41 years to advance the position of the unmarried father in Irish law. Since *The State (Nicolaou) v An Bord Uchtála*[75] the Irish superior courts have consistently denied the unmarried father any automatic rights to

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72 *Johnson v Ireland* (1987) 9 EHRR 203, *Keegan v Ireland* (1994) 18 EHRR 342, *Lebbink v The Netherlands* (2005) 40 EHRR, *Kroon v The Netherlands* (1995) 19 EHRR 263, *Elscholz v Germany* (2002) EHRR 1412.

73 *Johnson v Ireland* (1987) 9 EHRR 203, *Keegan v Ireland* (1994) 18 EHRR 342, *Lebbink v The Netherlands* (2005) 40 EHRR, *Kroon v The Netherlands* (1995) 19 EHRR 263, *Elscholz v Germany* (2002) EHRR 1412.

74 Unreported, High Court, 10 September 200 at 59. There was very clear evidence that the applicant father had played a considerable parenting role with the children since their birth at which the father was present. The children were born of a stable relationship and indeed the parties got engaged in July 2005. There was evidence that the applicant father was the primary carer of the children and thus the removal of the children without his knowledge or consent was a clear breach of his rights of custody.

75 [1966] IR 567. This case first established that the unmarried father possessed neither constitutional nor legal rights in relation to his child.

guardianship or custody thus leaving the unmarried father in a precarious position particularly in child abduction cases. This decision in *T v O* is significant in providing protection for the unmarried father in abduction cases and it is the first decision to acknowledge and protect the unmarried father. It should, however, be stressed that the protection afforded the unmarried father in this case arose from the fact that the father had played a significant parenting role towards the children from their birth and would be easily compared to a married father who would automatically acquire rights of guardianship and custody upon the birth of a child.

Israel

THE VOICE OF THE CHILD IN THE ISRAELI FAMILY COURT

Rhona Schuz[*]

Résumé

Il a souvent été dit que l'impact principal de la Convention des Nations Unies sur les droits de l'enfant (ci-après CIDE) dans le monde occidental, a été celui du droit de l'enfant de participer aux décisions qui le concernent tel que prévu par l'article 12. Ce droit est principalement invoqué dans le cadre des procédures judiciaires impliquant les parents lorsque celles-ci concernent l'enfant. Il n'est donc pas surprenant de constater que dans le courant des vingt dernières années la question de savoir comment on peut le mieux tenir compte de l'avis de l'enfant dans de telles procédures, a été largement débattue tant dans les prétoires et les parlements que parmi les chercheurs du monde juridique et des sciences sociales. L'objet du présent texte est de décrire et d'analyser la façon dont le système juridique israélien répond à cette nécessité de la prise en compte de l'opinion de l'enfant dans les procédures familiales qui le concernent. Nous le ferons particulièrement à la lumière des développements importants en 2007. Cet article compare les solutions du droit interne israélien en matière de droit de garde et de droit de visite avec celles proposées dans le cadre de l'application de la *Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants* (ci-après la *Convention sur l'enlèvement*), tant en ce qui concerne les règles de procédure qui garantissent le droit de parole de l'enfant, qu'en ce qui a trait au poids relatif accordé à son opinion.

En matière de garde, il n'existe pas de cadre normatif garantissant l'effectivité du droit de parole de l'enfant. Même si les juges ont le pouvoir d'entendre les enfants, on constate que peu d'entre eux l'exercent. Pourtant, le Comité Rotlevi, mis sur pied en vue d'évaluer les implications de la ratification de la CIDE par Israel, recommandait dans son rapport déposé en 2004, de légiférer afin de garantir le droit de participation des enfants dans les procédures judiciaires qui les concernent. Selon le Comité, tout enfant impliqué dans des procédures familiales devrait se voir offrir l'occasion de s'exprimer dans des conditions qui tenant compte de son âge et de son degré de discernement. Un projet pilote a été mis sur pied en 2007 au sein de deux tribunaux de la famille. Ce projet prévoit que les

* Senior Lecturer and Director of the Centre for the Rights of the Child and the Family at Sha'arei Mishpat Law College, Israel. Visiting Lecturer, Law Faculty, Bar Ilan University. This paper is an expanded and updated version of a paper given at the European Regional Conference of the International Society of Family Law in Chester, UK in July 2007.

enfants de plus de 6 ans sont invités à être entendus par un juge ou, s'il le préfèrent, par un travailleur social qui agit alors comme relais entre l'enfant et le tribunal.

À l'opposé, les règles de la procédure civile israélienne prévoient expressément que dans les cas relevant de la *Convention sur l'enlèvement*, «Lorsque l'âge et la maturité de l'enfant permettent de tenir compte de son opinion, la Cour n'entendra pas la cause sans avoir d'abord entendu l'enfant, à moins que la Cour ne conclue que cela n'est pas nécessaire en raisons de motifs particuliers qui doivent être actés». Alors que cette disposition semble très claire, de nombreux juges s'appuient en pratique sur toutes sortes de raisons pour ne pas entendre directement l'enfant victime d'enlèvement, préférant s'en remettre à un rapport d'expertise. Les juges invoquent plus particulièrement le fait qu'il n'est pas nécessaire d'entendre l'enfant et qu'ils ne disposent pas des outils nécessaires pour évaluer la fiabilité de l'opinion exprimée par l'enfant ou, encore, qu'une rencontre entre un juge et l'enfant peut être lui être dommageable. Le présent texte entend démontrer que ces raisons ne sont pas convaincantes. Une décision de la Cour suprême rendue en août 2007 semble heureusement annoncer un changement d'approche. Les juges majoritaires concluent que le premier juge a eu tort de ne pas rencontrer un enfant et ils précisent que les enfants doivent normalement être entendus directement par le tribunal afin de permettre la prise de décisions éclairées, mais aussi par respect pour l'enfant en tant que personne.

Il ne suffit pas de permettre à l'enfant de s'exprimer. Si son opinion n'est pas prise au sérieux, son droit de participation reste lettre morte. Lorsqu'il s'agit de l'intérêt de l'enfant, une lecture attentive de la jurisprudence israélienne montre bien que de nombreux juges préfèrent s'appuyer sur leur propre expérience ou sur celle des experts, plutôt que sur les volontés exprimées par l'enfant, jugeant que même les enfants matures sont lourdement influencés par les adultes de leur entourage et qu'ils ne peuvent pas vraiment comprendre les véritables enjeux de la décision à prendre. Ce phénomène s'observe surtout dans les affaires d'enlèvement international pour lesquelles la Cour suprême a établi des conditions très strictes en ce qui concerne la prise en considération du refus de l'enfant d'être retourné dans son pays d'origine. La Cour exige, en particulier, que le refus de l'enfant soit clair et qu'il soit exprimé avec une certaine force. Le présent article critique la manière étroite dont les tribunaux interprètent ces conditions, tant parce qu'elle constitue une violation du droit de l'enfant à la prise en considération juste de son opinion garantie par l'article 12(1) de la CIDE qu'en raison du fait qu'une telle approche neutralise ni plus ni moins l'exception du refus de l'enfant prévue par la *Convention sur l'enlèvement.*

En résumé, on peut dire que malgré des progrès indéniables en matière du droit des enfants d'être entendus, de nombreux tribunaux israéliens ont encore tendance à adopter une attitude paternaliste quand il s'agit des volontés de l'enfant et du poids qu'il convient d'accorder à son opinion.

I INTRODUCTION

It is often claimed that the greatest impact of the United Nations Convention on the Rights of the Child (CRC) in the Western world has been in respect of

children's right to participate in the making of decisions concerning them as entrenched in Art 12. This issue arises in many fields such as the right to agree to or to refuse medical treatment and the rights of pupils within educational establishments. However, by far the most significant context in which the child's right to participate arises is in relation to legal proceedings, between his parents, which concern him. Thus, it is not surprising that in the last two decades the question of how best to take into account the child's views in such proceedings has been widely discussed not only by courts and legislatures, but also by legal and social science researchers.[1] One of the central issues about which there is no consensus is whether the child should be heard directly by the court making the decision or whether he should be interviewed by a social worker or mental health professional who will then report to the court. Some may consider the combination of the two methods as optimal. In addition, there is a divergence of opinions in relation to the weight to be given to the child's views.

The purpose of this paper is to describe and analyse the Israeli legal system's response to the recognised need to take into account the child's views in family proceedings concerning him and, in particular, the important developments which occurred in 2007. It will be convenient to compare the development of the Israeli law in custody and visitation cases with that in cases under the Hague Convention on the Civil Aspects of International Child Abduction ('the Abduction Convention').[2] We will distinguish between the procedure for ascertaining the child's views and the weight to be attached to those views.

II ASCERTAINING THE CHILD'S VIEWS

(a) Custody cases

(i) Background

The need to take into account children's views in custody cases has long been recognised by Israeli Courts, both secular and religious.[3] However, whilst the courts have always had jurisdiction to invite the child to speak to them directly, most judges seem to have preferred to rely on the report of the child's wishes contained in a social work assessment or expert opinion.

Whilst, after Israel signed the CRC in 1990, some judges made comments about the child's participation rights and the necessity to hear the child directly in the

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1 See, for example, Raitt 'Hearing the Child in Family Law Proceedings' (2007) 19 Child And Family Law Quarterly 204 and May and Smart 'Silence in Court Hearing Children in Residence and Contact Disputes' (2004) 16 Child And Family Law Quarterly 305.

2 The Hague Convention on the Civil Aspects of International Child Abduction was brought into force in Israel by the Hague Convention (Return of Abducted Children) Law 5751–1991.

3 For discussion of the approach of Jewish law, see Shochetman 'Consideration of the Wishes of a Minor in Child Custody Cases' (2005) 4 Netanya Academic College Law School Review 545 (Hebrew).

light of Art 12 of the CRC,[4] empirical research conducted in relation to divorces, which took place in the late 1990s, shows that this rhetoric is not reflected in the situation on the ground.[5] According to this research, most judges in both secular and religious courts rarely meet with children.[6] In particular, in the vast majority of divorce cases, the parents agree as to the custody of the child, and the divorce agreement, which includes provisions for the children, is approved by the court without question. The research reveals that in such cases the parents rarely consult with their children about the custody and visitation arrangements.[7] Moreover, even where the parents resolve their differences about the arrangements for the children by mediation, there is rarely any involvement of the children in the process.[8]

(ii) The Rotlevi Report

In 2003–04, the Rotlevi Committee, which was set up by the Israeli Minister of Justice to review the basic principles in the area of the child and the law and their implementation in primary legislation in order to ensure compliance with the state's obligations under the CRC, published six comprehensive reports containing draft legislation.[9] Two of the reports deal with aspects of the child's right to participate in proceedings affecting him: 'The Child and his Family' and 'Separate Representation of Children in Civil Proceedings'.

'The Child and his Family' recommends adding a chapter to the Family Court Law 5755–1995 which will regulate the participation of children in proceedings affecting them and attaches a proposed law which contains 15 sections. The proposed law starts with the statement of principle that every child has the right to express his feelings, opinion and position and to be heard freely in every matter affecting him, which arises in the Family Court. The proposed law then goes on to state that in order to enforce this right, the child should be given the opportunity to express himself in a manner which is appropriate for his age, developing capacities, his wishes and his needs, and insofar as possible directly before the judge who is hearing the case.

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4 See, for example, Family Appeal 90/97 *Moran v Feldman-Moran*.

5 See Hacker 'Excluding Children from Divorce Proceedings' (2006) 22 Hamishpat 63 (Hebrew). See also *Report on the State of Israel Implementation of the Convention on the Rights of the Child* (2001) at 93, where it is stated that there is no consistent general policy in relation to hearing children's views in relation to matters affecting them and that whether the child is heard depends on the attitude and opinion of the particular judge.

6 Ibid 68–69.

7 Ibid 66–67. It should be noted that Israeli case-law holds that divorce agreements do not bind the child and that if he is not satisfied with the arrangements made for him, he can apply independently to the court. However, of course, most minors will not know of this right and will not be in a position to realise it.

8 One mediator, interviewed in the research, took the view that she could protect the interests of the children well enough without their participation: ibid 67.

9 For a general discussion of the reports, see Schuz 'Surrogacy and PAS in the Israeli Supreme Court and the Reports of the Committee on Children's Rights' in A Bainham (ed) *The International Survey of Family Law 2004 Edition* (Jordan Publishing, Bristol, 2004) 247, 264–268.

The proposed law lists various methods by which the child might be heard including: (i) in writing by the child; and (ii) by means of the adult accompanying the child (see below). In cases where the child is 9 years' old or older, he should be heard directly by the judge unless there are special reasons why this is not possible. In addition, the report recommends entrenching in legislation the requirement of special training for family court judges in how to talk to children.

An important feature of the proposed law is the requirement for the court to appoint an adult to accompany every child who is affected by Family Court proceedings. For this purpose, the proposed law provides for the setting up of a Department for the Accompaniment of Children in the Welfare Unit of every Family Court. The functions of the adult accompanying the child are, inter alia, to provide the child with information about the legal process, to explain to him his rights including his right to be heard, to explain to him the importance of participating in the proceedings and to encourage him to express his views. In relation to younger children, the adult accompanying the child may make known to the court the child's views. However, in relation to older children, the accompanying adult will not talk to the court instead of the child. Rather he may give guidance to the child before the meeting with the judge.

The proposed law provides two exceptions to the requirement that the child be heard. First, the court may decide that the child should not be heard where it is convinced that, for special reasons, hearing the child will cause a greater violation of the child's rights than if he is not heard. Secondly, in cases where the parties request from the court approval of an agreement which they have reached by themselves, the court should investigate whether the parents have given the children sufficient opportunity to express their views before coming to the agreement. If the court is satisfied that the child's right to be heard was sufficiently realised in the parental decision-making process, then it may approve the agreement without involving the child any further. However, where the court is not so satisfied, it will make provision for hearing the child. This arrangement is a compromise between the need to make sure that the child's voice is heard in the course of the parental negotiations about custody and visitation on the one hand, and the concept that the child should not be exposed to external agents if this is not necessary in a case where the decision is being made within the family and not by a third party.

The Sub-Committee on Separate Representation for Children in Civil Proceedings recommended widening the situations in which the court appoints separate representation for children. Where a child over the age of 12 years expresses a strong opinion, a lawyer will be appointed for him, unless he requests otherwise. Where the child is under 12, the court will appoint a guardian ad litem[10] 'wherever the court finds that there is a risk that without such an appointment the child's rights, needs or interests are likely to suffer real damage'.[11]

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[10] The guardian ad litem's function is to present to the court what is in the child's best interests.

(iii) The pilot project and accompanying Regulations

In accordance with the recommendations of the Rotlevi Committee, a 2-year pilot project has been set up to test out the scheme for hearing children in Family Court proceedings. The project, which commenced in September 2007, is being conducted in the Family Courts in Jerusalem and Haifa and is being accompanied by research, which will be published. The Regulations which govern the project,[12] whilst similar to the Rotlevi proposals, are different in a number of ways and make provisions for issues not discussed by Rotlevi.

In the key regulation, entitled 'the child's right to be heard', it is provided that in certain types of family proceedings[13] the court 'shall give the child the opportunity to express his feelings, his views and his wishes in relation thereto … and will place appropriate weight on them in making its decision, in accordance with the child's age and with his degree of maturity'.[14] The Regulations go on to provide that children aged 6 and over will be heard, but that younger children may also be heard if the court thinks it appropriate. Children are to be heard without their parents present, and usually siblings should be heard separately rather than together. The Regulations do not refer to the need for the parents to agree to the child being heard, but in practice children will not be heard unless both parents agree.[15]

The procedure for hearing a child is as follows. The court invites the child to come to a preliminary meeting in the Welfare Unit of the court. Explanatory material both for the parents and the children is sent with this invitation. At

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However, the draft law specifically states that where the younger child's wishes do not accord with the guardian ad litem's perception of his welfare, the guardian is obliged to present the child's wishes to the court.

11 In deciding this the court is to consider the real possibility of a conflict of interests in one of the following circumstances: (i) the minor is under 12 and has expressed a clear opinion on the matter under discussion; (ii) there is a difficult dispute between the parties; (iii) there is lack of contact or lack of co-operation between the child and his parents; (iv) the minor does not have parents, or the parents cannot be identified, or one of the parents has been declared incompetent; (v) it is alleged that the minor is a victim of a sexual offence, violence, abuse or neglect by a parent or other party to the proceedings; (vi) there is a cultural or religious dispute between the parties, which affects the way of life of the minor; (vii) there is a dispute about the medical treatment for the minor; (viii) the length of the proceedings is likely to harm the minor; (ix) the issue that arises is particularly complex or the minor's position is under discussion in parallel in more than one court.

12 Civil Procedure (Hearing Children) Regulations 5767–2007.

13 The relevant proceedings are those described in para 6(c) of the Family Courts Law 5755–1995 viz proceedings under the Legal Capacity and Guardianship Law 5722–1962 including rights of custody, education, visitation, ensuring contact between a minor and his parent or a minor's departure from Israel. The Regulations specifically provide that they do not detract from the jurisdiction of the court to hear children in any proceedings in accordance with any law.

14 Authors' translation. The same regulation goes on to provide that the court is allowed not to hear the child where it is convinced that the harm which will be caused to the child by realisation of his right to be heard is greater than that which will be caused to him by negating that right. This provision accords with the Rotlevi recommendations.

15 This information was given to the author in an unofficial telephone conversation with a social worker from one of the Welfare Units participating in the project. According to this social worker, parents were more likely to agree in high conflict cases than in more amicable divorces.

this meeting, a social worker will speak to the child by himself and explain to him, in a way which is appropriate to his age and degree of maturity, that he has a right to be heard by the judge who is deciding the case or by a social worker from the Welfare Unit, as he chooses.[16] In addition, the social worker will explain the purpose of being heard and the rules of confidentiality. If the child wishes to waive this right, he may make his views known to the judge in writing or via some other means.

Where the child opts to be heard by a social worker from the Welfare Unit instead of the judge, a transcript of the child's words together with the social worker's impression of the child will be passed to the judge. Whether the child is heard by the social worker or the judge, the transcript of the meeting is to be treated as confidential[17] and is to be placed in a safe in case it is needed by an appeal court. The court is not to disclose in its decision details of what the child said unless the child agrees and the court decides that disclosure will promote the child's welfare. The regulations do not address the problem of giving a transparent judgment without disclosing the child's views.[18] Where a child has been heard either directly or indirectly, the court is to explain its decision to the child in a way that is appropriate for his age and level of maturity.[19]

In addition, the Regulations provide for the situation where the parents come to an agreement between themselves regarding the arrangements for the children. Where the parents apply to the court for approval of an agreement relating to a family matter concerning children, the court will send to the parents an explanation about the importance of 'hearing' their child in relation to the matters affecting him before submitting the agreement for approval. In addition, before approving the agreement, the court will clarify whether the child was heard. Where necessary, the court may refer the parents to the Welfare Unit in order to receive information and guidance about 'hearing' their child. It should be noted that this provision is more moderate than that of the Rotlevi Committee in that it does not provide for the court to hear the child in such cases instead of the parents. Rather, the court will withhold its approval until it is satisfied that the child has been heard by his parents.

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16 In practice, when children come to the Welfare Unit for the preliminary meeting with the social worker they often did not want to come back again to talk to the judge and so opt to express their views there and then and for the social worker to pass them on to the judge (telephone conversation, above n 15).

17 However, in practice it seems that where the child is interviewed by a social worker, the latter's report will not be treated as confidential if the child does not mind and the social worker does not think that there is any need for confidentiality on the basis that confidentiality can cause suspicion and so may do more harm than good (telephone conversation, above n 15).

18 See Raitt above n 1 at 220–223 who reports some creative solutions adopted by the judges she interviewed.

19 The problem of the child hearing about the decision second hand from one of the parents was raised by Baroness Hale of Richmond at the European Regional Conference of the International Society of Family Law in Chester in July 2007.

Finally, the regulations provide that, where mediation is taking place under the auspices of the court, the child may be invited to be heard by the mediator if both the parents agree. Presumably if the child is not heard, the parents will have to convince the court that they have heard him before the agreement, which they reach via mediation, can be approved.

It will be seen that these Regulations implement most of the proposals of the Rotlevi Committee. The main element that is missing is the appointment of an adult to accompany a child in each case, the implementation of which would have demanded considerable resources. Furthermore, the unwritten need for parental agreement clearly undermines substantially the right of the child to be heard.

(b) Abduction Convention cases

(i) The provisions of the Abduction Convention and the Israeli Regulation

Article 13(2) of the Abduction Convention provides:

> 'The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.' ('the objection exception')

The Abduction Convention does not make any provision for ascertaining the child's views. Thus, each country may invoke its own procedures for determining whether the objection exception is established. In Israel, reg 295(9) of the Civil Procedure Regulations,[20] provides:

> 'Where a child is of sufficient age and level of maturity that it is appropriate to take into account his views, the Court shall not decide the case before it hears the child, unless the Court does not see any need for this for special reasons which will be recorded.'

This regulation appears unique. Although there are a few other countries where it is usual to hear the child directly,[21] and other countries where judges occasionally meet with children, we are not aware of any other regulation requiring judges to meet with all sufficiently mature abducted children whether or not the objection exception has been raised. In particular, the Brussels II

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[20] Author's translation. In 1996, a whole chapter (numbered 22(1)) dealing with the procedure in Abduction Convention Cases was added to the Civil Procedure Regulations 5744–1984.

[21] For example, in Germany, Denmark and the Netherlands, children over 12 are always heard directly.

Regulations,[22] whilst providing for sufficiently mature children to be heard in all Abduction Convention cases, do not require that the child be heard directly by the judge.[23]

Thus, the Civil Procedure Regulations appear to take a very enlightened approach to the child's right to be heard in Abduction Convention cases, despite the fact that, as we saw above, in other family proceedings there is no general requirement for judges to meet with children.[24]

(ii) The approach of the courts to ascertaining the child's views in abduction cases

First, it should be pointed out that, whilst the Rotlevi recommendations would appear to apply to all cases in the Family Court which affect children, the pilot project described above only covers certain types of proceedings listed in the Regulations, which do not include abduction cases.[25]

Perusal of the Israeli case-law on Art 13(2) of the Abduction Convention reveals that the importance of hearing children directly has not yet been internalised by most Israeli judges at all levels of the judicial hierarchy. Thus, whilst there are judges who do meet with abducted children, there is a significant number who, preferring to rely on expert reports, invoke the exception to the requirement to hear the child directly in the Civil Procedure Regulations. It seems likely that this latter approach reflects reservations of Israeli Courts in other types of cases, and of judges in other countries to hearing children directly.[26] Thus, it is worthwhile to consider the three main reasons given by the judges for not hearing children directly in abduction cases. At the outset, we would comment that none of the reasons are special and thus do not appear to come within the exception in the Civil Procedure Regulations.

No need

There are two possible scenarios in which the court might take the view that there is no need to hear the child. The first is where, even without hearing the child, the court is convinced that the child's objections to being returned should be upheld.[27] In such a case, presumably the child does not need an opportunity to be heard directly because his views have been taken into consideration. This was the case at first instance in the case of *PR v TAE* ('the *Italian Saga*').[28] The judge was convinced from the expert's report and her testimony that, despite

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22 Brussels II Revised Regulation (EC) 2201/2003, Art 11.2.

23 See per Baroness Hale in *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL 51, para 60.

24 Except under the pilot project discussed above.

25 See above n 13.

26 There is no need for the reservations to be expressed where there is no legal requirement to hear the child directly in the first place.

27 This seems to have been the case in *CC 1510/96 Romaalda v Baumel* (District Court, Israel) (unreported).

28 *Family Application 14830/05 PR v YAE* (published in nevo.co.il). The appeal of the case to the

her contrary conclusion, the objection exception was established, without hearing the children directly. However, this case illustrates the danger of relying on the 'no need' exception in such a case. On appeal, both the District Court and the Supreme Court took a different view of the expert's report and were not satisfied that the child's objections were genuine and independent. If the judge had reached the conclusion that the objection exception was established after hearing the child, it would have been harder for the appeal court to overturn the decision.[29]

The second and more common scenario is where the court is convinced that the child's objections ought not to be upheld either because they are not genuine or because of age or lack of maturity. This conclusion will usually be based on an expert's report together with the court's preconceived ideas about the weight to be given to the views of kidnapped children.

Thus, in the case of *Plonit v Ploni*[30] the District Court, upholding the Family Court's refusal to meet with the 8 and 12-year-old girls who allegedly objected to being returned to Italy, held that there was no need to meet with the girls because there was sufficient evidence before the court to show that the objection defence had not been proven. This conclusion was based both on the welfare officer's report that no weight should be attached to the children's views because they were confused and torn between two parents, and on research which claimed that a child who has been abducted is dependent upon the abductor like a person who has been brainwashed.

In addition, in the *Italian Saga*,[31] the Supreme Court rejected the argument that the children should have been heard directly on the basis that the children's position had been adequately brought to the notice of the court by the expert.[32]

District Court is *Family Appeal PR v YAE 151/05* (published in nevo.co.il). The appeal of the case from there to the Supreme Court is *Request for Family Appeal 672/06 Ploni v Plonit* (published in nevo.co.il)

29 But see *Request for Family Appeal 902/07 Plonit v Plonim* (published in nevo.co.il) ('the Dutch Saga') where the Supreme Court by a majority of 2–1 upheld the decision of the District Court *(Request for Family Appeal 393/06*) to return the children to Holland, despite the fact that the first instance judge (*Family Application 15150/06*) had held that the child objection exception was established on the basis of her meeting with the children. The District Court was not satisfied that the judge had been able to assess the genuineness and independence of the objections in a short meeting in the absence of an expert report.

30 *Family Appeal 28/97 Plonit v Ploni* (District Court, Israel).

31 Above n 28.

32 With respect, it is very difficult to accept this view in light of the expert's opinion that the girl's views were not authentic and that children of their age did not have sufficient insight to make such decisions. How could she possibly convey accurately the children's views to the court? In particular, the court record of the expert's evidence does not even refer to the reasons given by the children for their objections.

Court's lack of professional tools

In the *Italian Saga*,[33] Justice Procaccia in the Supreme Court commented that it was doubtful if any benefit would result from the court meeting with the children, since ascertaining their wishes was extremely difficult in the light of the pressure and influence to which they were subject from the father's extended family. Thus, identifying their real wishes, as opposed to the external verbal expression of them, should be left to experts who had reliable professional tools at their disposal.

Similarly, in the *Dutch Saga*[34] the District Court held that there was not sufficient professional foundation upon which to base the conclusion that the objection exception was established. In particular, a single meeting between the judge and the children was not sufficient to ascertain their genuine wishes in the absence of an expert report.[35]

Harm to the child

In a number of cases, the court's decision not to meet with the children is based on its concern that such a meeting will cause harm to the child. For example, in *Plonit v Ploni*,[36] the decision not to meet with the girls was also based on the Welfare Officer's claim that such a meeting might be harmful to them without spelling out the exact nature of the harm. It is assumed that the concern was that forcing girls who were in a state of bewilderment and confusion to make a decision would cause them psychological damage. Similarly, in the *Italian Saga*, the Supreme Court explained that requiring the children to meet with the judge in order to state a preference between their parents was liable to be harmful to the children because of the atmosphere of pressure by which they were surrounded during the legal proceedings.[37] Thus, in the Court's view, the damage caused by meeting the children was liable to be greater than any potential benefit therefrom.

(iii) A new approach

A Supreme Court decision from August 2007 provides hope that there will be a change in judges' approach to hearing children directly both in abduction and other types of cases. In *Plonit v Ploni* ('the *Belgian Saga*'),[38] the majority held that the lower instance judges were wrong not to hear the eight-and-a-half-year-old child directly and, allowing the appeal against the return order,

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[33] Above n 28.
[34] Above n 29.
[35] Above n 29 (District Court).
[36] Above n 30.
[37] Above n 28 (Supreme Court). Similarly, in the Dutch Saga (above n 29), the District Court expressed the view that since children are in a dilemma, torn between their parents, it is not appropriate to burden them with such a heavy decision.
[38] *Request for Family Appeal 5579/07 Plonit v Ploni* (published in nevo.co.il).

ordered that the child should be heard by the District Court, unless the psychologist who would be examining the child found that such a meeting would be harmful to the child.

Justice Arbel gives two main reasons why children should normally be heard directly by the court. First, such a hearing will inform judicial decision-making. She explains that the judge will be in a better position to make an informed decision about the child's views when he can form an impression of the child. He may gain insights from a face-to-face meeting, which could not be gleaned from reading a written report. Secondly, citing Art 12 of the CRC and the Rotlevi Reports, Justice Arbel states that hearing the child directly shows respect for the child as an individual and conveys the message that his views about his future are important and that he is not simply a chattel to be shuttled around by his parents.

It is noteworthy that Justice Arbel indirectly gives an answer to the three reasons given by judges for not hearing children directly discussed above. First, her explanation of the intrinsic value in the child's participation in the decision-making process refutes the 'no need' argument and to a large extent the 'lack of professional tools' argument. Since she considers that an expert report should always be commissioned in order to provide the widest possible factual and theoretical basis for making such a critical decision, the judge's meeting with the child will be in addition to, and not instead of an expert assessment. Finally, she deals with the 'harm' argument by making the direct hearing dependent on the expert's approval. In addition, she does provide some guidance on this point by expressing the opinion that where a child wants to speak to the court, a direct hearing will not usually lead to him being torn between his parents and will not be harmful to him.

The decision of the majority in the *Belgian Saga* creates a situation where the jurisprudence of the Supreme Court in relation to the need to hear children directly is inconsistent. In particular, the approach to hearing the child adopted in this decision does not accord with that taken in the *Italian Saga*[39] a year previously and in the *Dutch Saga*[40] a few months previously. In the latter case, the majority of the Supreme Court upheld the District Court's decision to return the children (aged 12 and 10), despite the fact that the Family Court judge had held that the child objection exception had been established after having met with the children directly. The majority agreed with the view of the District Court that the judge's impression of the children's objections was insufficient in the absence of an expert report and thus the mother had not satisfied the burden of proving the exception. In the minority, Justice Rubenstein held that the matter should be returned to the District Court to enable the children to be heard again and an expert report to be commissioned.

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[39] Above n 28 (Supreme Court).
[40] Above n 29 (Supreme Court).

He commented: 'Whilst the appeal court's obligation to hear the child is not the same as that of the court of first instance, in my view every one who hears the child is to be praised.'[41]

It will be interesting to see what impact the approach taken by Justices Arbel and Rubenstein will have on the practice of the lower courts and whether differently constituted benches of the Supreme Court will follow their approach. It is significant that in the *Belgian Saga*, there were problems with the expert report[42] and so the case was in any event being returned to the District Court in order for a further expert report to be commissioned. Thus, the question arises as to whether the appeal would have been allowed solely on the basis that the child had not been heard directly by the judge if the expert report had been satisfactory.

Finally, it will, of course, be appreciated that the approach of Justice Arbel is in accordance with that recommended by the Rotlevi Committee and implemented in relation to custody cases by the Regulations accompanying the pilot project.[43]

III THE WEIGHT GIVEN TO THE CHILD'S VIEWS

(a) Custody cases

The child's right to participate involves not only the right to be heard, but also the right to have appropriate weight placed on his wishes. Thus, hearing the child directly and then not treating his views seriously can be seen as paying lip service to his rights. On the other hand, it is clear that the child does not have any absolute right of autonomy and that his wishes will not be respected when this will cause him real harm.

The real area of difficulty arises where in the view of the court, usually in reliance on experts, the child's wishes do not promote his welfare. On the one hand, the court is obliged to decide in accordance with the child's welfare. On the other hand, automatically preferring the adults' interpretation of the child's welfare to that of the child himself is highly paternalistic.[44]

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41 The *Dutch Saga* above n 29 (Supreme Court) (author's translation).

42 First, the report expressed the possibility of the child being influenced by his mother could not be ruled out, but did not come to any conclusion about this critical issue. Secondly, the expert did not speak French and the interaction between the father, which he viewed and commented on, had been conducted in French. The Court required that the new expert be a French speaker. For later developments in the *Belgian Saga*, see below n 69.

43 See above.

44 For detailed analysis of this problem see M D A Freeman *The Rights And Wrongs of Children* (Frances Pinter, London, 1983) 7–40 and *The Moral Status of Children* (M Nijhoff, Dordrecht, 1997) 95–99 and Eekelaar 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in P Alston (ed) *The Bests Interests of the Child: Principles and Problems* (Clarendon Press, Oxford, 1994) 42. Both authors emphasise the need to limit paternalism to a minimum.

Prior to the CRC, the Israeli Courts were not consistent in their approach to the problem of welfare versus wishes in custody disputes. A few judges took the view that the genuine views of a sufficiently mature child should be respected unless this would clearly endanger him, or is otherwise manifestly contrary to his welfare.[45] However, other judges were not prepared to give this degree of weight to the child's views and simply treated them as one factor in determining the child's welfare.[46]

Israel's ratification of the CRC does not seem to have changed judicial attitudes to this issue. Whilst the case-law contains considerably more rhetoric about children's rights, with Art 12 of the CRC being cited by judges,[47] most courts take the view that the wishes of the child are not the most important factor and will be overridden by the need to promote the child's welfare.

In particular, courts not infrequently state that even apparently mature children are heavily influenced by the adults around them and their need to gain the approval of their parents.[48] Whilst there may be good reasons in a particular case for not upholding the wishes of the child,[49] in our view, these generalisations indicate an unhealthy paternalism. The assumption should be that the mature child's expressed views represent his own wishes and that he is capable of weighing up the advantages and disadvantages of the different options, unless proven otherwise. Clearly, it is much easier to give respect to the child's views where the choice is between two good parents[50] than where one or both of the parents' parental ability is lacking.[51] Nonetheless, judges should remember that usually children have had real experience of living with both parents and thus their assessment of the situation should be taken seriously, even if it differs from the theoretical assessment made by social workers and other experts.

It is perhaps not surprising that the Israeli courts do not really seem to have internalised the significance of giving appropriate weight to children's views

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45 Per Judge Eli Sharon in Y Ronen *Participation of a Child in Determining His Custody* (Boursey, Tel-Aviv, 1997) (Hebrew) 186. See also, for example, *CA 503/60 Wolf v Wolf* PD 15, 76 and *CA 352/80 Tzukerman v Tzukerman* PD 34(4) 689, 694, where it was said that the wishes of a child over 10 are always a serious and often a determinative consideration in relation to custody.

46 See, for example, *CA 740/87 Plonit v Almonit* PD 43(1) 667.

47 See Report on the Implementation of the CRC, above n 5, 28–29.

48 See, for example, *Family Appeal 654/01 Ploni v Almonit* (published at nevo.co.il) and *Family Application 4744/02 PP v PA* (published at nevo.co.il). Both cases involved 13 year olds.

49 In *Family Appeal 654/01*, the child did not want any fixed custody and contact arrangements, and requested the option to choose each day whether to go to his mother's or father's house. The Court found that the child needed stability and so rejected his wishes. In *Family Application 4744/02*, there was evidence that the child was able to manipulate the mother and that the more stable environment provided by her father and grandmother was better for her. As the case concerned only interim custody, it is assumed that the child's wishes would be investigated in more detail in the full hearing.

50 See, for example, *Family Application 24170/04 Ploni v Plonit*, where the wishes of a twelve-and-half-year-old boy to move to live with his father instead of his mother were respected, even though his mother had brought up the child very well up until now.

51 As, for example, in *Family Application 4744/02* above n 48.

since the recommendations of the Rotlevi Committee preserve the welfare of the child as the prevailing principle in disputes concerning children.[52] Whilst the wishes of the child are included in the list of factors to be taken into account in determining the child's welfare, the Rotlevi proposed laws do not attach any greater weight to the child's views than to any other factor.[53] We would suggest that the only way to ensure that children's views are treated more seriously is to create a statutory requirement that great importance should be attached to the wishes of children over a certain age[54] or even a presumption that these wishes should be respected unless this will clearly cause harm to the child.[55]

A particularly worrying development is the judicial suggestion that the stringent approach to children's objections taken in abduction cases applies also in other types of cases.[56] That stringent approach, which will be explained below, is justified by its proponents on the basis of not undermining the objective of the mandatory return of abducted children. No such policy exists in relation to custody and other types of cases. Thus, the criticism levelled at this approach below applies a fortiori to non-abduction cases.

(b) Abduction Convention cases

The issue of how much weight is placed on the views of the child seems to have generated more judicial discussion in recent years in the context of the Abduction Convention than in the context of general custody cases. The reason for this could be that in a custody case, the judge does not have to give a clear-cut decision as to the maturity of the child and the quality of the objections, because these issues are simply factors in determining the best interests of the child. On the other hand, in Abduction Convention cases, the court has to decide whether the child objection exception in Art 13(2) is established and if so whether it should, despite this, exercise its discretion to return the child. Thus, courts in Israel and abroad[57] have set out conditions, which have to be met in order to establish the exception.

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52 The Rotlevi Committee, General Part, Israeli Ministry of Justice (2003) 137–146.

53 Although their explanation to the proposed law does state that the child's wishes are 'a substantive and central factor' in determining the child's welfare and that the basic assumption should be that the expressed wishes of the child represent his welfare, ibid 142.

54 As, for example, in Norway where the Children Act provides that great importance should be attached to the wishes of a child of 12 or over (Act no 7 of 8.4.81 relating to Children and Parents, s 31) (quoted in the Rotlevi Report above n 52, 175).

55 See, even more radically, the Finnish Child Custody and Rights of Access Act which provides that decisions should not be enforced on children over 12 against their wishes (quoted in Rotlevi above n 52, 177).

56 See decision of Judge Geifman in *Family Application 049123/03*. Ironically perhaps, in this case the conditions were satisfied and the 13-year-old boy's wishes were upheld. The case was rather unusual (boy's request to return to his mother in Canada against the wishes of his father in Israel), but it is clear that the judge thought that these conditions governed children's views in all types of cases.

57 See the leading English case of *Re R (Minors)* [1995] 1 FLR 716.

Furthermore, both in determining whether the exception is established and in exercising its discretion, courts in Abduction Convention cases are not only concerned with the particular child, but also with giving effect to the Convention's objective of returning abducted children so as to give a clear message that child abduction is not acceptable and does not pay, in order to deter potential abductors. Thus, the question arises as to whether it is legitimate to violate the rights of the individual child in order to promote the policy of the Convention. The current author has previously stated the view that the rights of the child should be preferred and that interpreting the child objection exception more widely will not undermine the Convention.[58] A few judges in Israel and other countries have expressed similar opinions.[59]

However, the view of the Supreme Court in Israel, which has been reiterated a number of times recently, is that the child objection exception has to be interpreted very narrowly and that only in exceptional cases will a child's objections be upheld. This approach can best be demonstrated by examining the three conditions which the Supreme Court has held have to be fulfilled in order to establish the child objection exception, and the courts' application of those conditions.[60]

(i) The child must be of sufficient age and maturity.

Whilst there can be no doubt about the existence of this condition, which appears in the wording of Art 13(2), there is considerable room for interpretation in applying the condition.[61] Thus, judges in some countries have held relatively young children mature because they can make decisions about their extra-curricular activities,[62] whereas judges in other countries have imposed demanding tests of maturity, which many adults would fail to meet.[63]

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58 See Schulz 'The Hague Child Abduction Convention and Children's Rights' (2002) 12 *Transnational Law and Contemporary Problems* 396, 424–425 and 452.

59 See, for example, per Justice Nili Maimon in the Israeli Family Court in *Family Application 430/01 Plonit v Ploni* (not published) who states that the Abduction Convention has to be interpreted in harmony with the CRC and so Art 13(2) 'which gives weight to the views of the abducted child who has formed a view should not be interpreted narrowly, but the opposite' (author's translation) and per Ward LJ in the English Court of Appeal in *Re T (Abduction: Child's Objections to return)* [2000] 2 FLR 192.

60 The conditions were set out by Justice Procaccia in the *Italian Saga* above n 28 (Supreme Court) and have been adopted by the Supreme Court (as well as the lower courts) in subsequent case-law. See, for example the *Dutch Saga* above n 29 (Supreme Court) and the *Belgian Saga Request for Family Appeal 9114/07 Plonit v Ploni* (this is the continuation of the case discussed above, n 38).

61 See, for example, Judge de Moss's comment in the US case of *England v England* 234 F 3d 268 (5th Cir 2000) that: 'The words "degree of maturity" as used in Article 13 are inherently relative and subjective in their concept … For that reason, I recognize that judges reading the same record (or hearing the original testimony) could come to different conclusion on the subject of Karina's degree of maturity.'

62 See, for example, the German 'Lady Meyer Case' discussed in detail by Sobal and Hilton 'Article 13(b) of the Hague Convention: Does it Create a Loophole for Parental Alienation Syndrome – an Insidious Abduction' (2001) 23 *International Lawyer* 997.

63 See Freeman 'The Hague Child Abduction Convention – an Uneven Playing Field – The Voice of the Child in Hague Convention Proceedings' in M Freeman *Contemporary Issues*

The Israeli Supreme Court, in a number of recent decisions, appears to have adopted the latter more stringent approach.

For example, in the *Dutch Saga*,[64] it was held in relation to children aged 10 and 12 that a persuasive level of proof is required to show that the children had the ability to consider all the factors and balances, and to take into account all the family, cultural and other implications of the decision whether to return to Holland. The respondent failed to satisfy this level of proof.

Similarly, in the *Italian Saga*,[65] the Supreme Court relied on the psychiatrist's opinion that, whilst the children, aged 11 and 13, were mature and developed for their ages both mentally and physically, their insight was partial and their vision was only short term. In her view, the fact that they were unable to understand that separation from their mother would cause them damage in the long term demonstrated an error of judgment. Whilst such an error was common for children of their age, it was still considered an error of judgment by adults.

With respect, this stringent approach virtually turns the child objection exception in the Abduction Convention into a dead letter, because it is not clear in what way these cases are any different from other abduction situations. Furthermore, this approach to maturity is highly paternalistic and substantially undermines the child's right to participate because he is only considered old and mature enough if his wishes happen to coincide with the perception of adults (the expert and the judge) as to the correct decision.[66]

(ii) The child has formed an independent opinion

It is undisputed that allowing children to participate in proceedings concerning their future opens the door for influence by parents and other family members,[67] and that it is 'not honouring children's rights to be heard if they are allowed to operate merely as the mouthpieces of adults'.[68] The difficulty, however, comes in determining in a particular case to what extent the child is indeed expressing his own independent opinions, or is simply rehearsing the views he has heard from the adults around him.

Concerning International Child Abduction and the Hague Child Abduction Convention (Reunite, Leicester, 2002) 24, 34 (criticising English case-law).

64 Above n 29.

65 Above n 28.

66 Compare the more liberal approach found in the New Zealand case of *Clarke v Carson* [1995] NZFLR, where the judge states that 'the position at which it is right to take into account the view of children seems to me in the normal course to be the time when they are able to reason'. See also the less paternalistic approach of Wall LJ in the English Court of Appeal in the case of *Re T*, above n 59 who says 'a child may be mature enough for it to be appropriate for her views to be taken into account even though she may not have gained that level of maturity that she is fully emancipated from parental dependence and can claim autonomy of decision making'.

67 See Comments of the US Government on Preliminary Document No 6 in *Actes et Documents de la Quatorzième Session*, Oct 1980, Vol III, 243.

68 Per Judge Clarkson in the New Zealand case of *Winters v Cowen* [2002] NZFLR 927.

The Israeli Supreme Court's approach to this issue has also been paternalistic. For example, in two cases, the Court virtually discounted the views of the child on the basis that it is difficult to separate the child's wishes from the inevitable influence of the abducting mother because the child had been in her sole care for a considerable period of time, even though no incitement or deliberate attempts to influence the children had been proven.[69] With respect, there is a logical fault in this reasoning. Whilst it is true that the fact that the child has been in the sole care of the abductor in the country of refuge for a considerable time creates more scope for influence, this fact also provides an objective and reasonable explanation for the child's objection to returning to the country of origin, at least where he has become settled socially and educationally in the country of refuge. Thus, the assumption that the child's views are a product of influence does not give appropriate weight to the child's wishes.[70]

A further example of an over-paternalistic approach can be found in two cases where the Supreme Court took the view that the children's opinions were not independent because they had been 'blinded' by the fuss that had been made of them by the abducting parent's family in Israel and the benefits which had been bestowed on them.[71] With respect, as pointed out by the first instance judge in one of the cases, automatic association of the child's views with the fact that he is receiving a lot of attention makes the child's right to have his viewpoint considered virtually redundant.[72]

(iii) The child's objection to return is dominant and of special force

This condition clearly goes beyond the literal requirements of Art 13(2) itself and is inconsistent with case-law from other leading jurisdictions. For example, the English Court of Appeal has held that there is no reason to put a gloss on the words of Art 13(2)[73] and New Zealand case-law clearly rejects any requirement that objections should be of particular strength.[74]

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69 The *Dutch Saga*, above n 29 (Supreme Court) and the *Belgian Saga*, above n 60. (After hearing the child directly and considering the second expert's report, the District Court held that the child was not sufficiently mature and that his views were not independent. This decision was upheld on appeal.)

70 Compare the approach of Justice Miller in the US case of *Re Robinson* 983 F Supp 1339, 1343 (D Colo 1997): 'It is unrealistic, indeed inhuman, to expect a caring parent not to influence the child's preference. Accepting that there will be some influence, the question really becomes when it is undue.'

71 *Leave for Civil Appeal 3052/99 Shevah v Shevah* (adopting the assessment of the first instance judge who thought that, once the initial euphoria had worn off, the child would change his mind) and the *Italian Saga*, above n 28 (Supreme Court) (adopting the assessment of the expert).

72 The *Italian Saga*, above n 28 (Family Court).

73 *Re S (a Minor) (Abduction: Custody Rights)* [1993] Fam 242, 250, rejecting the view of Bracewell J that the exception 'imports a strength of feeling which goes beyond the usual ascertainment of the wishes of the child in a custody dispute': *Re R (A Minor: Abduction)* [1992] 1 FLR 105.

74 *Ryding v Turvey* [1998] NZFLR 313. Australian case-law seems to be inconsistent on this point.

Furthermore, the Israeli Supreme Court's interpretation that the views of a child who is in a situation of conflict cannot be sufficiently forceful[75] is highly problematic. By definition, children in abduction cases are in a situation of conflict and, even where they are absolutely sure that they do not wish to return, they are likely to display some signs that they miss the left-behind parent, family and friends in the country of origin. Such signs should not automatically be interpreted as evidence of ambivalence or that the child's views are not strongly held. The child has a right to have appropriate weight attached to all his views and not only to those which are dominant and expressed forcibly. As pointed out by the first instance judge in the same case, the requirement that the child's objection be of special force make the child's right to have his views considered almost meaningless.[76]

IV CONCLUSION

From the above description of the developments in Israeli law, it can be seen that whilst there has been considerable progress in realising the child's right to be heard both in custody cases and Abduction Convention cases, many Israeli courts still tend to take a paternalistic approach to the child's wishes and do not attach sufficient weight to his views.

Under the Regulations which accompany the pilot project, every child over the age of 6 who is affected by family proceedings (as defined in the Regulations) is given the opportunity to be heard directly by the judge. Even where the child opts to be heard indirectly by the social worker from the Welfare Unit, the judge is supposed to receive a verbatim transcript of the child's views. This is a significant improvement on reliance on expert reports where the child's views are reported second hand through the eyes of a third party.

The principle of the child's right to be heard is further promoted by the welcome decision of Justice Arbel in the *Belgian Saga*.[77] It is to be hoped that her clear message that children should be heard directly by the judge will lead to a change in the judicial approach to meeting with children both in Abduction Convention cases and in other cases, which are not covered by the pilot project.

On the other hand, Justice Arbel's heavy reliance on expert reports in ascertaining the wishes of the child is a cause for concern. Whilst in this particularly complex case, there may have indeed been a need for expert evidence, it does not follow that in all abduction or other types of cases this will be so. The Israeli Supreme Court's over-reliance on expert reports in relation to

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Compare *L v Director-General, NSW Department of Community Services* (1997) FLC 92–477 with *Re F (Hague Convention: Child's Objections)* (2006) 36 Fam LR 183.

75 In the *Italian Saga* (Supreme Court), above n 28.

76 *Italian Saga* (Family Court), above n 28.

77 Above n 38 (Supreme Court).

children's views is also seen in the *Italian Saga*,[78] where that court followed the expert's recommendation despite the first instance judge's rejection thereof and the *Dutch Saga*,[79] where the court was not prepared to rely on the first instance judge's impression of the children without an expert report. This approach to expert reports underlies the paternalistic attitude of the court to the children's views. The assumption seems to be that the expert knows what is in the best interests of the child. Thus, if the child's wishes do not accord with the expert's opinion, this is a sign that the child is not mature or that he has been influenced by those around him.

If it is indeed considered that experts should be routinely appointed, then, in order to ensure more consistency and objectivity, a system of internal experts should be created akin to the CAFCASS officers in the English Court.[80] These experts are trained only to consider the issues that are directly relevant to the case and this reduces the danger of paternalism.

In summary, there is considerably more work still to be done in order to ensure full realisation of the child's right to participate in proceedings concerning him in the Israeli Family Court. The pilot project is already revealing some of the practical problems in trying to provide all children with the opportunity to be heard directly[81] and it is expected that the official research accompanying the project will provide useful data which will enable improvements to be made to the scheme. In addition, it is hoped that once judges get used to the idea that children's views should be ascertained in every case, this will eventually lead to greater respect being given to those views.

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78 Above n 28.

79 Above n 29.

80 See Baroness Hale's praise of the CAFCASS officers in *Re D*, above n 23.

81 For example, the practical difficulty of inviting children to be heard without their parents' consent (see above text accompanying n 15) and the need to make provision for children to be heard by the judge immediately after their preliminary conversation with the social worker rather than having to come back again (see above n 16).

Italy

ALLOCATING CHILD SHARED CUSTODY TO SEPARATING OR DIVORCING COUPLES: LAW 54/2006

Virginia Zambrano[*]

Résumé

En 2006, le gouvernement italien a fait adopter une législation sur la garde partagée. Le présent texte entend faire état des changements et des questions que soulève la garde partagée. Tout en affirmant que l'objectif premier du droit de garde est de servir le meilleur intérêt de l'enfant, la nouvelle approche établit des principes importants en la matière. Certains de ces principes tombent sous le sens commun et visent à épargner aux époux les habituels conflits judiciaires. Les enseignements des tendances jurisprudentielles du passé ont mené à la mise en place de nouvelles façons de faire: 1) avant de rendre une ordonnance de garde, le juge doit impérativement considérer la possibilité d'une garde partagée; 2) la garde exclusive ne peut plus être accordée que dans des cas exceptionnels; 3) des contacts significatifs doivent être organisés entre l'enfant et chacun des parents; 4) les relations personnelles entre l'enfant et les tiers significatifs doivent être préservées; 5) les aliments pour enfants s'analysent comme une «obligation nouvelle» à laquelle sont normalement tenus les parents; 6) il existe désormais une obligation alimentaire à l'égard de l'enfant majeur qui n'est pas encore autonome financièrement. Si la nouvelle loi a ses mérites, il n'en demeure pas moins que certains aspects devront être précisés comme, par exemple, celle de l'étendue de la discrétion judiciaire en la matière. Malgré l'intention déclarée du législateur d'effacer la distinction entre l'exercice concret de l'autorité parentale et le droit lui-même, on reste sous l'impression que la loi ne réussit pas vraiment à redéfinir les relations parents-enfants pour les mettre en phase avec le concept d'exercice conjoint de la parentalité.

I INTRODUCTION: ITALIAN LAW 54/2006

The enactment of Italian Law no 54 of 8 February 2006 on 'Separating parents and the allocation of shared custody of children' introduces the institution of shared (or otherwise labelled) joint custody into the Italian legislative system, and reformulates the scope of provisions contained in Art 155 of the Italian Codice Civile (Civil Code, hereafter CC). Allied with this is the introduction of

* Professor of Private Comparative Law, University of Salerno, Italy.

other new provisions contained in articles of the code (Arts 155 to 155 *sexies*) as well as in Arts 709 *bis and ter* set forth in the Italian Codice di Procedura Civile (Civil Procedure Code).[1]

The recognition of the principle that 'the failure of two individuals as a couple does not necessarily imply failure as parents' must, in the current analysis, be viewed as lying with the objective of the reform itself.[2] By avoiding the traditional and therefore necessary 'links' inherent in the persistence of matrimonial bonds and harmonious performance course of parental duties, the primary focus under the new provisions is on the position of minors and the protective care or guardianship of their moral and physical interests.

Hence, the Italian legislator's main concern is to mitigate the emotionally distressing or disturbing experience of a separating couple and to ensure that, even in the course of this traumatic experience, minors are placed in the lawful custody of both parents.[3] In this context, Law no 54 provides a useful regulatory site to respond to the needs already felt in foreign legislative and EU legal systems, as well as in the most sensitive views taken by legal theorists and judges. In reality, however, the innovative feature behind the law does not lie with the definition of the notion of the interests of the minor, but rather with the use of such a notion which increasingly acts as a guideline for the whole regulatory framework underlying matters of family crisis. It is not by chance that such a framework has been perfected in the current set of Italian legislative rules, whilst also fulfilling the legal principles already set out in the New York Convention on Children's Rights and the Strasbourg Convention.

By analogy to repealed provisions, Art 155 CC, however, does not spell out what stands behind the concept of a child's interest but opts for a precise, concrete meaning of it, a meaning that can be established only by considering the specific child's needs. Nevertheless some scholars have made a convincing argument for establishing a valid hermeneutic criterion for interpreting a similar law. They seem to connect the interests of children with the opportunity 'to strike a right and continuous balance' with each parent in order that minors 'receive care, upbringing and education throughout their childhood', and preserve 'significant ties' with preceding generations and relatives of each grade of parenthood.[4]

Viewed this way, sole custody, being allocated as a solution which precludes the parent not assigned custody from participating in the daily life of the child, had not been shown to provide enough guarantees; nor had joint custody,

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1 See G Giacobbe 'Affidamento condiviso dei figli nella separazione e nel divorzio' in *Dir fam e pers*, 2006, XXXV, 2, at 707.

2 In this regard, see C M Bianca *'La nuova disciplina in materia di separazione dei genitori ed affidamento condiviso: prime riflessioni'* in *Dir fam e pers*, 2006, XXXV, 2, at 678.

3 For a discussion: F Ruscello 'La tutela dei figli nel nuovo "affidamento condiviso"' in *Familia*, 2006, 4–5, at 626 et seq; M Dell'Utri 'L'Affidamento condiviso nel sistema dei rapporti familiari' in *Giur it*, 2006, at 1549.

4 See B De Filippis *Affidamento condiviso dei figli nella separazione e nel divorzio* (Cedam, Padova, 2006) 67.

introduced by the reformed Law on Divorce 78/1987, been very successful.[5] In applying joint custody, judges were heavily influenced by the existence of a number of factors, such as: (a) the necessity of a short distance between the two parents; (b) the absence of disagreement between them; and (c) the existence of frequent contact between the former couple. In a similar vein, an alternated custody order – in providing a period of alternated residence between the parents – had been rarely applied in court decisions, since it was deemed inappropriate to ensure minors a reasonably stable family environment to live in.

On these grounds, under Law 54/2006 the relevance given to the protection of the child's best interests contributes towards clarifying the very substance behind the institution of shared custody, while also bringing into focus the differences in earlier provisions. Shared custody means above all 'sharing out' the responsibilities inherent to parenthood, regardless of where the child is physically placed. This is confirmed by both the title of the law and the rubric of Art 155 *bis* CC, especially where the provisions identify shared custody as providing the stimulus to, and the rationale for, accomplishing some kind of agreement between the former couple. These objectives, however, are determined by the relevancy given to the paramount 'moral and physical interest of the child'.[6]

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[5] Views are taken among judges that extremely restrictive criteria prevail in the field of shared custody. Here the main focus is on the absence of controversy and opposition by the married couple, though the latter may themselves go through a crisis. Doubt is cast on substantial agreement or friendly relations persisting between the couple even after their separation, and which may result in systematic and fruitful encounters that ultimately lead to a definite solution of emotional tensions as the origin of the crisis in the couple (on this point, see Tribunal of Genoa, 18 April 1991, in *Rep Foro it*, ad vocem *Separazione dei coniugi*, n 47). In some judicial pronouncements emphasis is placed on the risk that shared custody is likely to become an instrument for one party in the couple to take control over the life behaviour of the other, thus resulting in considerable violation of the state of privacy of the latter (Appellate judgment Rome, 5 September 2003, in *Rep Foro it*, 2004, ad vocem *Separazione dei coniugi*, n 50). Less rigorous views have also been taken among judges in regard to the legal arrangement of shared custody involving serious disagreement (typically a protracted one) between the former couple, whenever the outcome of the settlement was such as to become favourable to the interest of the child concerned. These arguments are to be found in judicial proceedings: Tribunal of Brindisi, 11 January 2001, in *Rep Foro it*, voce *Separazione di coniugi*, 2001, n 56. More recently, the pronouncement by the Italian Supreme Court (Cass, 20 January 2006, n 1202, in *Mass Giust civ*, 2006, 7/8) made the choice for placing a child in the custody of both parents to be conditional upon moral and physical interests, by emphasising that 'in this particular context an order for custody shared by both parents – rather than exclusively one parent – is a discretionary matter for the individual judge deciding on the merits of the case to deal with. It is for the judicial authority to take the relevant legislation as a key criterion to assess the interest of the minor him-herself and, where the judge has given sufficient grounds concerning his final decision, he has similarly to recognise the full worth of the fact which is then not susceptible of judicial re-examination, when grounds of legitimacy behind his own decision are taken into account.'

[6] Some applications of these principles can be found in Trib Venezia, 22 Gennaio 2003, in *Giur merito*, 2003, 1418 et seq, where judges use the concept of 'joint custody'. Recently they preferred the shared parenthood solution, even though courts seem to be very demanding in what the requisite parents must comply with before adopting such a provision (for example, parents should own fully furnished, comfortable houses), Trib Bologna, 18 April 2006, ined.

By reading the wording of Art 155 CC (which opens up the rubric concerning 'Provisions on matters affecting children'), there are good reasons to believe that the content of shared custody takes precedence over simple sole custody of the child, because it relies on a newly conceived mode for parents to exercise their own authority and power. This aspect stands high on the agenda reforming the law in Italy.

II NEW CONTENT OF SHARED CUSTODY: JOINTLY EXERCISED RESPONSIBILITY

Article 155, para 3 CC makes provision for both parents to exercise parental responsibility over their children. An important principle therefore arises from such an article which, in the opinion of leading scholars, provides an exception for courts to intervene only in cases of contest between parents.[7]

In this context – following the view that shared parenthood is deemed to be a way of avoiding children suffering because of their father's divorce – only in very exceptional cases can courts allocate sole custody to only one parent.[8] In fact, the fundamental scope of Law 54/2006 is to provide for decisions to be made by both consenting parents, and similarly ensure that these decisions are taken by 'common agreement'. In the Italian system, legislative options concern primarily the personal and existential domains of the child and, if possible, his or her involvement in proceedings. Legal scholars, in fact, take the view that children should always be involved in choices that affect them directly, regardless of their age so long as they have 'sufficient understanding'.[9] In the face of the above-mentioned scenario, it should be clear enough that parental behaviour cannot simply consist of putting passively into practice their children's will. Parent-child relations, being transformed in terms of parental responsibility rather than rights, implies – *ex adverso* – co-operative efforts to satisfy the interest of the child. Unlike a directive and controlling power, parental responsibility must be seen as a collection of rights – arising from reproduction – that enable parents to perform their duties towards children.

Not surprisingly, in a context where family autonomy is paramount, the very position of the court has changed. Courts, in fact, are empowered to make decisions by acting as 'mediators' *super partes*, whenever disagreement arises

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7 In the Italian system, the distinction between acts of ordinary and extraordinary administration is related to property management and constitutes one of the most debatable issues among interpreters, F Mirabelli 'I c d atti di amministrazione' in *Scritti giuridici in onore di Scialoja*, III, *Diritto civile*,(Zanichelli, Bologna, 1953) 351 et seq; F Ferrara 'ad vocem Amministrazione (atti di)' in *Nuovo Dig it* (Utet, Torino, 1937) 393 et seq); U Natoli, *L'amministrazione dei beni ereditari* (Giuffrè, Milano, 1968 I) 189 et seq).

8 For a general account of legislative changes, G Basini 'Commento sub art 155 c.c.' in G Bonilini, M Confortini and C Granelli (eds) *Codice Civile ipertestuale*, *Aggiornamento alle leggi 54 e 55 del 2006* (Utet, Torino, 2006) 11 and G Salito, 'l'affidamento condivisio' in *II diritto di famiglia. Trattato teorico-pratico* (vol V, diretto da Autorino, Torino, 2007) 137–143.

9 See P Stanzione 'Interessi del minore e 'statuto' dei suoi diritti fondamentali' in *Fam e dir*, 1994, 111.

between former couples. Indeed, Art 316 CC, which provided for dissenting parents to apply to the court and have their dispute settled there, had already emphasised the central role for agreement to be reached by the couple.[10] Incidentally, the need to re-dimension the scope for judicial manouevre when dealing with a family crisis becomes visible not only in the area of private autonomy – as will be shown later in the current analysis – but also in the area of mediation, the latter being a legal instrument to resort to under former Art 155 *sexies* CC.

Law 54/2006, in fact, lays the ground for a voluntary-based system of family mediation by providing that the parties may, following the court's advice, choose to apply for such a system.[11] Such an option arising from legislation can be said to provide an early, but timid, attempt at bringing Italian legislation into line with similar legislation adopted in other countries, as well as with the set of guidelines originating in EU legislation (in particular, the 1996 Strasbourg Convention brought into force, in Italy, on 19 April 2003, whose Art 13 explicitly favours resorting to 'mediation and any other dispute settlement systems and their use in achieving an agreement').

The difficulties behind a proper functioning of family mediation in the Italian legal system owe much to the complexity of the national laws and practices in which mediation is configured, as much as the absence (unlike in Spain) of a systematic training of professional mediators. Moreover, the current law does not mention the binding or non-binding nature of mediation and which formalities are required for such agreement to be validly made. As a result of uncertainty arising from the applicable provisions, efforts have been made by the Italian Judiciary Association (*Associazione Nazionale Magistrati*) to provide guidelines for use by the courts in order to establish the requirements for mediation to operate and duties for mediators to fulfil, including the requirements for an agreement to be reached by the couple. The current practice requires such an agreement to be formalised in writing. It amounts to a proper deed, binding on both spouses that, in the case of a mediation failing, can be reversed into a request for consensual separation or jointly agreed divorce by the parties.

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[10] See L Ferri 'Della potestà dei genitori' in *Commentario c.c. Scialoja-Branca* (Zanichelli, Bologna-Roma, 1988) 47 et seq and M Sesta 'Le nuove norme sull'affidamento condiviso:a) profili sostanziali' in *Fam e dir*, 2006, 4, 383. For a different approach, see A P Scarso 'Il disaccordo tra i genitori in merito all'educazione religiosa del figlio' in *Fam pers succ*, 2006, 8–9, 738.

[11] It is not clear whether the conciliatory attempt at forming an agreement between the spouses may take place at any time during the proceedings. From a combined reading of both paragraphs of Art 155 *sexies* CC, the assumption is that it may take place during a preliminary as much as procedural trial, although *incipit* of para 2 seems to vest the judge with the discretionary power to take any sort of decision.

III CONTENTS OF PARENT AUTHORITY: PERSONAL CARE, LIFE INTEREST AND MAINTENANCE DUTIES

By emphasising parental responsibility, Law 54/2006 casts a new light on three important issues: (a) the concept of financial and moral care to be given to minors; (b) legal representation and administration of a person under age by a guardian; and (c) life interest (otherwise termed life tenancy). Their substance does not vary during the emotionally distressing experience of family divorce, both in the event of 'consensual' and 'judicial' separation, since no distinction whatsoever seems to apply under the scope of Art 155 CC.

Where personal care is concerned, a special place is given to it by Art 155 CC, in which it is upheld as a real, sacrosanct right of the child not to be interfered with. Personal care implies the provision of financial support for a child's living expenses, upbringing and education by the parents themselves, as provided for by the scope of the provisions in Art 147 CC (or, in a wider and general context, in Art 30 of the Italian Constitution). Reformed Art 155 CC is of relevance since, unlike the provision made in the earlier Art 155 CC, it expressly provides for child 'care' as one of the duties for parents to fulfil. This new provision is of the utmost importance, because the inclusion of a fresh new 'duty' among those which parents are normally expected to comply with (the notion of 'care', precisely speaking) also modifies the meaning of other similar duties.

To put it differently, under the earlier (repealed) Art 155 CC, the duty on parents to bring up and educate their children fell within a 'financial-type legal framework', being equated with entities susceptible to monetary assessment. Instead, under the new article, which aptly deals with 'care' or otherwise necessities – in other words – with 'the provision of support for a person's living needs', the purpose is to restore the primacy of living needs and brings value-based property aspects back to a subordinate and dependent position, in line with the wording of the Italian Constitution.

On the other hand, Art 155 CC says nothing about the way parents can dispose of or administer goods belonging to the child. In this respect, as the new law does not mention it, courts and scholars turn to the general provision set forth in the Italian Codice Civile. So it is for the right claimed by the parents who exercise parenthood authority over the goods of their child (ie life interest as under Art 324 CC). Article 324 CC, in fact, has not been modified by the new law. It should then be recognised that such a right can be claimed by both parents, even when separated.

In the case of a life interest (Art 324 CC), the condition and the extent to which the new way of conceiving the parental attitude towards the child has changed, can be seen in the event of a spouse entering into another marriage. Under these circumstances, the question has been raised by scholars as to whether the party entering into a new marriage may have his or her lawful title to the life interest extinguished by virtue of the provision losing its *ratio*. The majority of

theorists believe that the right of a party will not just cease to exist but will rather be transformed into some kind of managing relationship. It is therefore easy to recognise that a dually ambivalent circumstance will arise from goods owned, which provides for a life interest to be recognised in 'full' for one spouse and 'partially' for the other.

However, the most interesting guidelines arising from Law 54/2006 are concerned with the duty or obligation for the spouses to maintain their child, or similarly to favour harmonious growth of their children.[12] Here it is significant that, far from the reference to old-fashioned 'provision for support' set out in Art 148 CC, reference has been to 'incomes', used in relation to 'financial resources' held by both parents. Clearly, the purpose behind the latter reference has been to define new criteria unambiguously which can contribute towards proportionality together with provisions set forth in Art 155, para 4 CC.

Over the past years, the difficulty of establishing the extent to which maintenance may be allowed had been the cause of serious problems, particularly considering the wide judicial leeways in applying the relevant law. The power held by courts had in fact been the cause of suspicion by scholars, who were concerned about the effects likely to arise from such an approach.

Five criteria are introduced by Law 54/2006. They concern, respectively, the current needs of the child, the life-style enjoyed by the child in regular co-living, the length of stay with each parent, the financial resources of both parents, and the economic value of family duties as well as the childcare duties of each parent. By clearly defining the criteria for the assessment of child maintenance, the new law can be said to represent a definite novelty in this direction.

Despite the intent of the legislator to narrow down judicial powers under the scope of Art 155, para 4 CC, the rules enunciated for the determination of child maintenance are merely directive rather than binding in nature. These rules are therefore derogable at any time by the parties concerned, and require that any different agreement be dependent only upon the interest of the child, which will have to be assessed by the court. Only in cases of disagreement does the requirement arise for the parents to comply with the quantum to be determined in line with the criteria fixed by the legislator and, as such, aimed at ensuring that they contribute to childcare in equal parts.

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[12] Of significant value is a very recent judgment by the Supreme Court in Cass, 18 August 2006, n 18187 (available at: www.affidamentocondiviso.it) whereby the purpose behind joint custody, dealing mainly with the children's own interests, does not preclude the duty to provide for a maintenance payment (where of course there are grounds to require such duty) in favour of the parent with whom the children live. Although it gives priority to the 'existential' interest of the minor, shared custody cannot preclude the duty of either parent to provide for a child's maintenance payment in relation to the child's living needs, the latter being measured on account of the family and social contexts.

The scope of Art 155, para 4 CC clearly illustrates the legislator's intention to draw a line in the sand between two modes of fulfilling the duty to maintain a child, whether directly or indirectly. Indeed, apart from specifying that 'each parent shall *provide for financial maintenance* of their children in a way which is proportional to their own income', the rule makes it explicit that the 'court may establish, *where necessary*, that a child-maintenance payment be allowed periodically with a view to accomplishing the proportionality principle'.

It becomes clear therefore that scope of the new law is to provide for 'direct child-maintenance', rather than for a child's maintenance payment. This rule is a reflection of a new legal perspective on matters of family crisis (as it arises from Law 54/2006), since it allows each parent to meet the needs of his or her own child on a daily basis, and particularly seems to find its application in cases where the parents live in places not far from the child's home. Where these conditions do not occur, a parent with whom a child does not live has a duty to provide for a periodical (maintenance) payment. The latter, regarded as an ordinary tool to fulfil such a duty as under earlier provisions in force, will then become a secondary tool for use, unless otherwise agreed by the parents. This way of ensuring child support had been the cause of perplexities and legal debate not only among scholars, but also in courts. Doubts and questions arose from the difficult task of specifying the subject (child or parent whom the child lived with) entitled to receive such a payment.

Allied with the argument for legitimacy of a custodian parent with regard to legal representation of the person under age[13] was the contrary argument for the existence of one's own rights enjoyed by a parent.[14] The new set of provisions do not offer clear-cut indications on this point, so that the view should be – except for the wording of Art 155 *quinquies* CC which recognises direct legitimacy to fall upon the person coming of age – that, in the case of a person under age, the parent with whom a child lives should be entitled *iure proprio* as regards the collection of the maintenance payment.

IV OBLIGATION TO PROVIDE FOR MAINTENANCE OF A PERSON OF 18 YEARS OR OVER

Provisions regulating child maintenance become complete by recognising the right to maintain a person over age who is not yet financially independent. Article 155 *quinquies* CC expresses the principle – almost unanimously shared by scholars and courts – whereby maintenance allocated to a person who is

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[13] See M Dogliotti 'Doveri familiari ed obbligazione alimentare' in *Tratt dir civ*, already led by Cicu-Messineo, and continued by Mengoni, VI, 4 (Giuffrè, Milan, 1994) 492.

[14] See G Alpa, P Zatti *Commentario al Codice Civile* (Cedam, Padova, 1999) 1171 et seq, but for a different approach, see N Scannicchio 'Nuove norme sulla disciplina dei casi di scioglimento del matrimonio' in G Cian and G Oppo (eds) *Commentario al Codice Civile* (Cedam, Padova, 1992).

financially dependent on his or her parents should be put on equal footing to maintenance allocated to a person under age.[15]

What clearly comes out from reformed provisions is the legislator's intention to legislatively provide for a maintenance right of a person over age. Such right was not included in earlier provisions, only being (prior to reform) a matter for courts to deal with. Thus, the Italian legislator has been able to identify the essence of such a right with the idea of parents' 'responsibility', as arising from reproduction. As a result of this fact, a relationship comes into being and does not merely cease to exist when a person becomes of age. This relationship is aimed at ensuring the person (regardless of his or her own age) can benefit from education, development and promotion of his or her own personality and character (see, for instance, former Arts 2, 3 and 30 of the Italian Constitution as well as Arts 147, 148 CC).

Yet the legislative framework, even under this new modern approach, raises many doubts if we compare it to the principle of direct child maintenance, as introduced by the new law. In this regard, age becomes no less important when it comes to defining the right to maintain a person over age. This point does not come by chance since it involves the natural issue as to which person may be entitled to receive a maintenance payment. Here two possible solutions may be suggested.

According to some scholars, the solution set forth in Art 155 *quinquies* CC would apply solely to cases where the family crisis occurred after the child had come of age, but before he or she had gained financial independence. Only in this case would maintenance be arranged by asking the judge to direct 'in favour of children of 18 years old or over who are not financially independent to periodically receive a maintenance payment' (Art 155 *quinquies* CC).[16]

Others, to cut short any dispute, say that the solution must be found by simply looking at the scope of the law. If its purpose is that of ensuring a child over age has a right to maintenance, then a child and each parent may always apply under the new provisions, including those who are waiting for a separation or divorce order.[17] Still other scholars, though in a minority,[18] believe that a maintenance duty ceases to exist for a child upon his or her coming of age, and the court will therefore always be compelled to redefine the (maintenance) contents, whenever it is necessary to do so. Yet, in this context, leading scholars and courts strongly argue that no variation occurs to the original obligation, unless special circumstances require the court to state the contrary.

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[15] The delicate aspect of the duty to provide children over age with financial maintenance is a controversial issue among judges. On this point, a different position is taken in Cass Civ SU, 30 November 2007, n 25010 ined; Cass Civ, 27 May 2005, n 11320, in *Giust Civ Mass*, 2004, f 6; Cass Civ, 18 January 2005, n 951, in *Dir e Giustizia*, 2005, f 6, 29.

[16] See G Basini, above n 8, 30.

[17] G Casaburi 'La nuova legge sull'affidamento condiviso (ovvero tanto rumore per nulla)' in *Corr merito*, 2006, 5, 567.

[18] The assumption is made in G Finocchiaro 'Assegno versato direttamente ai maggiorenni' in *Guida al diritto*, 11, 2006, 41 et seq.

In any event, the requirement arises that 'non-financial independence' must not be based upon guilt or negligent conduct by the person who failed to make efforts, or refused to obtain his or her own support by way of income. The need for protective care of a person over age will therefore no longer exist when a person adopted a course of conduct which was indolent or irresponsible in nature.[19] On the other hand, by specifying the right to maintenance of a child, Arts 147 and 148 CC do not provide any reference to guilty conduct, as a proper *ratio* which justifies a person's failure to comply with the inherent duty. For this reason, the belief among scholars is that a responsibility principle falling upon one's son or daughter does exist (Art 315 CC) and should be viewed as a counterbalance to the principle imposed on parents.

It is not for this reason that a son or daughter is obliged to perform a job. Italian courts assess a son's or daughter's conduct in a flexible manner, by taking into account the decisive role played by his or her character in making appropriate choices in life, and his or her own aspirations.[20]

Faced with the above issues, a different argument should be made where a son or daughter loses his or her job for reasons that are not dependent on him or herself. In these circumstances, the maintenance duty will not arise again, simply because the fact that he or she had a job shows an ability to produce an income. The carrying out of a job is a token example of the capability of a child to provide financial support on his or her own.

It is true that, as a result of this failure, a more complex issue will arise, concerning the obligation to provide alimony for persons in need. But this entails another question, one that has nothing to do with a revival of the original maintenance obligation.[21]

V AGREEMENTS ON FAMILY CRISIS AND CONTRACTUAL FREEDOM

The topic of shared custody also provides food for thought about the role of private autonomy in the realm of family relations.

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[19] In this way, Cass Civ, 18 January 2005, n 951, in *Fam e dir*, 2006, 1, 36; Cass Civ, 1 December 2004, n 22500, in *Fam e dir*, 2005, 137; Cass Civ, 3 April 2002, n 4765, *cit*, 908 ss; Cass Civ, 2 September 1996, n 7990, in *Fam e dir*, 1996, 5, 522 et seq; Cass Civ, 30 August 1999, in *Fam e dir*, 1999, 6, 576 et seq; Cass, 3 April 2002, n 4765, in *Nuova Giur Civ Comm*, 2003, 908 et seq.

[20] See, among other scholars, G Autorino and V Zambrano 'Affidamenti familiari' in P Cendon (ed) *Il diritto privato oggi* (Giuffrè, Milan, 2002) 361; Cass Civ, 3 April 2002, n 4765, *cit*, 908 et seq; Cass Civ, 4 March 1998, n 2392, in *Giur it*, 1999, 252; App Rome, 13 May 2002, in *Temi romana*, 2002, 44.

[21] See, eg, A Finocchiaro 'Del matrimonio' in *Comm cod civ Scialoja-Branca* (edited by F Galgano), sub art 84–154 (Zanichelli, Bologna, 1993) 316; M Dogliotti 'Doveri familiari e obbligazioni alimentari' in *Tratt dir civ*, already led by Cicu-Messineo, and continued by Mengoni, VI, 4 (Giuffrè, Milan, 1994) 59 et seq.

It is well-known that family law in Italy has for years been considered to belong to the kingdom of *status* and, as such, been taken away from whatever directory or controlling power the parties had. This view was influenced by the recognised function performed by the family per se, as displaying the state's superior public interest, where no space for negotiation was allowed to the parties.[22] Moreover, the inderogable character of provisions was the foundation for the protection of the superior interests held by the state and the system of guarantees underlying the positions held by individual persons.

In this framework, the debate over a rigidly conceived model of *status* and flexibility of contract has gained ground in parallel to the evolutionary trends in family relations. This tendency has been confirmed by recently introduced law reforms.

The objective pursued by the Italian legislator in fact seems to have given way to a new type of solidarity among the members of a family. This solidarity is no longer 'imposed' – as under Art 143 CC – but rather negotiated and, in the latter sense, gains more popularity among legal practitioners. It is for this reason that some scholars have made the argument for the so-called 'negotiable season' to properly describe the propitious moments favourably disposed towards the opening up of a scenario in private autonomy, which the topic of Italian family law would indeed seem to be going through (let us think, for example, of the new 'patto di famiglia' as provided for under Art 768 *bis* CC, that, allowing the owner of a company to transfer his property to the son or daughter he has chosen, introduces a significant exception – based on a contractual approach – in the Italian inheritance system).

On the other hand, the central role played by consent stems from consensual separation proceedings, where the agreement reached binds parties by its terms, pursuant to the general rules applicable to contracts.[23] But private autonomy preserves its central role also when the ground for separation proceedings is questioned (for this reason named 'giudiziale'). Here the spouses may agree on the ways in which they are entitled to visit, educate, and bring up their children, and so forth. The reference to agreement is to be found in the newly introduced Art 155 CC, which therefore reiterates the indispensable role played by negotiated agreements when managing family crisis. In this context, exceptions apply when further distinctions are made between agreements as far as their content is concerned. Distinctions therefore arise between: (a) agreements on child custody; and (b) agreements on child maintenance and the family home.

It is worth noting how, in both cases highlighted above, the child's interest stands as the only limitation posed on his or her parents' agreement by Arts 155 CC. This, of course, does not necessarily mean adherence to the model

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22 See P Rescigno 'Situazione e status nell'esperienza del diritto' in *Riv dir civ*, 1973, I, 212.

23 P Zatti 'I diritti e i doveri che nascono dal matrimonio e la separazione dei coniugi' in *Tratt Rescigno*, Torino, 1996, II, 3, 138; G Bonilini *Manuale di diritto di famiglia* (Giuffrè, Milan, 2005) 196 et seq, Cass Civ, 22 January 1994, n 657, in *Nuova giur civ comm*, 1994, I, 710; Cass Civ, 20 November 2003, n 17607, in *Fam e dir*, 2004, 473 et seq.

of shared custody, since parents may opt for exclusive forms of custody every time they are able to demonstrate that such forms best fit the interest of the child. In real practice, however, it is likely that agreements will continue to provide, especially in cases of children of a tender age, for custody to be arranged exclusively on the mother's side, without the court having to regard it *contra legem*. Therefore, parents can be considered free to define by themselves the most appropriate ways of arranging for their child's custody; they may do so by deciding which of two spouses the child is expected to live with and the criteria by which their authority as parents will be exercised.[24] It follows that, where the agreement proves to be harmful for the child, courts may not approve it.

The issues discussed above are partly similar to those relating to maintenance agreements. Here too, a limitation imposed on such agreements is represented by the child's own interest, and the argument for both scholars and courts has been to rule out the possibility that parties may agree on *una tantum* payment of the maintenance. The periodical character of such payment is in fact conceived as a guarantee for a more accurate assessment of the child's interests, whose needs cannot be foreseen in advance (cf Art 158 CC). This aspect apart, parties nonetheless must be free to choose the time needed and the extent to which maintenance will be allocated, or to identify other ways in which maintenance will be allocated to a child.

With regard to the latter, doubts are cast over the possibility of parents fulfilling their obligations by transferring or creating the whole host of rights in personam in favour of a child (think, for example, of alienating items of real property to a child). Scholars and courts have both raised questions about the legal nature of such an obligation arising from contract law, without arriving at a definite solution.

Different positions are the consequence of the debate raised in civil law countries – and in the Italian legal system as well – over one of the most tangible, and therefore complex, aspects of contractual legal theory (ie *causa* in contract law). In this respect, the apple of discord concerns the role played by the 'causa' in justifying the transfer of property. In fact, arguments have been made to provide explanation in terms of 'causa solutionis', 'causa familiae', reason for transaction or bargain, etc.[25] In this very puzzled landscape of theories, aimed at finding a causal justification in the transfer of the property, an acceptable explanation seems to come from Art 1322 CC whose para 2 allows parties to realise all kind of contracts (even the ones not stated in the

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[24] Reference is to F Tommaseo 'Le nuove norme sull'affidamento condiviso:b) profili processuali' in *Fam e dir*, 2006, 4, 395.

[25] G Oberto 'I trasferimenti patrimoniali in occasione della separazione e del divorzio' in *Familia*, 2005, 181 et seq. On different judicial positions: Trib Vercelli, 24 October 1989, in *Dir fam e pers*, 1991, 1259 et seq; Cass Civ, 25 September 1978, n 4277, in *Mass*, 1978; Cass Civ, 17 June 1992, n 7470, in *Dir fam e pers*, 1993, 70 et seq; Cass Civ, 15 March 1991, n 2788, in *Foro it*, 1991, 1, 1787; Cass Civ, 12 May 1994, n 4647, in *Vita not*, 1994, 1357; Cass Civ, 5 September 2003, n 12939, in *Riv not*, 2004, 468 et seq.

Italian Codice Civile) providing they are 'worthy of protection' (where worthiness of protection means compliance with the general principle of the Italian legal system).

Moreover, Art 155 *quater* CC establishes that parents may also agree on the provision of a family home, to the extent that it responds to the interest of the child.[26] The article has put more (subjective) emphasis on the person who may be allowed a family home, by including the interest of a child to continue living there and the interest of the parties themselves.[27] Where there is no agreement between the parties, it is for the judge to consider further interests likely to arise. The second paragraph of Art 155 *quater* CC makes it clear the ways in which financial relations are regulated between the spouses, including any possible lawful title in property. Thus the provision introduces a kind of variable for determining child-maintenance payments under former Art 155 CC. This variable operates for the benefit of the spouse who is not the owner of the house, but has been entitled by the court to live with his or her children in the family home.

VI VISITING RIGHTS OF NON-CUSTODIAN PARENTS, GRANDPARENTS AND OTHER RELATIVES

The current wording of Art 155 CC seems to put an end to the debates raised in the past with regard to the existence of a right, for a non-custodian parent, to spend time with his or her children (visiting rights). By 'detaching' the notion of custody from a similar notion of co-living/cohabitation, the (ordinary) possibility that a child will permanently stay with only one of the parents certainly does not affect the way in which parenthood responsibility may be exercised, which remains shared between both parents. However, perplexities are still alive in spite of the *ratio* of the law being crystal clear. In fact, the second paragraph of Art 155 CC establishes that courts must decide 'the length of time and modalities of a child's presence' with each parent.

Even though such a provision does not affect parental responsibility that remains shared, the question of determining what is going to survive, if any, of the 'visiting rights' still keeps scholars busy, while rising to the challenge of legal reform.

Scholars have pointed out that the right to visit a child implies 'not only a right vested in a parent but also his/her own duty, as well as a right vested in his/her child'.[28] As already mentioned, Law 54/2006 is inspired by the 'interest of the

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[26] On the notion of the family house as a physical environment (or domestic habitat) used to refer to the running of family relations, see Cass, 9 September 2002, n 13065, in *Mass Giust civ*, 2002, as well as Cass, Sez Un, 21 July 2004, n 13603, in *Foro it*, I, 442 et seq.

[27] See A Spadafora 'L'assegnazione della casa familiare nel progetto di l. n. 66' in *Dir fam e pers*, 2005, 707.

[28] According to G Basini, above n 8, 14.

child' as the guiding principle for individual provisions therein, and therefore for a parent to ensure that such an interest is realised in full.[29]

It is true that, from the point of view of time to be spent with children, parents are now put on an equal footing with each other.[30] Nevertheless, it is understandable that a proper right to visit still exists, in favour of the parent who does not have the physical custody of the child.

In this context, however, privileges enjoyed by the parent who is allowed physical custody are analogous to those recognised to the parent who has got no such custody. In both categories parents are expected 'to take care of' the upbringing of their assigned child, be responsible for the child's education and development, show approval of the choices made by the child, and be aware of the effects likely to be caused to the personality and character of the child when living with another parent.

Neither may grandparents – nor in general all other persons with whom a child is related – have a proper 'right' to visit the child. Beyond any shadow of doubt, Art 155 CC makes it clear that the aim behind the norm is to ensure the maintenance of the same significant relations the children would have been involved in, if a divorce or separation order had not been issued.

Like parents, however, grandparents are not entitled to maintain relations with a minor, if not beneficial to the minor. Grandparents are not, in other words, holders in themselves of any 'visiting rights'. In fact, the privilege of continuing some kind of relationship with a minor appears, on the one hand, to be influenced by already existing contact and, on the other, to be subordinate to whether such a right may be in the interest of the child.

However, the non-existence of a visiting right for grandparents becomes visible by reading the comprehensive legal provisions of Law 54/2006, in which no reference is made to recognition of such a right.[31] On the contrary, it should be added that the new law – although recognising the importance for children in keeping relationships with grandparents and other relatives – does not set any guideline for systems of procedure designed to ensure that their interests are satisfied.

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29 See G Autorino and V Zambrano 'Affidamenti familiari' above n 20, 182 et seq.

30 This is the thesis of B De Filippis, above n 4, 71.

31 On this point, it is significant that G F Basini 'La nonna, Cappuccetto Rosso e le visite: dal c d "diretto di visita" degli avi' in *Fam pers dir*, 2006, 5, 443, has shown Art 29 of the Constitution to place emphasis on the so-called single-unit family rather than the traditional, enlarged family, which also included previous generations. This means that, by establishing some of the children's sacrosanct rights, Art 30 of the Constitution requires parents rather than other different relatives to have an exclusive duty to protect such rights.

VII ALLOCATING CHILD CUSTODY TO ONLY ONE PARENT AND CHALLENGING SHARED CUSTODY

Although some if its contents had merit, repealed Art 155 CC contained provisions only on sole custody. The said article made a distinction (however hard this may have been for the interpreter) between the rightful holding of parental power, which was vested in both parents, and the exercise of it, which remained the privilege of a custodian parent alone, unless questions of greater concern were to be agreed by both parents.[32]

The ways in which Arts 155 and 155 *bis* CC are currently worded do not expressly reiterate the above-mentioned distinction.

Thus, different solutions arise from the need to establish a proper interpretation of what parental responsibility really means. Whatever the interpretation, leading scholars maintain that the principle of jointly exercised parenthood finds its way also under Art 155 *bis* CC the scope of which is to provide for sole custody in cases where it best follows the child's interest. Actually, in failing to make a specific provision on parental authority, the said article not only appears to be restricted to a mere protection of the minor's interest, but also confirms the legislator's disfavour with sole custody.

Without dismissing the principle of parental authority to be always exercised jointly by the parents, the existence of a *discrimen* between the notions of joint custody and exclusive custody, therefore, seems to lie with different interpretations of the concept of parental responsibility. This concept will require the judge to make his own decision regarding concrete situations, always bearing in mind the child's welfare.[33]

In spite of a clear preference for shared custody, Art 155 *bis* CC however makes provision for sole custody, whenever shared custody turns to be 'contrary to the interest of the child', following a proper direction by the judge or an application by the parents themselves at any time.[34] Because of the general character of the provision, the judge will be duty-bound to make his own assessment in the instant case, by relying on the contribution of experts in the field to help him appreciate the particular case. In this context, a vital role is played by the child who is allowed to be heard in court, before the court adopts any measure arising from Art 155 CC.[35] This rule allows the judge to come up

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[32] For a critical approach, see P Stanzione 'Interesse del minore e contrasti fra genitori' in *Problemi di diritto privato* (Bruno, ed, Salerno, 1998) 988.

[33] According to the term used in F Ruscello, above n 3, 629.

[34] In the view of M Sesta, above n 10, 384, allocation of exclusive custody to a parent by the judge is not dependent upon so-called 'extreme' situations, such as those required for instance in Arts 330 and 333 CC. In other words, no 'serious' conduct is required of a parent since the choice for exclusive custody may rely also on objectively assessed factual circumstances.

[35] Some scholars take the view that the hearing of minors is essential for judges to be sure of their decisions. Any failure to provide such hearings could result in the proceedings being null and void, F Tommaseo, above n 24, 397 and B De Filippis, above n 4, 134. While also supporting

with the correct assessment of factual circumstances and better pursue the child's own interests, but also to protect the child's welfare.[36]

It is true that Art 4, para 8, of the Law on Divorce 898/70 – also applying to separating couples – provided for the possibility that courts may consult minors, but such a possibility was confined only to very exceptional cases where important needs required the judges to do so.

In terms of substantive law, Art 155 *sexies* CC introduces, also in matters of separating and divorcing couples, the legal principles enshrined in the New York Convention of 28 November 1989 on children's rights, and later ratified by the Italian Government by Law 176/1991, whose Art 12, in fact, expressly establishes the right for minors to express their own views and to be heard in proceedings that they are concerned with. Similarly, rights exercisable by minors are to be found in the Strasbourg Convention of 25 January 1996, which was later ratified by the Italian Government in 2003. Under this law, it is established that the hearing of a minor, who must be shown to have sufficient understanding, is mandatory and judges must take minor's preference into account.[37]

VIII SCOPE OF THE NEW PROVISIONS

In the Italian legislative landscape, the realm of separation and divorce provisions does not appear to be unified in a single *sedes materiae*. While the Italian Codice Civile regulates separation matters (as under Arts 149–158 CC), divorce procedure is ruled by specific laws (Law 898/1970 and Law 74/1987: the former introduced the divorce in the Italian legal system, the latter modified it).

As a result of systematised provisions still lacking in the field, numerous interpretative problems have been raised by scholars and judges, all such problems originating from the diversity of solutions devised by the Italian legislator when dealing with similar situations. For such problems to be avoided, a solution comes from Art 4 of Law 54/2006, which establishes that

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the duty to hear minors, other scholars believe that judges are not duty-bound to hear minors in person but may also delegate other third parties to do so, G Dosi 'Separazioni, guida all'affido condiviso. Le regole sulla casa e sul mantenimento' in *Dir e giust*, 2006, 104. According to R Russo 'Si divorzia dal coniuge, ma non dai figli' in *Dir e giust*, 2005, 36, 22, the role played by a minor is confined to his or her 'role as milestone party' in judicial proceedings, and 'who is constantly involved in the claims of the parties and decisions of the judge, but never to be allowed to have his voice heard about his/her own concerns'.

36 M Dogliotti 'L'interesse del minore nella separazione fra i coniugi' in *Dir fam e pers*, 1986, 33 et seq.

37 M Dogliotti 'L'interesse del minore nella separazione fra i coniugi' in *Dir fam e pers*, 1986, 33 et seq. Art 3 of the Strasbourg Convention provides that: 'A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights: a) to receive all relevant information; b) to be consulted and express his or her views; c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.'

provisions therein must apply to cases of separation by mutual agreement, separation not agreed upon, divorce and declaration of nullity of marriage, as much as to judicial procedures concerning custody orders for children born outside marriage. In these circumstances the Italian legislator has used a good model which couples in crisis can comply with and which also affects parent-child relationships.

It is significant that this has been done by opting for the wider meaning of the term 'parent' instead of 'spouse'. This choice is consistent with the formulation of Art 317 CC, whereby the exercise of parents' authority in separation proceedings and also 'in cases of separation, annulment or divorce' is regulated by Art 155 CC. Anyway, the provision set forth in Art 4 of Law 54/2006 does not seem to solve problems of compatibility with the rules applied in divorce matters.

In a context where an 'absent-minded' Italian legislator overlooked to declare provisions in Art 6 of Law 878/1970 as being expressly abrogated, scholars wonder if such provisions may still survive in the event of divorce proceedings. On this point of view Art 155 *bis* CC had failed to provide any sort of clarification.

Yet there are good reasons to believe that any such incoherence in the provisions is more apparent than real. The difficult distinction between holding and exercising parental authority leads us to the conclusion that Art 6 of Law 878/1970 should be repealed, its content, however, being redefined under the new provisions.[38] At the same time, Law 54/2006 is still notably ambiguous in character and fails to provide uniformity.

Where the question is raised about obtaining a custody order for children born out of wedlock, the fact that courts must apply Art 317 *bis* CC – which indeed favours sole custody – is the paramount example of that lack of coordination noted before. As a remedy to a similar distraction, leading scholars have aptly argued for a further 'implicit abrogation'[39] to operate under Law 54/2006, which rests on the equal treatment clause enshrined in Arts 2, 3 and 30 of the Italian Constitution.

Courts, in dealing with a crisis among the natural members of a family or a failure to live together by the natural parents, will be bound to deliver their pronouncement on child custody by giving *priority* to an assessment of the possibility of ordering shared custody, and considering exclusive custody where the former route turns out to be in conflict with the moral and physical interests of the child.

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[38] Among others, G Dosi, *Separazioni, guida all'affido condiviso*, above n 35, 107; G Casaburi 'La nuova legge sull'affidamento condiviso', above n 17, 565; R Villani 'La nuova disciplina sull'affidamento condiviso, dei figli dei genitori separate' in *2006 Studium juris*, 520.

[39] G Briziarelli 'L'interesse dei minori come stella polare. Ma la strada della riforma resta incerta' in *D&G*, 2006, 23, 41.

The heavy impression, however, arises that the Italian legislator did not achieve in full the intended purpose of redefining the relationship between parents and children in the light of the notion of jointly exercised parenthood. As a result of this analysis, there is no doubt that a rather complex scenario emerges. This scenario fails to fulfil expectations raised by many in legal milieus and, above all, leaves it up to interpreters – and more adequately judges – to define the contents and limitations of the law.

But the new law also shows that there have been enormous changes in this area. No longer is a child regarded as property to be moved about. Children, like adults, are entitled to a hearing. The concepts have changed and language too. In this context the courts – much more than a legislator – play a central role in continuing to honour established rights, while allowing space in which new rights can see the light of day.

Japan

RECENT DEVELOPMENTS IN PARENT-CHILD RELATIONSHIPS, PARENTAL RIGHTS, AND CHILD CUSTODY IN JAPAN

*Ryoko Yamaguchi**

Résumé

La jurisprudence japonaise a connu au cours de la dernière année une série de développements importants dans le domaine des relations entre parents et enfants, qu'il y ait ou non de liens biologiques entre eux. Dans deux cas où il était allégué qu'une fausse déclaration de naissance avait été enregistrée alors que les parents et l'enfant n'avaient pas de liens biologiques mais avaient plutôt cohabité pendant une très longue période, la Cour suprême du Japon, tout en éludant la question de l'existence d'un lien naturel de parenté, a décidé que la contestation d'une telle relation peut constituer un abus de droit. D'autres décisions jurisprudentielles concernent la procréation médicalement assistée, plus particulièrement la question de la fertilisation in vitro après la mort du donneur et celle de la conception pour autrui. Jusqu'à présent, le système juridique japonais avait négligé de tenir compte des avancées de la science reproductive mais cette jurisprudence pourrait bien provoquer une nouvelle activité législative.

Et au cours des dernières années, le Japon a connu de nombreuses affaires de garde impliquant des enlèvements d'enfant et des questions relatives au droit de visite. Étant donné que le Code civil japonais ne permet pas l'octroi de responsabilités parentales conjointes ou de garde partagée après le divorce, les parents se disputent souvent âprement la garde exclusive des enfants. Il a été souligné que ce système du «tout ou rien» est préjudiciable pour l'enfant et que le temps est venu de réformer le Code. Ce chapitre s'intéresse aux récents développements dans le domaine des relations parent-enfant, des droits parentaux et du droit de garde.

I INTRODUCTION

The year 2006 witnessed a number of significant developments in Japanese case-law concerning the legal relationship between parents and children, both with and without biological ties. In two cases involving submission of false

* Professor of Law at Kyoto Sangyo University. I would like to thank my Faculty of Law colleague Karyn Kandell who helped with English editing and beneficial comments.

notifications of birth, where the parents and child had no biological relationship but had lived together as parents and child for very long durations, the Japanese Supreme Court, although sidestepping the issue of the existence or non-existence of a natural parent-child relationship, held that a challenge to such a relationship may constitute an abuse of right. Other cases involved issues arising out of medically assisted procreation. To date, Japan's legal system has failed to keep up with the advances in reproductive technology, but these cases may trigger new legislation. To draft such legislation, it is necessary to research the relevant law and legal systems in other jurisdictions and discuss the issues of who is a parent and who is a child from the viewpoints of philosophy, bioethics and law.

As for the Japanese Civil Code,[1] although family law scholars and lawyers have held many discussions and have repeatedly called for revision of its family law provisions over the years and, moreover, the Law Commission of the Legislative Council of the Ministry of Justice published a report on the need to reform the family law provisions concerning the formation of marriage, effect of marriage, matrimonial property, divorce, visitation and equality of illegitimate children in 1996,[2] the family law provisions have yet to be revised.

This chapter focuses on recent developments in the areas of parent-child relationships, parental rights and child custody.[3] Over the past few years, Japan has had many child custody cases involving child abduction and visitation. Because the Japanese Civil Code does not allow joint parental rights or joint custody after a divorce, parents often fight each other for sole parental rights. It has been pointed out that this 'all or nothing' parental rights system is harmful to the child and the time has now come to revise the Code.

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1 The Japanese Civil Code contains provisions on areas of law including property law, contract law, tort law, family law and inheritance law.

2 See Y Matsushima 'Reforming Family Law' in Y Matsushima *Contemporary Japanese Family Law* (Minjiho Kenkyukai, Tokyo, 2000) 57. There are widespread arguments about reforming family law with respect to, for example, the minimum age for marriage, marriage of minors, the right to choose different conjugal surnames, requirements to contest a contract regarding marital property, grounds for divorce, distribution of marital property after divorce, the time period between separation and divorce, time limitations on remarriage after divorce, visitation, and inheritance of illegitimate children. However, the Law Commission did not discuss parental rights in its 1996 report because the issue of joint parental rights after divorce was somewhat premature given Japanese society at that time.

3 The definitions of 'parental rights' and 'custodianship' are not clearly set forth in detail in the Civil Code. In general, 'parental rights' are interpreted so as to outline the legal status of parents in the contexts of protecting, promoting, and representing the interests of their children and administering the children's assets. See Minamikata 'Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in *Chotei* (Family Court Mediation)' (2005) 39 *Family Law Quarterly* 489, 492. In case of divorce, one parent shall have parental rights and duties including legal and physical custody.

II PARENT-CHILD RELATIONSHIPS WITHOUT BIOLOGICAL TIES

When a child is born, the biological parents are required to report the birth to the competent ward official for entry into the Family Register (*Koseki*).[4] A couple who wish to be the legal parents of a non-biological child must adopt the child legally[5] and, where a person to be adopted is a minor, the permission of the family court must be obtained.[6] However, some couples occasionally falsely report a birth instead of an adoption in order to avoid the family court procedure or to hide the non-biological relationship and pretend to be the biological parents. It is said that this has been happening since the late nineteenth century.[7]

In one such case, after the passage of about 50 years a parent brought an action seeking the invalidation of the notification of birth and a declaration that there was no natural relationship between the parent and child due to their inheritance dispute following the death of the other parent. The child, the appellant, argued that such a false notification of birth should be treated as a legal parent-child relationship by adoption, because the plaintiff had the intention to be a parent of the appellant at the time of notification and the register should be amended to reflect notification of an adoption instead of a birth.[8] The Supreme Court, however, did not accept the argument of the appellant and held that the notification of birth should not be accepted as that

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4 *Koseki* is a registration system under which every family is registered with the government. Details of birth, marriage, divorce and death are recorded as is the relationship between each person. The *Koseki* Act (the Family Registration Act) was enacted in 1871 to register and classify people as either head of the family or family members under family units. See Y Matsushima, 'The Development of Japanese Family Law from 1898 to 1997 and its Relationship to Social and Political Change' in Y Matsushima *Contemporary Japanese Family Law* (Minjiho Kenkyukai, Tokyo, 2000) 18, n 2.

5 There are two types of adoption in Japan. One is 'ordinary adoption', which is the traditional type that is generally recognised as a way to guarantee that a family will not die out if parents have no children and even allows adoption of adults. With this type of adoption, the adoptee's legal relationship with the biological parents and blood relatives is not extinguished and the persons involved sometimes know the adoptive nature of their relationship. The second type of adoption, which was established in 1987, is 'special adoption'. With special adoption, the legal relationship between an adopted child and his or her natural parents and blood relatives shall be extinguished. Prior to 1987, since the special adoption option was not available, couples who wished to be full adoptive parents often used to make notifications of false birth reports in order to extinguish the relationship between the biological parents and child.

6 Civil Code, Art 798 provides that where a person to be adopted is a minor, the permission of the family court shall be obtained; provided that this shall not apply in the cases where the person to be adopted is a lineal descendant of either the adoptive parent or the adoptive parent's spouse. After the family court grants permission for an adoption, the adoptive parent is required to submit notification of the adoption for entry into the Family Register.

7 See Nakagawa, 'Hanrei Hihyo (Case Study, The Judgment of the Supreme Court of 7 July 2006 (No. 688) and The Judgment of the Supreme Court of 7 July 2006 (No. 1708))' (2007) 136–2 *Minsho Ho Zasshi* 75, 82.

8 See S Wagatsuma, *Shinzokuho (Family Law)* (1961) 280.

of an adoption because the means of notification are completely different and that, as a consequence, no legal parent-child relationship existed.[9]

More than 30 years passed following this decision – and 70 years from the landmark case which formed the basis for its holding – before the Supreme Court sided with the children when asked to rule on claims seeking a declaration of the non-existence of a natural parent-child relationship based on a non-adoption theory. On 7 July 2006, in two separate cases, the Supreme Court, although not deciding the substantive question of whether a natural parent-child relationship existed, upheld the appeals of the children involved with respect to the possibility of the occurrence of an abuse of right in connection with such claims.[10]

In one case, the appellant who had lived with parents as their child for 55 years appealed the judgment of the Hiroshima High Court. He concluded that the claim made following the death of the parents by the appellee, who was the first daughter of the parents and had been adopted by another couple, to seek a declaration of non-existence of the natural parent-child relationship between the parents and the appellant, recorded as their child born in wedlock in the family register, was not an abuse of right. The Supreme Court held that the Hiroshima High Court had legally erred in making its determination that there was no abuse of right on the part of the appellee with respect to this claim, because in reaching its conclusion it had not taken into account the following facts: (i) the appellant had actually lived with the parents as their natural child for a period of about 55 years; (ii) it was not until an inheritance dispute had occurred that the appellee denied, and sought a declaration of the non-existence of, a natural parent-child relationship between the appellant and the parents; (iii) if the non-existence of the natural parent-child relationship should become final and binding by a court judgment, the appellant would be highly likely to suffer considerable mental distress and economic disadvantage; (iv) although the parents are presumed to have desired to maintain their relationship with the appellant as their legitimate child, it would be impossible for the appellant to be adopted by them and acquire the status of their

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[9] Judgment of the Supreme Court of 8 April 1975, 29–4 *Minshu* 401. The Court based its decision on the landmark case of the Judgment of the Old Supreme Court of 4 November 1936, 15 *Minshu* 1946 and the line of cases following it: the Judgment of the Old Supreme Court of 27 July 1938, 17 *Minshu* 1528; the Judgment of the Supreme Court of 28 December 1950, 4–13 *Minshu* 701; and the Judgment of the Supreme Court of 23 December 1974, 4–13 *Minshu* 701. Following the Court's decision in 1975, there were two more similar decisions by the Court, the Judgment of the Supreme Court of 16 June 1981, 35–4 *Minshu* 791 and the Judgment of the Supreme Court of 11 March 1997, 49–1 *Kasai Geppou* (hereinafter *Kagetsu*) 55.

[10] The notion of adoption was involved in a second issue considered by the Supreme Court in the case described in the text accompanying n 11, but it was also raised in the context of an abuse of right theory. In connection with that issue, the Supreme Court affirmed as justifiable the part of the Hiroshima High Court's judgment holding that appellee's claim to seek declaration of non-existence of a legal parent-child relationship by adoption was not an abuse of right because the appellant had not lived as the parents' adopted child. The Supreme Court therefore continued its practice of denying recognition of a parent-child relationship by adoption in these types of cases.

legitimate child as they are now deceased; and (v) the motive for which the appellee came to deny the natural parent-child relationship could not be deemed to be reasonable.[11]

In another case, issued on the same day, the appellant who had lived with parents as a natural child for 51 years appealed the judgment of the Tokyo High Court upholding the claim of the appellee, one of the parents, to declare the non-existence of a natural parent-child relationship after the other parent had died. The Supreme Court held that the Tokyo High Court had legally erred in making its determination that there was no abuse of right on the part of the appellee because it had failed to take into consideration: (i) the substantial life of very long duration of the appellee and the appellant as natural parent and child; (ii) the considerable mental distress and economic disadvantage which the appellant would highly likely suffer as a result of a declaration of invalidity; and (iii) the motive of the appellee for denial of the natural parent-child relationship.[12]

As noted above, the Supreme Court did not decide in these cases, in a non-adoption theory context, the substantive question of whether the claims to seek a declaration of the non-existence of a natural parent-child relationship amounted to an abuse of right, but remanded the cases to the high courts for further examination. It is the author's belief that, instead of merely sidestepping this question by invoking the possible use of the legal theory of abuse of right in order to protect a parent-child relationship, the Supreme Court should instead overrule the precedents and hold that a long-term substantial de facto parent-child relationship grounded on a false notification of birth amounts to a legal adoption. That is, it should recognise the existence of a legal parent-child relationship by adoption in such cases.

In any event, these cases have great import for potential similar claims in the future. The reason many plaintiffs bring an action to invalidate a birth registration is usually due to family discord or inheritance disputes, but such a selfish motive is not usually admitted and should not be accepted or condoned by the courts.

III PARENT-CHILD RELATIONSHIPS WITH BIOLOGICAL TIES: LACK OF LAW REGULATING ASSISTED REPRODUCTIVE TECHNOLOGY

In 2000, a Special Committee belonging to the Ministry of Health, Labour and Welfare held discussions on medical technology for reproductive treatment and concluded, in particular, that surrogate conception should be prohibited.[13]

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[11] Judgment of the Supreme Court of 7 July 2006 (No 688), 60–6 *Minshu* 2307. For an English translation, see www.courts.go.jp/english/judgments/text/2006.07.07–2005.-Ju-.No..833.html.

[12] Judgment of the Supreme Court of 7 July 2006 (No 1708), 1966 *Hanrei Jiho* 62.

[13] Special Committee on Medical Technology for Reproductive Treatment Assessment

Furthermore, since 2003 the Committee on Legislation for a Parent-Child Relationship Relating to Assisted Reproductive Technology Treatment within the Legislative Council of the Ministry of Justice has discussed enactment of special provisions for the Civil Code regarding a parent-child relationship, with respect to a child born with the help of assisted reproductive technology using donor sperm, eggs or embryos. Despite all these discussions, there is still no law in Japan with respect to the parent-child relationship and reproductive treatment using donor sperm, eggs and embryos.

Such a law is urgently needed. According to studies, the number of babies who are born each year as a result of in vitro fertilisation is more than 15,000 and, as the result of other types of reproductive treatment, over 40,000. An increasing number of people who are unable to conceive due to infertility are receiving reproductive treatment, which is becoming very common in Japan.

(a) In vitro fertilisation after death

While legal problems arising out of reproductive treatment using the sperm, eggs and embryos of a married couple are rare, one case involving in vitro fertilisation after death came before the Supreme Court in 2006.

In this case, the husband's sperm was frozen prior to receiving irradiation in contemplation of a bone marrow transplant as treatment for his leukemia. After he died, his widow took his sperm to a different hospital without revealing her husband's death. The woman became pregnant by in vitro fertilisation using the frozen sperm and delivered a child, X. X brought an action against the public prosecutor pursuant to Civil Code Article 787 seeking posthumous acknowledgment of paternal affiliation.[14] The Matsuyama District Court rejected X's request on the grounds that fertilisation had occurred after his father's death and society does not recognise a dead man as the father of a child born through such means.[15]

The Takamatsu High Court reversed the Matsuyama District Court decision based on the following grounds: (i) as Art 787 of the Civil Code was enacted prior to the development of artificial reproduction, its background should not disallow a child conceived and delivered by a woman as a result of artificial reproduction conducted using a man's frozen sperm after his death from seeking acknowledgment of the man's paternity pursuant to the Article; (ii) as a legal parent-child relationship can be established under Art 787, based on the

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Subcommittee for Advanced Medical Care of the Health Science Council ('Special Committee'), Ministry of Health, Labour and Welfare, 'Report on Ideal Reproductive Treatment Using Donor Sperm, Eggs and Embryos', III-1-(2)-5), 8 December 2000. For an English translation, see www.mhlw.go.jp/english/wp/other/councils/00/index.html.

14 Civil Code, Art 787 provides that a child, his or her lineal descendant, or the statutory representative of either, may bring an action for affiliation; provided that this shall not apply if 3 years have passed since the day of the death of the parent.

15 Judgment of the Matsuyama District Court of 12 November 2003, (2004) 1144 *Hanrei Times* 133.

objective finding of the existence of a parent-child relationship by blood in cases where the father or mother of a child born out of wedlock does not voluntarily acknowledge and report the child as his or her own, the father's existence at the time of conception of the child cannot be required as a condition to uphold a claim for acknowledgment under the Article; and (iii) its findings showed that there was a biological relationship between the father and child, that the father had consented to the use of his frozen sperm and for his wife to have a child after his death, and that there was no evidence of any special circumstances that would make it unreasonable to uphold the child's claim for acknowledgment of paternity.[16] The Takamatsu High Court therefore recognised the legal relationship between father and child. The public prosecutor, representing the public interest, appealed.

The Supreme Court reversed the Takamatsu High Court's judgment on 4 September 2006, holding that there was no law at present allowing the establishment of a legal parent-child relationship between a man and a child conceived and delivered by a woman as a result of an artificial reproduction procedure conducted after the man's death by using his frozen sperm. The Court stated that, where a child is conceived and born after the father's death, there is no possibility under the current legal system of the Civil Code for the occurrence of the basic legal relationships between child and parent or their relatives to which a person is entitled based on a legal parent-child relationship, for example, for the father to have parental authority over the child, for the child to enjoy the father's custody, care and support, or for the child to become the father's heir or an heir through stirpes based on the relationship with the father. The Court concluded that the issue of a legal parent-child relationship between a child conceived after the father's death and the deceased father should, in principle, be resolved by enactment of legislation on whether or not to recognise their legal parent-child relationship, and, if it should be recognised, what the requirement or effect of such a relationship should be, after consideration of the issue from various perspectives such as: the bioethics concerning artificial reproduction conducted by using the frozen sperm of a deceased person; the welfare of a child born through such a process; the awareness of related people who are supposed to have relationships with the child as parents or relatives; and public opinion on these matters.[17]

One lawyer who disagreed with the judgment opined that the Supreme Court had ignored the welfare of the child and that it is a child's basic human right to have his or her legal father determined.[18] On the other hand, one scholar in favour of the judgment stated that, while the Takamatsu High Court had

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16 Judgment of the Takamatsu High Court of 16 July 2004, (2004) 1160 *Hanrei Times* 86.

17 Judgment of the Supreme Court of 4 September 2006, 60–7 *Minshu* 2563, (2007) 1227 *Hanrei Times* 120. For an English translation, see www.courts.go.jp/english/judgments/text/2006.09.04–2004.-Ju-.No..1748.html.

18 K Murashige, 'Shigo Seishoku no Houteki Chii (Legal Status of a Child Born after the Father's Death)' (2006) 1207 *Hanrei Times* 32, 37.

pointed out the father's consent to the child's birth, it was irrelevant and a dead father does not have the right to have a child after death.[19]

Following the Supreme Court's decision in this case, the Japan Society of Obstetrics and Gynecology adopted and announced a policy for doctors to reject the use of a man's sperm after his death.

(b) Surrogate conception

More problematic are the issues arising out of the use of surrogate or host mothers.[20] While there is no law prohibiting surrogate conception, the guidelines of the *Japan Society of Obstetrics and Gynecology* issued in 2003 prohibit doctors from taking part in procedures for births through surrogacy and the Special Committee of the Ministry of Health, Labour and Welfare recommended such a prohibition in 2000. However, from a few years ago, a number of couples have gone to the United States and South Korea to attempt to have a baby via a surrogate or host mother to circumvent these restrictions. In fact, it is said that there have been over 100 children born through a surrogate or host mother in another country in recent years. Most of these couples, however, have reportedly registered the children as their own legitimate offspring.

In one famous case, a TV personality couple announced that, because the wife had lost her womb due to uterine cancer, they had had twin babies via a host mother arrangement whereby the embryos created through in vitro fertilisation using the husband's sperm and the wife's eggs were implanted in the womb of a woman who lives in the state of Nevada in the United States. They had made a contract with the host mother surrogate and her husband for the birth, agreeing that the Japanese couple would be the parents of the babies. The couple obtained a judicial decision from a Nevada court recognising them as the legal natural parents of the twins. However, the couple's Japanese ward office refused to accept the birth notification they submitted indicating that they were the twins' parents because, according to Japanese case-law, the Civil Code presumes that the woman who gives birth to a child is its mother.[21]

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[19] N Mizuno, 'Hanrei Hyoshaku (Case Study, Judgment of the Takamatsu High Court of 16 July 2004)' (2005) 1169 *Hanrei Times* 98, 102–103.

[20] The 'surrogate mother' method involves injection of the husband's sperm into the womb of a woman other than his wife, who will conceive and give birth to a child. This is performed in cases where the wife's eggs are not available because her ovaries and womb have been removed or where she is unable to conceive a child for other reasons. The 'host mother' method involves implantation of embryos developed as a result of in vitro fertilisation using the husband's sperm and the wife's eggs into the womb of a woman other than the wife, who will conceive and give birth to a child. This is performed in cases where the wife is unable to conceive but the sperm and eggs of the couple are available. Special Committee, above n 13, at III-1-(2)-5).

[21] Although Civil Code, Art 779 provides that a father or a mother may acknowledge his or her illegitimate children, the Judgment of the Supreme Court of 27 April 1959, 16–7 *Minshu* 1247, held that a mother who gave birth to a child need not acknowledge the child in order to establish a parent-child relationship.

The family court dismissed the couple's appeal against the ward's action in November 2005, but in September 2006 the Tokyo High Court ruled in favour of the couple and ordered that the birth notifications be accepted, noting that unless the twins are recognised as the children of the couple they would be in the state of having no legal parents in Japan.[22] The decision of the High Court was based on its recognition of the effect of the judicial decision of the Nevada court recognising the legal parent-child relationship between the couple and the twins, through application or analogical application of Art 118 of the Code of Civil Procedure, which deals with the recognition of final and binding foreign judgments in Japan. The High Court reasoned that recognition of the effect of the judicial decision would not run contrary to Japanese public policy and morality, and would therefore satisfy the requirements of item 3 of that Article,[23] on grounds which included the following: (i) the couple are the biological parents of the twins; (ii) they have no other way to have a child without using a host mother; (ii) the American woman agreed to be the host mother in the spirit of volunteerism and she received only minimum payment for her labour and expenses incurred in accordance with Nevada law – the money paid was not consideration for the children, there was no sales contract, the surrogacy contract was not prejudicial to the host mother's dignity and it gave top priority to her safety; and (iv) the host mother and her husband did not want to be the twins' parents, whereas the Japanese couple have taken care of the children and wish to be their parents and, considering the children's welfare, it would be best for the Japanese couple to continue to take care of them.

The ward filed an appeal and the Supreme Court ruled on 23 March 2007 and reversed the Tokyo High Court's decision.[24] Like the Tokyo High Court, the Supreme Court held that, under the Civil Code, where a woman has conceived and delivered a child by way of assisted reproductive technology using another woman's egg, the legal mother of the child is the woman who has given birth to the child, and a mother-child relationship cannot be established between the child and the genetic mother. However, the Supreme Court refused to recognise the legal validity of the decision of the Nevada court, holding that a judicial decision rendered by a foreign court, acknowledging the establishment of a natural parent-child relationship between persons who are not eligible for such a relationship under the Civil Code, is incompatible with the fundamental principle or fundamental philosophy of the rules of law in Japan. Thus, it should be deemed to be contrary to public policy as prescribed in Art 118, item 3 of the Code of Civil Procedure and therefore not be effective in Japan.

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22 Judgment of the Tokyo High Court of 29 September 2006, 1957 *Hanrei Jiho* 20.

23 Code of Civil Procedure, Art 118 provides that a final and binding judgment rendered by a foreign court shall be effective only if it satisfies, among other requirements, item 3: 'The contents of the judgment and the court proceedings in which it has been rendered are not contrary to public policy in Japan.'

24 Judgment of the Supreme Court of 23 March 2007, 61–2 *Minshu* 619. For an English translation, see www.courts.go.jp/english/judgments/text/2007.03.23–2006.-Kyo-.No..47.html.

The Supreme Court ruled that it could not find a legitimate parent-child relationship between the twins and the Japanese couple. The twins can therefore not be registered as the children of the couple or as Japanese citizens even though the couple are their biological parents.

The Court, however, stated in its opinion that, in view of the existence of surrogate births due to medical advances that did not exist at the time of the enactment of the Civil Code, it is necessary to enact new legislation concerning the parent-child relationship and medically assisted procreation based on the best interests of the child.

The Japanese legal system has obviously failed to keep up with advances in reproductive technology and there are conflicting opinions over surrogate births between the public and academics, including scientists and legal researchers. As mentioned above, both the government's Special Committee and the Japan Society of Obstetrics and Gynecology reject surrogate conception, but public opinion takes the opposite view. According to a recent survey conducted by the Ministry of Health, Labour and Welfare, 54% of the 3,400 adults aged 20 to 69 who responded said that surrogate births involving a married couple's sperm and eggs plus host mothers may be acceptable in society under certain conditions, while 16% were against it, down from 24.8% in the previous survey in 2003.[25]

One family law scholar who opposes surrogacy births has stated that, while a woman has the rights to give birth to a child and to create a family, these rights are not absolute and the surrogate or host mother faces great risks when she gives birth to a child.[26] As Japanese women are expected to play a great role by giving birth to children after marriage, she said, surrogate births are harmful to both women and children.[27]

IV CHILD CUSTODY AND CHILD ABDUCTION

In making child custody decisions and determining what is in the best interests of the child, Japanese courts have traditionally emphasised a maternal preference and maintaining the status quo as well as considering such other factors as a parent's affection towards the child, a parent's intention to care for the child, the living environment, a parent's occupation, and a parent's financial situation. In recent years, courts have also taken into consideration such factors as who is the primary caretaker and who would be the friendlier parent vis-à-vis visitation.

Japan still recognises the maternal preference doctrine. Many judges believe that a mother is a better custodian than a father for younger children because

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[25] See 'Public support for host surrogacy tops 50% for first time' *Kyodo News,* 8 November 2007.

[26] M Ishii, 'Dairi-Bo, Nani wo Giron Subekika? (Surrogate Mothers: What Should We Discuss?)' (2007) 1342 *Jurist* 10, 22.

[27] Ibid.

they think the mother is better able to take care of them based on the notion of gender. Many scholars, however, argue for rejection of this gender bias. Another factor increasingly considered by courts is which parent is the primary caretaker of the child. But many argue that this factor is not different from the maternal preference doctrine because in the majority of Japanese families the mother takes care of the children most of the time. A new rule that the courts are beginning to take into account is the 'friendly parent rule', that is, the parent who would facilitate the contact of the children with the other parent through visitation will be regarded as the better custodian and courts should grant custody to the friendlier parent who seems to have the autonomy to make parenting plan arrangements including visitation.

Another factor that has been determinative in child custody cases involving a parental abduction is the need to impose a penalty for the abduction. In four similar High Court cases that were decided in June 2005,[28] in which the mother had returned to her parents' home with the child or children and the father had subsequently abducted and taken the child or children to his house, the High Courts granted custody to the mother based at least in part on the desirability of imposing a penalty for the abduction.

In one case, the mother had returned to her parents' home with three children aged 6, 5 and 3, because of her husband's cruel violence against her, including incidents of psychological abuse, beating, kicking, and slapping her so hard that she became temporarily deaf. During the parents' separation, the father abducted the children from their kindergarten and took them to his house. The mother filed a motion with the Family Court to have the children returned to her, but the Family Court denied the motion on the grounds that maintaining the status quo of the children's life with the father was in their interest and that there was no evidence that the father had been violent toward the children. The mother appealed and the Sendai High Court upheld the appeal, finding that in comparing the interests of the children as to living with the father, abductor and current de facto custodian, and as to living with the mother, former de facto custodian, unless the abductor could be recognised as having a stronger claim to custody than that of the mother, the Court should grant the mother's appeal because it should not condone the abduction.[29] The main factor which the Sendai High Court took into account in reaching its decision was the desirability of imposing a penalty for the abduction.

In the three other similar child custody disputes, in deciding which parent would be the better custodian based on the best interests of the child, the Sapporo High Court emphasised the factors of maternal preference and the penalty for abduction as well as considering the friendlier parent;[30] the Osaka

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[28] Judgment of the Akita Branch, Sendai High Court of 2 June 2005, 58–4 *Kagetsu* 71; Judgment of the Sapporo High Court of 3 June 2005, 58–4 *Kagetsu* 84; Judgment of the Osaka High Court of 22 June 2005, 58–4 *Kagetsu* 93; and Judgment of the Tokyo High Court of 28 June 2005, 58–4 *Kagetsu* 105.

[29] Sendai High Court Case, above n 28, 58–4 *Kagetsu* 71.

[30] Sapporo High Court Case, above n 28, 58–4 *Kagetsu* 84.

High Court emphasised the primary caretaker, the friendlier parent and the penalty for abduction as well as considering maternal preference;[31] and the Tokyo High Court emphasised the primary caretaker and the penalty for abduction as well as considering maternal preference.[32] All of the courts made much of the importance of maternal nature with respect to a 2-year-old daughter, a 4-year-old child, and a 7-year-old child, respectively.

The number of parental child abduction cases in Japan is increasing. One reason is that mothers frequently return to their parents' home with their children without telling the fathers and without a court order. Such conduct is not regarded as abduction, because there is currently no restriction on relocation during separation or after divorce in Japan. To prevent such problems, it is therefore necessary to make a rule to restrict relocation with children without the consent of the spouse or ex-spouse.

More importantly, the courts need to start taking into consideration the significant factor of domestic violence when rendering their custody decisions. Although one of the causes of separation in three of the four cases discussed above was the domestic violence of the husband,[33] none of the courts cited the domestic violence when deciding their custody orders. Despite the enactment in 2001 by the Japanese legislature of the Domestic Violence Prevention Act providing for restraining orders, regrettably the negative factor of domestic violence has not yet taken root as a consideration in child custody cases. Even if a court does not find that a parent had been violent toward a child as well as toward another member of the family, the court needs to consider and point out in its decision that domestic violence is detrimental to, and not in the best interests of, the child to be placed in custody. Indeed, if a parent was a victim of domestic violence, the judge should allow the abused parent to escape with the child from the abusive parent without the abusive parent's consent and should not require that the abused parent be the friendlier parent in making a decision.

V PARENTAL RIGHTS UNDER THE JAPANESE CIVIL CODE

Prior to the end of World War II, Japan had an '*Ie*', or household, system in which the head of the family held absolute power against other family members as the 'emperor of the family'.[34] Under that system, the relationship between parent and child was that of superior and subordinate.[35] When the new Constitution based on freedom and equality among people was adopted in 1947, the Civil Code was accordingly revised and the system was formally

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31 Osaka High Court Case, above n 28, 58–4 *Kagetsu* 93.

32 Tokyo High Court Case, above n 28, 58–4 *Kagetsu* 105.

33 The Sendai, Osaka and Tokyo High Court Cases, above n 28, involved domestic violence to some degree.

34 See Y Matsushima 'The Evolution of Japanese Family Law: A Personal Appraisal of Japanese Family Law' *Contemporary Japanese Family Law* (2000) 3–4.

35 Ibid at 3.

abolished. As for a parent, the Civil Code presently provides that a person who exercises parental rights and duties holds the right, and bears the duty, to care for and educate the child.[36] The relationship between parent and child is based on the dignity of the individual. Unfortunately, although it has been 60 years since the revision of the Civil Code, some parents still believe that their parental rights are absolute against their children and their children do not have any rights. A number of legal academics have therefore called for further revision of the Civil Code to include provisions that are grounded in the interests and rights of the child.

A symposium with the theme 'The Ideal for Parental Rights Statutes' was held by the Japan Society for Socio-Legal Studies on Family Issues on 10 November 2007, at which Japanese researchers reported on parental rights in Japan, Germany, France, England, and the United States and family law scholars, lawyers and judges discussed the problems concerning Japanese parental rights in comparison to those in other countries.

The members of the symposium agreed that some of the main issues and problems concerning Japanese parental rights today are as follows:

(1) Japan has not yet abolished its discrimination between legitimate children and illegitimate children despite its ratification in 1994 of the UN Convention on the Rights of the Child (CRC), which prohibits discrimination of any kind against children, irrespective of their or their parents' or legal guardians' 'birth or other status'. For instance, the Civil Code provides that the share in an inheritance of an illegitimate child shall be one-half of the share in an inheritance of a legitimate child.[37] Furthermore, it provides that one parent shall exercise parental rights and duties with respect to an illegitimate child whereas both parents have parental rights and duties with respect to a legitimate child.[38] One of the unwed parents therefore does not have any visitation rights or any parental rights.

(2) The father and mother have equal parental rights and duties during marriage, but the Japanese Civil Code does not allow for joint parental rights[39] after divorce. In contrast, the BGB of Germany, the Droit Civil of France and the Children Act of England all provide for joint parental rights and responsibilities[40] both during and after marriage and the family law statutes of most states of the United States authorise joint custody

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36 Civil Code, Art 820.

37 Civil Code, Art 900, item 4.

38 Civil Code, Art 819, para 4.

39 Both parents have parental rights during marriage whereas only one parent has parental rights involving custodial rights after divorce. Usually, the parent having parental rights also has custodial rights, but Civil Code, Art 766 allows the parent without parental rights to have only custodial rights. Just 1% of all divorced couples in Japan share parental rights and custodial rights after divorce, but this does not mean joint parental rights or joint custody. See Minamikata, above n 3, at 492–493.

40 Of course, each country has its own terminology for and concepts of what constitute 'parental

after divorce. The rights of the non-custodial parent are ambiguous in the Japanese Civil Code. One parent after divorce is to be a non-custodial parent without any parental rights irrespective of rights concerning child support and inheritance. Most of the symposium's presenters were in favour of joint parental rights during marriage and after divorce.

(3) Some parents voluntarily make an arrangement for visitation after divorce, but there is no provision for visitation in the Civil Code. The Civil Code permits divorce by mutual consent without a court order and 90% of all divorces are accomplished through submission of a signed document of divorce in which parents with children indicate who will exercise parental rights. The Japanese divorce system allows for complete non-intervention in the couple's decisions and respects parental autonomy, but many scholars are afraid that such a system does not take into account the interests of the children involved.

The reason Japan does not have any code provisions dealing with joint parental rights and visitation after divorce is the lack of consensus on the notion of the interests of the child. While many scholars believe that frequent and continuing contact with both parents is in the best interests of the child, as many people in numerous other countries believe, some lawyers and some members of the public think that such contact is harmful to the children as there may be a conflict of loyalty between their father and mother. Due to this disagreement, Japan does not have any code provision concerning the interests of the child. Nevertheless, Japan has ratified the CRC which, pursuant to Art 9, para 3, obligates state parties 'to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'. So the Japanese government should enact statutes without regard to whether or not a child's parents are married.

Another reason the Japanese legislature has hesitated to enact a statute providing for joint parental rights after divorce is the lack of social support.[41] A couple without any legal or administrative intervention may not have access to competent advice concerning a parenting plan as to how they can take care of their children in a co-operative manner after divorce. It is therefore necessary to establish some social and judicial support systems to advise and encourage parents prior to and after divorce.

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rights and responsibilities', for example, 'elterliche Sorge' in Germany, 'autorité parentale' in France, and 'parental responsibility' in England.

[41] Japan has a '*chotei* system' which is similar to a court mediation process. If parents fail to reach an agreement regarding divorce or children, they must go through the compulsory process of *chotei* prior to litigation. Minamikata, above n 3, at 491. Whereas *chotei* can be useful for the divorce process, it is neither educational nor does it encourage the divorcing parents to make future plans, and the c*hotei* commissioners are not able to give advice about a post-divorce parenting plan. See S Minanmikata, 'Mediation for Mediators?' (2006) 39 *Hosei Riron* 133.

VI CONCLUSION

One of the most important notions concerning the parent-child relationship and parental rights including custody is the rights of the child. In cases of divorce, it is particularly important for children to have their opinions heard. According to the Rules for Family Court Judges, the family court shall hear the statement of a child aged 15 or older when making a determination regarding child custody,[42] and usually family court investigators conduct an investigation concerning a child under 15 and make a report to the court. But it is not in the best interests of children to state their opinions directly before a court, because the children could easily become stressed among the adults present and might not be able to reveal their true thoughts. Moreover, it is not certain that the examination of a child's feelings through an interview of the child by family court investigators will ensure the rights of the child, because the interviewers are connected to the court, are neutral vis-à-vis the parents and child, and therefore are not the child's advocates.

What children need are their own representatives to whom they can express their views. Children need such support to ensure their legal rights and protect their interests. It is therefore necessary for Japan to enact legislation mandating the use and input of a child representative as part of the divorce process and also for juvenile dependency and juvenile delinquency cases.[43] There would be options of using such persons as lay representatives, lawyers, or psychologists to fill the role. To draft an effective law, it is imperative for Japanese lawyers, scholars, and other relevant persons to undertake studies and examine the laws and systems on child representatives in other countries. In particular, it is necessary to conduct research about how a representative should interview a child and how it is possible to represent simultaneously both the child's wishes and the child's interests.

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[42] Rules for Family Court Judges, Art 54.

[43] Revised Juvenile Act 2007, Art 23–3 stipulates that a juvenile court judge may appoint a public lawyer in some serious cases of juvenile delinquency involving detention. However, the percentage of juvenile delinquency cases in which adult 'attendants' such as defence lawyers, parents or other supporters represent the juvenile is still not high. As for juvenile dependency cases, there is no child representative system.

Korea

TRANSFORMATION OF KOREAN FAMILY LAW

*Whasook Lee**

Résumé

Le droit familial coréen a connu une réforme révolutionnaire en mars 2005, après celle de 1990. La réforme la plus récente est la conséquence directe de la déclaration d'inconstitutionnalité (ou d'incompatibilité constitutionnelle) de six dispositions importantes issues de l'importante réforme de 1990. Cette dernière avait donné lieu à des débats passionnés à propos du système patriarcal, notamment sur la question du «chef de famille». Pour l'essentiel, la réforme de 2005 est entrée en vigueur en mars 2005, à l'exception des dispositions relatives au chef de famille et à l'adoption plénière, qui sont entrées en vigueur en janvier 2008. Au surplus, les règles sur le divorce par consentement mutuel ont été modifiées en 2007 et doivent entrer en vigueur dès juin 2008. Le concept de «chef de famille» a été aboli et cela a une signification énorme. Le projet de loi sur le régime de la séparation de biens n'a pas encore été adopté par l'Assemblée nationale mais nous en discuterons tout de même brièvement le contenu. L'objectif de la réforme de 2005 était d'éliminer les dispositions du droit coréen de la famille qui étaient inconstitutionnelles (ou du moins incompatibles avec la Constitution), alors que la réforme de 2007 est plutôt axée sur la protection des personnes vulnérables et sur l'égalité entre les sexes. En modifiant la procédure de divorce, la réforme de 2007 annonce une meilleure protection des enfants, qui sont les plus grandes victimes du divorce de leurs parents. Elle instaure aussi le principe de l'égalité économique réelle entre les hommes et les femmes. Le droit de la famille coréen reflète désormais les changements dans la société et dans la famille. De l'avis de l'auteur, la prochaine étape sera la réforme du droit de la protection des enfants à la suite du divorce, ainsi que celle du droit patrimonial de la famille en dans le cadre du divorce et des successions.

I INTRODUCTION

In 1997, the Korean Constitutional Court declared that Art 847 of the Korean Civil Code (hereafter CC), which regulates the limitation period for the action of denial of paternity,[1] was incompatible with the Constitution.[2] Since that

* Professor of Law, Yonsei University Korea.

1 Art 847, CC was amended (italicised part) in the 31 March 2005 Reform of family law (hereafter March 2005 Reform) so that the action of denial of paternity shall be brought by the husband or wife against the other spouse or the child *within 2 years* from the day when he or

time five more provisions regarding family law have been decided as unconstitutional or incompatible with the Constitution by the Constitutional Court during 1997–2006, namely: the prohibition of marriage between parties who have the same surname and origin of surname (Art 809 CC);[3] the 'head of the family' system;[4] the 10-year limitation period to claim for recovery of inheritance (Art 999(2) CC);[5] absolute acceptance of inheritance by law (Art 1026, para 2 CC);[6] and the addendum para 3 CC which is a transitional measure for qualified acceptance.[7]

Among these, two inheritance provisions, which were decided as unconstitutional or incompatible with the Constitution, were amended in the 2002 Reform.[8] The amendment of family law provisions pursuant to the decision of incompatibility with the Constitution, including amendments of several other provisions, came into force on 31 March 2005,[9] except for the 'head of family'[10] system and the 'full adoption' system[11] which have been in force since 1 January 2008. The coming into force of these two systems was delayed because more preparation was necessary.

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she becomes aware of the cause of the action. According to the previous provision, only the *husband could bring an action within one year from the day when he became aware of the child's birth*. The English translation of the Civil Code in this paper is quoted from the Korean Legislation Research Institute.

2 The Korean Constitutional Court Decision on 27 March 1997, case no 95 heonga 14 et al.

3 The Korean Constitutional Court Decision on 16 July 1997, case no 95 heonga 6–13. Art 809 CC was amended as 'Prohibition of Consanguineous Marriage' in the March 2005 Reform.

4 The Korean Constitutional Court Decision on 3 February 2005 case no 2001 heonga 9 et al. The 'head of family' system, which was mainly regulated in chapter 2 of part IV, CC, was deleted on 1 January 2008 according to the March 2005 Reform.

5 The Korean Constitutional Court Decision on 19 July 2001, case no 99 heonga 9 et al. Art 999, para 2 CC, which was decided as unconstitutional, was amended in the January 2002 Reform as follows (italicised part): 'the claim for recovery of inheritance under paragraph (1) shall lapse at the expiration of three years from the date he comes to know the infringement, *or ten years from the date the right of inheritance is infringed*. The previous provision on the ten years part was that the claim for recovery of inheritance lapsed on the expiration of *ten years from the date when inheritors become aware of the commencement of the inheritance'*.

6 The Korean Constitutional Court Decision on 27 August 1998, case no 96 heonga 22 et al. Art 1026, sub-para 2 CC was recovered in the January 2002 Reform with the establishment of a specially qualified acceptance of inheritance in Art 1019, para 3 CC.

7 The Korean Constitutional Court Decision on 29 January 2004, case no 2002 heonga 22 etc. Addendum para 3 CC was passed in the 2002 Reform to relieve the inheritors who could not register for the renunciation of an inheritance or the qualified acceptance of an inheritance during the period between the suspension of applications by the decision of Constitutional Court and enforcement of the Reform Act of 2002. But it was declared as incompatible with the Constitution because it provided only for the inheritors who have known the commencement of inheritance from 27 May 1998 to before the enforcement of Reformed Act of 2002, Addendum para 4 CC was passed in December 2006 to *relieve those inheritors even if they knew the commencement of inheritance before 27 May 27 1998 who could not register qualified acceptance.*

8 See n 5 and 6 above.

9 See n 1 and 3 above.

10 See n 4 above.

11 The full adoption system was established by the 2005 Reform Act regardless of the Constitutional Decision.

Korean family law was transformed in a revolutionary way in 1990. Despite epochal reforms, the six provisions referred to have been declared unconstitutional or incompatible with the Constitution, due mainly to the patriarchal systems[12] which still existed in family law after 1990. At the end of a long and heated argument regarding the existence of these two patriarchal systems between progressive groups (who insisted on their elimination on the ground that they discriminated against women) and redundant Confucians (who wished to preserve the systems in the name of tradition), the National Assembly chose a compromise in the 1990 Reform. This was to reduce the power of the 'head of the family' and to abolish his duty to the family, and to preserve the marriage prohibition between parties who have same surname and origin of surname (hereafter 'same surname marriage prohibition'). Nevertheless, these patriarchal systems could not survive social change, the continual campaign for the abolition of patriarchal systems in family law by feminist activists, and the prevailing view on gender equality in Korean society. The result was that the Constitutional Court decided these two patriarchal systems violated the Constitution; 'marriage prohibition' in 1997 and in 2005 'head of the family'. After a long and heated discussion the National Assembly passed the Reform Bill to abolish the 'head of the family' system in family law and to revise the 'same surname marriage prohibition' system into a prohibition of marriage between close relatives. Therefore, the Reform of 2005 was inevitable.[13]

Furthermore, the Family Law Reform Bill on the procedures for divorce by agreement was passed by the National Assembly in November 2007 and was promulgated in December 2007, coming into force in June 2008. As the National Assembly has suspended passage of the Reform Bill in relation to the separate property system, movement on the Family Law Reform will continue in 2008 or 2009.

This chapter introduces the Family Law Reform Act, which comes into force in 2008. Accordingly, the chapter will address the abolition of the 'head of the family' system (II), the reform of divorce by agreement (III), the reform of parental authority (IV), and the full adoption system (V). Finally, the Reform Bill on the separate property system will also be addressed (VI).

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[12] It means the 'head of the family' system and the prohibition of marriage between parties who have the same family surname and the same origin of the surname.

[13] The Contents of the Reform of 2005 was introduced by Mi-Kyung Cho ('Recent Reform of Korean Family Law'), Hyunah Yang ('Colonial Legacies in the "Family-Head System" In Korean Family Law') and Jinsu Yune ('Tradition and the Constitution in the Context of the Korean Family Law') at the International Conference of Family Law in 2005.

II ABOLITION OF THE 'HEAD OF THE FAMILY' SYSTEM

The 'head of the family' system was declared incompatible with the Constitution.[14] The National Assembly passed the Reform Bill eliminating the 'head of the family' system in March 2005. This came into force on 1 January 2008. The significance, controversy and court decision relating to the 'head of the family' system will now be discussed.

(a) Significance of the 'head of the family' system

The 'head of the family' system is significant for the following reasons. First, all Koreans must have his or her name entered into a family register. A child takes his or her father's surname and origin of surname and this name is entered into the father's family register. The child cannot transfer his or her family register to the mother's or to the family register of their mother's second husband, even when the mother is recognised as the person who has parental authority as well as fostering rights after divorce. When a daughter is married to a man who is not the first son of his parents, the husband will be a 'head of a branch family' and the wife shall have her name entered into the husband's family register as a family member. When the husband is the first son of his parents, the wife shall have her name entered into the family register of which the 'head of family' is her father-in-law. As a result, the 'family' in terms of family register has only a legal meaning and might be different from the family who are blood relatives and live together in the same house, since a married daughter is not a family member of her parents' family register whether she lives with her parents or not, according to the 'head of the family' system.

Secondly, the 'family' consists of the 'head' of the family and the 'family members'. The power[15] of the 'head of the family' is very weak and formal, rather than substantial. Further, also the 'head' has no duty to his family members. Despite this, the 'head of the family' system has enormous significance, since the 'head' of the family is a standard in organising the family register (the identification system). Therefore, the 'head of the family' system has great significance, regardless of whether the 'head' of the family has power or a duty to the family members or not.

The third reason is very important. When the 'head' of the family dies, his first son succeeds to the status of the 'head' of the family according to Art 984 CC, which regulates the order of succession to family 'headship'.[16] If the 'head' of the family has no son, the first daughter could become the 'head' of the family,

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[14] See n 4 above.

[15] The powers were: (1) Consent to leave the Family (Art 784, para 2); (2) Power of Entry into the Family Register for Lineal Blood Relatives of Head of Family (Art 785); (3) Power for Family Council (Art 966); (3) Power of Extinguishment of Family (Art 793) etc. These articles were deleted from January 2008.

[16] Art 984 CC, which lost its validity in 1 January 2008, stated: '1. a male who was a lineal

but not once she is married and becomes a member of another family. The provision on the order of succession to 'headship' is not optional according to his or her intention, but compulsory under the law. Consequently, Art 984 CC sent a strong symbolic message that in Korean society sons were more important than, and superior to, daughters.

(b) Controversy

Ever since the 'head of the family' system was established in the Korean Civil Code in 1960, the system has been criticised by progressive family law scholars and feminist groups. Such groups argued for the abolition of the 'head of the family' system on the ground that the system was unconstitutional, because the system contains articles that discriminate against females and daughters, for example:

(1) daughters are inferior to sons in succeeding to the status of the 'head' of family (which means discrimination between daughters and sons);

(2) when a daughter gets married, her family register shall be automatically entered in her husband's family register or husband's father's register as a family member (which discriminates between the wife and the husband);

(3) even when a married woman divorces and she is determined as having parental authority and fostering rights over her child, the child's family register cannot be moved to the mother's, even though she is the child's agent in law (which discriminates between the mother and the father);

(4) when the husband who was the 'head' of the family dies, the first son succeeds to the status of the 'head' of the family, not the surviving spouse (which discriminates between the mother and her son).

Meanwhile, the conservatives, represented by Confucians, have insisted that the system should be preserved in the Civil Code on the ground that the system has been a Korean tradition and custom for a long time. They also insist that the 'head of the family' system is not discriminatory against women, since the status of 'head of the family' is not a social standing or rank, and gives no associated practical power over family members.[17]

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descendant of the person to be succeeded. 2. a female lineal descendant who was a member of the family of the person to be succeeded' (sub-para 3–5 CC omitted).

[17] For more details, see, Whasook Lee *Historical Background of 'Head of the Family system in Korean Civil Code and its Influence on Korean Society, Study on Asian Culture* (Research Institute of Asian Culture, Kyungwon University, 1997); Hyunah Yang and Jinsu Yune, n 13 above.

(c) Decision of the Constitutional Court

Petitioners claimed that Arts 778,[18] 781[19] and 826, para 3 CC[20] are incompatible with the Constitution, since these provisions violated the equal protection clause of the Constitution[21] by discriminating on the grounds of gender. It is remarkable that the Constitutional Court decided that the 'head of the family' system itself, including all kinds of system-related articles,[22] is incompatible with the Constitution, even though the Court was asked to decide only on the three articles that were challenged by the petitioners. The Constitutional Court explained that, although these three articles were the core provisions of the 'head of the family' system, they were not able to be separated from the rest of the system.

The Court held that the 'head of the family' system was incompatible with the Constitution, holding that Art 778 violated the Constitution's protection of individual dignity and value, by compelling a man to have the status of the 'head' of the family without his intent or consent. The Constitutional Court also declared that Art 781 and Art 826, para 3 CC violated individual dignity, value and the right to pursue happiness, since they did not respect the parties' intentions or self-determination in regard to the status of marriage and the parent-children relationship as well as discriminating between husband and wife.[23]

(d) Effect of the abolition of 'head of the family' system

(i) Expectations

The 'head of the family' system is typical of the patriarchal systems included in the Korean Civil Code. As the Civil Code contains the basic principles on

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[18] Art 778 CC (Definition of Head of Family): 'A person who has succeeded to the family lineage or has set up a branch family, or who has established a new family or has restored a family for any other reason, shall become the head of a family.' This article was deleted on 1 January 2008.

[19] Art 781 CC (Entry into Family Register and Surname and Origin of the Surname of Child): 'A child shall succeed to his or her father's surname and origin of surname and shall have the name entered into his or her father's family register.' This article lost its validity on 1 January 2008. According to the Reformed Family Law, which came into force on 1 January 2008, a child shall have his or her Personal Registry. The child shall succeed to his or her father's surname and origin of surname in principle, but when the parents agree to have the child assume his or her mother's surname and origin of surname at the time of filing a report on their marriage, he or she shall succeed to the mother's surname and origin of surname.

[20] Art 826, para 3 CC: 'The wife shall have her name entered in her husband's family register. When the wife is the head or the successor of headship of her parents' family, the husband may have his name entered in his wife's family register.' This article was deleted from 1 January 2008. According to the new law, the wife shall have her own personal registry.

[21] Korean Constitutional Art 36(1): 'Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.'

[22] It means Arts 778–799, Art 826, paras 3 and 4, Arts 980–966 (which are on the order of succession to the headship).

[23] For more details, see Jinsu Yune, note 13.

family relations, the system has power or influence over the other law relating to the family and could thus influence Korean society to become patriarchal. Therefore, the deletion of the 'head of the family' system means that Korean society may change in many respects and may attain true gender equality. Furthermore, Korean society may be transformed from male-centred to individual-centred regardless of gender, from a vertical-relationship to a horizontal-relationship society, from patriarchy to democracy, which respects individual freedom in family life, and which ensures equal relationships among family members.[24]

(ii) Reformed provision and personal registry

Change of child's surname

According to Art 781, para 1 CC, which entered into force on 1 January 2008, the father and mother can choose to let their children assume their mother's surname and origin of surname when their marriage is registered. According to the previous law a child assumed the father's surname and origin of that surname. This provision was one of the typical principles of the 'head of the family' system.

Furthermore, where there is a need to alter the surname and origin of surname for the welfare of the child, such detail may be altered with the approval of the court on the request of the father, mother or child. In the case of remarriage, a child may now take the mother's new husband's (stepfather's) surname and origin,[25] whereas the change of surname and origin was not permitted at all under the previous law.

It is of enormous significance for a child to take the mother's surname and origin of surname instead of the father's, or to change to the mother's husband's surname after the parents' divorce, since Koreans traditionally regard genealogical purity of the family as a very important matter. For a long time it has been thought that a surname and the origin of surname represent the father's bloodline. That is why the change of surname and origin of surname may not be permitted in principle in the Korean Civil Code.

Newly established personal registry

As the 'head of the family' system was abolished on 1 January 2008, a new identification system is now in force. The new system is individual-centred, since every family member has his or her own personal registry. It could be said that the 'head of the family' registry, which was family-centred according to the previous law, was changed to an individual-centred system by the new Act. Another characteristic is that it has adopted a multi-purpose certification system that includes a basic certificate, a marriage certificate, a family

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[24] Whasook Lee *The Significance of the Reformed Family Law 2005 and Evaluation* (November 2005) 30–33.

[25] Art 781, para 6 CC.

certificate, a full adoption certificate, a detailed certificate, etc. Therefore the new identification system is a mixture of an individual-centred system and a family register.

III REFORMED PROCEDURE FOR DIVORCE BY AGREEMENT

The Korean Civil Code provides two kinds of divorce: divorce by agreement and judicial divorce. A husband and wife may divorce when they agree to divorce with the confirmation of the Family Court. The reason for the confirmation system, established in the 1977 Reform, is that in many cases the wife was the weak party from a social and economic point of view. Thus, a decision by a husband and wife to get a divorce by consent would not usually be reached by means of a true mutual agreement, but would more often reflect the will of the husband at that time. The confirmation system is believed to play a significant role in protecting the legal position of wives. Couples divorcing by mutual consent represented 90% of all divorced couples until 1976, but the figure was reduced to 70% by 1979 after the second Family Law revision established the confirmation system in 1977.[26]

The divorce rate in Korea has increased rapidly since the 1990s. Vital statistics on population show that 93,171 couples divorced in 1977, 38,429 couples in 1985, 67,858 in 1995, 139,365 in 2004 and 125,000 in 2006.[27]

The social background to the rising divorce rate is thought to be related to the increasing economic status of women in Korea. In the past, Korean women endured unhappy marriages for social and economic reasons. As women found jobs more easily in modern society, they became more independent economically. New social structures and a new social consciousness allow more divorces and the value of the family is transformed.[28] In traditional society, there were many kinds of social structures restraining divorces such as ancient customs, social control, and patriarchal thinking, which all functioned against divorce. But in modern society the social and geographical movement of people weakened these factors. Marriage itself and the relationship of husband and wife have been transformed and consensus on the notion of equality is increasing. Another reason lies in the Civil Code itself, in which the procedure for divorce by agreement is so easy and simple that the husband and wife may divorce easily, without any legal advice or any other consideration.

The amendment of divorce by agreement on 21 December 2007[29] is to improve the procedure by stipulating a reflection period and by establishing a process

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[26] Bonghee Han 'Retrospect and Prospect on Korean Divorce Law' *Korean Journal of Family Law* Vol 7 (published by the Korean Society of Family Law) 110.

[27] Statistics Office, Statistic on Divorce of 2006, 2007.

[28] Jungok Kim *Social Background of Divorce rate increased, Divorce and Family* (Korean Research Institute of Family Study, 1993) 21.

[29] It is in force from June 2008.

for the submission of a mutual agreement for the protection of the child.[30] The contents of the Family Law Amendment of December 2007, some reforms being new and some of them being revisions of the previous law, are as follows:

(1) According to the reformed Act, divorcing parties should be informed about the divorce by the Family Court and the Court may advise them to meet a professional counsellor (Art 836–2, para 1 CC).[31] According to previous law, parties could report their divorce after obtaining the confirmation of the Family Court without any other procedure.

(2) The parties who apply to the Family Court for confirmation of their intention to divorce, can obtain it only after a certain period has elapsed, for example:

   (a) after 3 months, when they have a child to foster (Art 836–2, para 2, sub-para 1 CC);
   (b) after 1 month, when they have no child (Art 836–2, para 2, sub-para 2 CC).

   The Family Court can exempt or shorten the period when urgent circumstances to divorce are anticipated due to domestic violence (Art 836–2, para 3 CC).[32]

(3) Divorcing parents must submit a mutual agreement stating who has the foster right over the child according to the Art 837 CC or who has parental authority according to Art 909, para 4 (Art 836–2, para 4 CC).[33]

(4) The mutual agreement should include who brings up the child, who pays for bringing up the child, and how much, and how visitation rights are to work (Art 837, para 2 CC).[34]

(5) If the agreement is against the interests of the child, the Family Court can order its correction in the interests of the child or, *ex officio*, decide matters necessary for such fostering by taking into consideration the age and the wishes of the child, the financial status of either parent and any other circumstances (Art 837, para 3 CC).[35]

(6) If the divorcing parents cannot agree on the fostering of their child, the Family Court may decide these matters upon the application filed by the

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[30] For more details, see Whasook Lee 'A Study on the Draft of Family Law Reform' (2006) 32 *Yonsei Law Review* 12 (Institute of Legal Studies, Yonsei University).

[31] This clause was created in the Reform of 2007.

[32] This procedure was newly established by the December 2007 Reform.

[33] This procedure was newly established also by the 2007 Reform. The provisions on the parents' right to foster and parental authority after divorce are separated in Korean family law.

[34] This clause was reformed in the 2007 Reform.

[35] It was reformed in the 2007 Reform.

parties or *ex officio* (Art 837, para 4 CC). The Family Court should take into consideration Art 837, para 3 CC in deciding matters of fostering.[36]

(7) The Family Court can change arrangements or take proper measures for fostering a child upon the application of father, mother, child, or public prosecutor on its own initiative when it is necessary in the interests of the child (Art 837, para 5 CC).[37]

(8) A child may claim a right to visit his or her parent who does not have fostering rights.[38] According to the previous law either parent who did not have fostering rights could claim visiting rights.[39]

(9) When a spouse has disposed of property which was in his or her name, even though acquired during the marriage, to prevent the other spouse from claiming it for property division, the other spouse can make a claim to the Family Court for the revocation of the disposition or a return to the status quo ante (Art 839–3, para 1 CC).[40] According to the previous law, when a spouse who had title to property, disposed of the property, even if the property was acquired during marriage, the other spouse could not have the disposition revoked, but could claim division of the property as part of divorce proceedings or after divorce. As husbands have title to property in most cases, the property division claimed by wives was sometimes meaningless when the husband disposed of the property acquired during the marriage before the divorce. That is why reform bills on the separate property system to limit the spouse's right to dispose of property were submitted to the National Assembly. But the Assembly passed only the right of a party to apply for cancellation of the other party's property disposition (Art 839–3 CC), while reform bills on the separate property system were suspended.[41]

IV THE REFORM ACT AND REFORM BILL ON PARENTAL AUTHORITY

The Reform Act of 2007 also emphasises the intervention of the Family Court for the child's welfare in determining parental authority, parallel with the Reform Act on fostering children after divorce. Article 909, para 4 CC was reformed as follows:

> 'If either a child born out of wedlock is affiliated or parents are divorced, the person with parental authority shall be determined by an agreement between the parents and if it is impossible to make such an agreement or the parents could not

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36 It was created in 2007 Reform.
37 It was reformed in 2007 Reform.
38 Art 837–2, para 1 CC.
39 It was reformed in 2007 Reform.
40 This provision was created in 2007 Reform.
41 For more details, see Part VI of this paper.

> come to an agreement, the Family Court, ex officio or upon the request of the party concerned, may designate the person with parental authority.'

According to the previous law, the party concerned requested the Family Court to designate the person with parental authority. The subject was changed from the party to the Family Court to secure the welfare of the child through the Court's intervention.

It is regrettable that the principle of 'the best interest of the child' (in determining parental authority after the parents' divorce) was not passed by the National Assembly in the 2007 Reform. The 2005 Reform established standards in exercising parental authority, declaring that '[i]n exercising parental authority, priority shall be given to the welfare of a child'. The problem with the 2005 Reform is that it did not include the 'welfare of the child' principle in determining parental authority after divorce, which is as important as in exercising parental authority. Consequently, the Reform Bill of 2007 included a clause on the principle of 'the welfare of the child' in determining parental authority (in Art 912 CC), but it was not passed by the Assembly.

V ESTABLISHMENT OF A FULL ADOPTION SYSTEM

The Reform Act of 2005 has established a full adoption system, which came into force on 1 January 2008. Thus, the Korean adoption system has two systems: 'common adoption' and 'full adoption'. Under the common adoption system which is regulated by Arts 866–908 CC, the adopted child cannot change his or her surname and origin and the child maintains a relationship with the biological parents as well as with the adoptive parents. Therefore, the adopted child can inherit from his or her birth parents, while the child and the adoptive parents can also dissolve the adoptive relation by agreement or by judicial decision.

However, under the full adoption system, the adopted child shall be deemed to be born during the marriage of the adoptive parents, which means the adopted child's relationships before such a full adoption are terminated. As a result, the surname and origin of the adopted child can be changed at the request of full adoptive father, full adoptive mother or adopted child, upon approval of the court.[42] The fact that the adopted child can get the adoptive father's surname has enormous significance in Korea; Koreans traditionally regard the genealogical purity of the family as important and it has been thought for a long time that a surname and the origin of surname represent a person's bloodline. That is the reason why a change of the surname and origin is not allowed in the Civil Code in principle, and is also another reason why adoption has tended to be rare in Korean society. Moreover, it is one of the reasons why Korea has earned a rather shameful reputation as a baby-exporter internationally. It is understandable that Korean adoptive parents tend to

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[42] Art 781, para 6 CC, which was in force from 1 January 2008.

register the adopted child as their child born during the marriage, since they want their adopted child to be known as their own with the same ancestral line as them, as well as avoiding the public stigma of adoption.[43]

Another significant aspect of the full adoption system is that adoptive parents may make a request to the Family Court for such a full adoption after meeting some requirements, and the Family Court may reject the request when it is not appropriate for the welfare of the child. In contrast, common adoption is a private contract between adoptive parents and a child or his or her legal agent. It was reported that over 151 parents requested the Family Court to adopt a child through full adoption within 5 days of the new system coming into force on 1 January 2008.[44] A summary of the full adoption system follows.

First, to assess whether full adoption is in the welfare of the child, the Family Court may take into consideration the situation of the child's upbringing, the motives for the full adoption and the competence of the prospective adoptive parents to bring up the child, along with other circumstances.

Secondly, any person who wants the full adoption of a child may make a request if they fulfil the following requirements:[45]

(1) A couple who have been married for more than 3 years can become adoptive parents. However, where either the husband or wife (who have been married for more than one year) want a full adoption of the spouse's birth child, the same (3 year's marriage) shall not apply.

(2) The child to be adopted shall be under the age of 15.

(3) Consent to such adoption shall be obtained from the natural parents of the child to be adopted. This shall not apply if such consent cannot be obtained due to the loss of parental authority or the death of the parents or for any other cause.

(4) The adopted child's agent by law assents pursuant to Art 869.[46]

Thirdly, when the full adoption of the child has been declared by the Family Court, the child shall be deemed to be a child born during the marriage of the adoptive parents. As a result, the child may take the adoptive father's surname and origin according to Art 781 CC,[47] and relationships of the adopted child before such full adoption are terminated. However, where either the husband or

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43 The Korean Supreme Court has decided on the validity of the use by the adoptive parents of the birth register instead of the adoption register in the interests of the adopted child. Supreme Court, 1977.7.26, case no 77 da 492.

44 *The Lawtimes*, 14 January 2008.

45 Art 908–2 CC.

46 Art 869 CC (Assent to adoption of person under 15 year's of age). If the person to be adopted is under 15 year's of age, his agent by law shall assent to the adoption on his behalf.

47 See Part II(d)(ii) above.

the wife has been granted the full adoption of the other spouse's child as his or her own independently, the relationship between the spouse, the spouse's relatives and the child shall be continued.[48]

Fourthly, dissolution by consent of a full adoption is not allowed in principle, but the adoptive parent, adopted child, natural father or mother or public prosecutor may apply to the Family Court for the dissolution of a full adoption under the following subparagraphs:[49]

> '(1) Where the adoptive parent has abused or deserted the adopted child or otherwise has severely impaired the welfare of the adopted child.
> (2) Where it is impossible to maintain the relationship of a full adoption due to any act of immoral conduct which the adopted child has committed against the adoptive parent.'

The reason why dissolution of an adoption is allowed under the full adoption system is to enable the adoption of children in a society where adoption is not familiar as well as in a society where blood ties are important. The legislature was worried that, if dissolution of adoption was not allowed, it would be an obstacle to adoption.

VI BILL REFORMING THE SEPARATE PROPERTY SYSTEM

According to Art 830 CC which regulates the matrimonial property as well as the separate property system, inherited property belonging to either husband or wife from the time before marriage and property acquired during marriage in his or her own name shall constitute his or her own property. Any property of which title is uncertain as between the husband and wife shall be presumed to be in their co-ownership. A spouse who has no title to property even if it was acquired during the marriage may claim a division of property against the other party according to Art 839–2 CC, which was established in the 1990 Reforms.

Even though the right to claim division of property was established in the Civil Code, the separate property system still has some serious problems. For example, a spouse who has the title to property can dispose of that property without the other party's consent even if it was acquired during marriage with the help of the other party (including assistance as a homemaker or by earnings). Furthermore, the other spouse may not revoke the property disposition made by the spouse with title to the property. Under the separate property system the title of the property works as a standard in determining ownership of the property during the marriage, or in dividing the property on divorce. However, a spouse who does not have title to the property can easily

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[48] Art 908–3, para 2 proviso CC.
[49] Art 908–5 CC.

forget the importance of title, since that spouse may trust the spouse who has title or may not know the significance of the separate property system. When they divorce, a spouse who has no title to property, typically the wife, can claim property division against the other spouse who has title. However, if the spouse with title, typically the husband, disposes of property before the divorce to avoid the other party's claim, the claim could be meaningless in spite of prevailing in court. Since husbands have title to property in many cases,[50] wives who have no title were reported as victims in many cases on property division. As a result, family law scholars, feminist groups and lawyers asserted that the separate property system needed to be revised. Thus, four amendment bills, three of them to revise the separate property system and one to change the system into a community property system, were submitted to the National Assembly. A government bill is to limit the disposition right of the spouse with title, similar to the other bills.[51] The contents of the amendment bill, in brief, follows:

(1) A spouse who has the title to property cannot dispose of it without the other party's consent. Such property is limited to the other spouse's dwellinghouse (to protect the other spouse's right of residence).[52]

(2) A spouse may make a claim for the division of property even during the marriage. This clause is to protect a spouse who does not have title to property, when the claim for division of property is threatened and the property is under the other spouse's management.[53]

(3) The Bill stipulates a principle of equal division of the matrimonial property.[54] According to the current provision (Art 839–2 CC) how the property acquired during marriage is divided, depends upon the judge. As a result, when the wife is a homemaker, she could get about 30–50% of the property.

(4) A surviving spouse will inherit half of the estate when the other spouse dies.[55]

(5) A spouse may claim the revocation of a disposition of property where the spouse with title has designed to avoid the other party's claim for property division.[56][57]

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[50] It is not popular in Korea for couples to have the title registered as co-owners.
[51] Other bills except the community property system bill are similar in contents, but different in details.
[52] Art 831–2, established by the Reform Bill on the Separate Property system.
[53] Art 831–3, established by the Reform Bill on the Separate Property system.
[54] Art 839–2, revision of the property system in the Reform Bill.
[55] It is to revise Art 1009, para 2 CC, according to the Reform Bill.
[56] See Part III of this chapter.
[57] Art 839–3, established according to the Reform Bill.

Except for the revocation of property dispositions, the Bill was not passed by the National Assembly in December 2007 due to a perceived need for extra examination and study.

VII CONCLUSION

The Korean Civil Code was reformed in a revolutionary way in March 2005, subsequent to the existing Reforms of 1990. The 2005 Reform came into force on the date of promulgation (31 March 2005), with the 'head of the family' and the full-adoption system changes coming into force from January 2008. Furthermore, the Reform Bill, including the revision of the procedure for divorce by agreement, was passed by the National Assembly in November 2007, which will come into force in June 2008.

This chapter introduced the Korean family law Reform Act, which came into force in January 2008. The abolition of the 'head of the family' system, the full adoption system, newly reformed divorce by agreement procedures and reformed parental authority clauses were reviewed in this chapter. The Reform Bill on the separate property system was not passed by the National Assembly, but the contents of the Bill have been discussed briefly.

Korean family law is now changing in parallel with changes to the family and the society. However, the true reason for the parade of family law reforms lies in confrontation between conservative groups who have depended on the patriarchal systems such as the 'head of the family' system and the 'same surname marriage prohibition' on the grounds of 'good and fine' custom, and progressive scholars of family law and feminist groups, who, for more than 45 years, argued for the revision[58] and abolition[59] of patriarchal systems.

When the Constitutional Court decided that the 'same surname marriage prohibition' was not compatible with the Constitution (1997) and the 'head of the family' system was similarly incompatible (2005), family law revision began to move towards a truly democratic and open society.

The character of the 2005 Reform was to eliminate elements in Korean family law incompatible with the Constitution, while the 2007 Reform represents a new era to protect weak persons as well as to attain gender equality in the true sense of that phrase. The reforms of 2007 is a starting point to protect children, often the greatest victims of their parents' divorce, by the revision of the process of parents' divorce. It is also designed to attain substantial and economic equality between genders. Further reforms to provide for the welfare of children after divorce, revision of the matrimonial property system, the rules

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[58] They had insisted that the 'same surname marriage prohibition' should be revised as the consanguineous marriage prohibition and it was reformed in 2005.

[59] They had insisted that the 'head of the family' system should be abolished and it was abolished in the 2005 Reform.

of surviving spouses' share of inheritance, and change to the system of divorce by judges are likely to take shape during the next steps in the Korean family law reform process.

The Netherlands

PARTY AUTONOMY AND RESPONSIBILITY

*Dr Ian Curry-Sumner**

Résumé

Ce chapitre est consacré aux changements majeurs et aux projets de réforme proposés au cours de l'année 2007. En ce qui concerne le mariage entre personnes de même sexe, la Cour suprême des Pays-Bas a décidé que l'île autonome d'Aruba a l'obligation de reconnaître un tel mariage célébré aux Pays-Bas. Par ailleurs, au pays le débat s'est ravivé en ce qui a trait à la question de savoir si, pour des raisons de conscience personnelle, les registraires peuvent refuser de célébrer un mariage entre personnes de même sexe. Nous faisons également état d'un certain nombre de modifications apportées au droit patrimonial de la famille, ainsi qu'à la parentalité et l'adoption (plus particulièrement dans les cas comportant un élément d'extranéité). Le statut légal des mères lesbiennes a fait l'objet d'un important rapport et la place du père biologique, dans un tel contexte, a été disputée jusqu'en Cour suprême. Des questions relatives à la citoyenneté, le divorce, la pension alimentaire pour enfants, les plans parentaux et la protection de la jeunesse sont également abordées. Par exemple, les châtiments corporels ne sont désormais plus acceptés comme gestes d'éducation.

This chapter addresses the major changes and proposals for change in Dutch family law during 2007. With respect to same-sex marriage, the Dutch Supreme Court declared that the autonomous Caribbean island of Aruba had to recognise such a marriage concluded in The Netherlands. Back in The Netherlands itself, debate has been rekindled on the question of whether registrars should have a conscientious objection to avoid solemnising same-sex marriages. A number of changes to matrimonial property law are discussed, as well as parentage and adoption (especially where there is an international element). The legal status of lesbian parents has been the subject of a major report and the position of the biological father in such a situation has been litigated as high as the Supreme Court. Questions relating to nationality, divorce, child maintenance, parenting plans and child protection are also covered. For example, physical punishment can now no longer constitute part of the raising of children.

* UCERF and Molengraaff Institute for Private Law, Utrecht University.

I INTRODUCTION

2007 has seen a wave of legal changes crash onto the shores of Dutch family law. Although the passing of each new tide brings with it new legislative proposals, the tide remains unpredictable. Every now and again, it is important to take a step back and assess the current state of affairs in order to determine whether the system as a whole still lives up to its aims. During this summary of the main legislative and judicial changes to Dutch family law in 2007, critical attention will be paid to the overarching notions of coherence and legitimacy. In doing so, a number of golden threads will be identified.

This chapter will address the major changes and proposals for change in Dutch family law during the course of 2007. Obviously, due to the breadth of this topic, a selection has been made of those topics that have either caused significant discussion in Parliament or in society at large, or areas that have been addressed in previous surveys and have been revisited during the course of 2007.

II THE BEGINNING OF THE BEGINNING

Two people meet, fall in love and decide to spend the rest of their lives together. A fate destined for millions of people around the world. What makes The Netherlands unique is that all couples, regardless of their sexual orientation or sex, have a choice with regard to the formal registration of their relationship. Since 2001, The Netherlands has been characterised by plurality in its adult relationship law. Same-sex and opposite-sex couples alike have the choice to either get married or register their partnership.[1] When marriage was opened to same-sex couples in 2001, the Minister of Justice called for the laws regarding marriage and registered partnership to be evaluated after 5 years. In 2007 that evaluation was completed and published. Entitled *Huwelijk of geregistreerd partnerschap?* (Marriage or registered partnership?),[2] the evaluation consisted of three major sections: a national perspective, an international perspective and a sociological perspective.

The *national legal perspective* consists of an analysis of the statutory rules relating to marriage and registered partnership, concentrating on the similarities and differences between these two relationship forms. This research is based on an analysis of the relevant legal provisions, case-law and legal literature up to 1 July 2006. This black-letter and case-law analysis is complemented by a questionnaire-study distributed among Dutch notaries and Dutch Registrars of Births, Deaths, Marriages and Registered Partnerships, as

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1 Furthermore, couples can also choose not to formally register their relationship, and instead enter into a cohabitation contract, or alternatively simply live together. These two relationships will be discussed here.

2 K Boele-Woelki, I Curry-Sumner, M Jansen and W Schrama *Huwelijk of geregistreerd partnerschap? Evaluatie van de wet openstelling huwelijk en de wet geregistreerd partnerschap* (Kluwer: Ars Notarius Nr 134, 2007).

well as with interviews with Dutch lawyers practising in this field of law. In total 74 notaries, 300 Registrars and 5 lawyers participated in the research.[3]

The *international legal perspective* is divided into two sections. In the first section, the registration schemes for non-married couples in 14 European jurisdictions are described and compared. The systematic description of the establishment, the rights and duties and the termination of the registered relationship in each of these systems forms the basis for a comprehensive overview of the internal substantive regimes. Furthermore, this description contains the necessary information for a fertile external comparison. The second section focuses on the private international law rules of 13 European and non-European jurisdictions in relation to the recognition of Dutch registered partnerships and same-sex marriages. This research is based on an analysis of the relevant legal provisions, case-law and legal literature.

The *sociological perspective* is aimed at ascertaining insight into the reasons underpinning a couple's choice to formalise their relationship, as well as the reasons associated with their choice of formal relationship, ie registered partnership or marriage. This perspective comprises three sections. In the first section, demographic information relating to the number of marriages and registered partnerships is analysed. In the second section, the results of a large-scale, representative sociological survey are expounded. A detailed questionnaire was sent to approximately 2,500 partners, of whom approximately 1,200 responded. The survey was limited to those partners who had celebrated a marriage or registered a partnership since 2001. The third and final section provides the results of a number of follow-up interviews conducted with respondents from those persons who had responded to the detailed questionnaire.

The results of these three perspectives are combined to form the basis of the conclusions. In answering the main research questions posed at the start of the research, a distinction is drawn between the problems experienced as a result of the legislation, the differences between the two formal relationship forms in Dutch law and the possible recommendations for removing these problems and differences. It is important to note that not all differences lead to problems, and not all problems are a result of differences. In the conclusions, attention is first devoted to summarising the problems experienced in relation to these two pieces of legislation. Thereafter, focus shifts to the proposed recommendations put forward by the research team, aimed at tackling the problems and/or removing the differences. Many of the problems and differences noted in this report will be discussed at various points throughout this article. However, it is important to note that the *Act introducing registered partnership* smoothed the way for the opening of civil marriage to same-sex couples. It is plausible that this piece of legislation provided the catalyst for the debate surrounding the opening of civil marriage and in that respect should be evaluated positively.

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[3] For the precise details regarding the respondents, see K Boele-Woelki et al, ibid, 47 and 62.

The opening of civil marriage is moreover to be regarded as a success. Many of the recommendations have since been taken up by the Minister of Justice and will lead to legislative amendments.[4]

This evaluation illustrates the necessity for the legislature to remain constantly vigilant with respect to family law. In a rapidly evolving society, the legislature must be willing to amend, modify and adjust legislation to meet the needs of society. This evaluation exemplifies the Dutch legislature's desire to do so, and the legislature should be commended upon this initiative, as well as the subsequent legislative amendments made as a result of this evaluation. Nonetheless, as indicated in the report itself, the choices will often remain political ones, and in so doing, it is essential that the legislature articulate the arguments on both sides of discussion. It is only by doing this that society will be able to determine the added value or benefit of the changes proposed.

Although it no longer takes 6 years to cross the Atlantic Ocean, it did take 6 years before the status of same-sex marriages concluded in the Netherlands was finally settled on the small autonomous island of the Dutch Kingdom in the Caribbean, namely Aruba. The case involved a Dutch female same-sex couple. They had registered their partnership in 1999 and converted this partnership into a marriage in 2001. The couple subsequently travelled to Aruba and requested that their marriage be recorded in the Register of Births, Deaths and Marriages. On 19 July 2004 their request was refused by the local registrar, since, although according to Art 1:30, Dutch Civil Code (*Burgerlijk Wetboek*), a marriage may be concluded by two persons regardless of their sex, this is not the case according to Art 1:31(1), Aruban Civil Code, which states that a marriage may only be concluded between one man and one woman.

On 9 December 2004, the Court of First Instance (*Gerecht van eerste aanleg*) ordered the Registrar to record the marriage certificate in the Registers of Births, Deaths and Marriages and thus regard the couple as validly married. The Registrar appealed this decision to the Joint Court of Appeal of The Netherlands Antilles and Aruba (*Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba*). On 23 August 2005, the Joint Court of Appeal confirmed the decision of the Court of First Instance. On 13 April 2007, the Dutch Supreme Court (*Hoge Raad*) delivered its decision, after the Registrar appealed once again. Although the majority of this decision is devoted to the precise nature of foreign legal facts and their 'inclusion' in the Aruban Registers of Births, Deaths and Marriages, the case is important in that all three legal instances declared that a same-sex marriage concluded in The Netherlands must be legally recognised in Aruba, despite the fact that same-sex marriages are not possible on the island (Art 40, Statute for the Kingdom of The Netherlands formed the basis for all three judicial decisions).

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[4] Directoraat-Generaal Wetgeving, Internationale Aangelegenheden en Vreemdelingenzaken, 1 November 2007, Reference 5509711/07/6.

Article 40 provides a rule of interregional private international law.[5] This provision states that all authentic instruments issued in one part of the Kingdom must be recognised and enforced in all other parts of the Kingdom. The idea behind this provision is that with regard to recognition and enforcement the Kingdom should be regarded as one legal jurisdiction. There is, therefore, in relation to authentic instruments from other parts of the Kingdom, no place for the standard private international law inquiry into the validity of the document.[6] The only possibility to derogate from this basic constitutional tenet is if the law expressly provides for it. This is, however, not the case with regard to Art 1:26, Aruban Civil Code.[7] As a result, neither the Registrar nor the Court was permitted to carry out a choice of law test or public policy test with regard to the recognition of a same-sex marriage concluded in The Netherlands.[8] Obviously, same-sex marriages concluded in Belgium, Spain, Massachusetts (USA), Canada and South Africa will not fall under the ambit of Art 40, Statute for the Kingdom of The Netherlands, and thus in all likelihood will not be recognised.

Back on Dutch soil, the same-sex marriage debate is also far from over. Commotion was once again stirred up in 2007,[9] when the Christian Union (*Christen Unie,* now a governmental coalition party) ensured that the Government Coalition Agreement granted registrars with conscientious objections to solemnising same-sex marriages the right to refuse to officiate such ceremonies.[10] It would, however, appear that this was simply a storm in a teacup. Although it would seem that there are more than 100 registrars who refuse to solemnise same-sex marriages, municipalities have created pragmatic solutions to solve the problem. Although some municipalities have ordered all registrars to celebrate all civil marriages, regardless of the sex (or sexual orientation) of the parties, other municipalities have allowed registrars to voice their objections and find an alternative registrar.

It is in this author's opinion, however, unjustified that registrars are permitted an opportunity to object to solemnising same-sex marriages. Would such an objection on other grounds also be acceptable? What would happen if a registrar refused to solemnise a marriage ceremony between a Catholic and a

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5 'Vonnissen, door de rechter in Nederland, de Nederlandse Antillen of Aruba gewezen, en bevelen, door hem uitgevaardigd, mitsgaders grossen van authentieke akten, aldaar verleden, kunnen in het gehele Koninkrijk ten uitvoer worden gelegd, met inachtneming van de wettelijke bepalingen van het land, waar de tenuitvoerlegging plaats vindt.' (Translation: 'Judgments given by a judge in the Netherlands, the Dutch Antilles or Aruba and orders given by the judge, and also bailiffs' copies of authenticated documents that have been written there, can be executed in the entire Kingdom [of The Netherlands], taking into account the legal regulations of the country where the execution takes place.').

6 HR 14 January 1994, *NJ* 1994, 403.

7 The basis upon which foreign marriage certificates must be registered in Aruba.

8 HR 13 April 2007, *NJB* 2007, 1120, §3.3.3.

9 For the earlier discussions on this subject see, I Sumner and C Forder 'Bumper Issue: All you ever wanted to know about Dutch family law (and were afraid to ask)' in A Bainham (ed) *The International Survey of Family Law 2003 Edition* (Jordan Publishing, 2003) 263-321, at 266-267.

10 A Hendriks, 'De gewetensbezwaarde ambtenaar. Als 't maar geen muslim is …' *NJB* 2007, 619.

Protestant, or between persons of different races? What about registrars who would refuse to register divorces on religious grounds? In the end, the law is, and should always remain, the law. Since marriage as regulated in Art 1:30, Dutch Civil Code, is a civil ceremony, a civil servant must abide by the law and execute his or her tasks in accordance with the law. Allowing registrars to express conscientious objections undermines the very essence of the separation of Church and State, and should therefore not be permitted under any circumstances.

III THE END OF THE BEGINNING: THE LEGAL CONSEQUENCES

Although matrimonial property law was extensively discussed in the 2003, 2004 and 2007 Surveys,[11] it is nonetheless important to mention a number of developments with regard to this field of law. As is commonly known, The Netherlands still adheres to a default matrimonial property regime often referred to as a universal community of property regime. Although proposals have been put forward aimed at dramatically reforming this area of law, these proposals appear to have bitten the dust once again. Nonetheless, a number of leading matrimonial property and family lawyers from both The Netherlands and Belgium have written an open letter beseeching the Dutch Second Chamber not to withdraw the current proposal from the parliamentary agenda.[12]

Nonetheless, other developments have taken place with regard to periodical netting covenants (or participation clauses as some authors refer to them).[13] On 1 September 2002, the Act on Netting Covenants became effective,[14] which introduced a statutory system for contractual netting covenants.[15] This form of premarital contract is currently one of the most popular in The Netherlands. The basic idea behind this system is that the spouses contractually agree to equalise their assets and debts either at the end of each specified period –

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[11] For the earlier discussions on this subject see, I Sumner and C Forder 'Bumper Issue: All you ever wanted to know about Dutch family law (and were afraid to ask)' in A Bainham (ed) *International Survey of Family Law 2003 Edition* (Jordan Publishing, 2003) 263-321, at 269-277; I Sumner and C Forder 'Proposed revision of matrimonial property law, a new inheritance law and the first translation of the Dutch Civil Code, Book 1 (Family law) into English' in A Bainham (ed) *International Survey of Family Law 2004 Edition* (Jordan Publishing, 2004) 337-369, at 339-361; G van der Burght 'Overview of matrimonial developments' in B Atkin (ed) *International Survey of Family Law 2007 Edition* (Jordan Publishing, 2007) 207-215.

[12] Open brief aan de Tweede Kamer der Staten-Generaal over het wetsvoorstel 'Aanpassing wettelijke gemeenschap van goederen (wetsvoorstel 28 867).

[13] The translation used in this article is taken from I Sumner and H Warendorf *Family Law Legislation in The Netherlands*, (Intersentia, Antwerp, 2003).

[14] Netting covenants are regulated in Arts 1:132-148, Dutch Civil Code.

[15] The reasons surrounding the introduction of this Act have been explained at length in the 2003 Survey: I Sumner and C Forder 'Bumper Issue: All you ever wanted to know about Dutch family law (and were afraid to ask)' in A Bainham (ed) *International Survey of Family Law 2003 Edition* (Jordan Publishing, 2003) 263-321, at 271.

normally each year – (periodical netting covenant or *periodieke verrekenbeding*) or at the end of the marriage (final netting covenant or *finale verrekenbeding*). The provisions of this Act were divided into three sections: part one lays down general rules regarding all sorts of netting covenants (Arts 1:132-140, Dutch Civil Code), part two covers periodic netting covenants (Art 1:141, Dutch Civil Code) and part three deals with final netting covenants (Arts 1:142-148, Dutch Civil Code). It is important to bear in mind that these provisions are mere suggestions and may in turn be deviated from in simple contracts. Despite the strong emphasis on party autonomy, there are provisions that parties are neither permitted to exclude nor derogate from, including:

- the right to request from the other spouse an annual, written overview of assets;[16]
- the right to request termination of the obligation to participate;[17]
- the right to request damages;[18]
- the right to request a payment provision;[19]
- the limitation period applicable to netting covenants cannot be excluded;[20] and
- the right to request a description of the goods subject to the netting covenant.[21]

In 2006, the Dutch Supreme Court handed down a number of important decisions in relation to these provisions. Although these cases actually fall outside the scope of this chapter, it is important that these decisions be dealt with here, since they were not dealt with in the 2006 Survey. On 1 September 2006, the Dutch Supreme Court decided that Arts 3:196 and 3:199 (the *laesio enormis* principle), Dutch Civil Code, were not applicable in those cases where agreement had already been reached prior to the entry into force of the Act on Netting Covenants, even if the actual equalisation and division occurred subsequent to entry into force of this Act.[22] Furthermore, on 6 October 2006, the Dutch Supreme Court also determined that in attempting to explain contractual terms in marital contracts concluded prior to 1 September 2002, use should be made of the so-called Haviltex-criteria. These criteria,

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16 Art 1:138(2), Dutch Civil Code.
17 Art 1:139(1), Dutch Civil Code.
18 Art 1:139(2), Dutch Civil Code.
19 Art 1:140(1) and (2), Dutch Civil Code. This normally occurs when one of the spouses encounters financial difficulties and requires a special arrangement to spread or ease the netting claims.
20 Art 1:141(6), Dutch Civil Code.
21 Art 1:143(1)–(3), Dutch Civil Code.
22 HR, 1 September 2006, *LJN: AT544*. For more information on this important decision, see J Van Duijvendijk-Brand 'Periodieke verrekenbedingen. Over de onvolmaakte wetgeving en de onmisbare rol van de Hoge Raad als quasi-wetgever' *Echtscheidingbulletin*, 2007, 23-29.

originating from a 1981 Supreme Court decision, deal with how a contractual relationship between parties is to be explained. These criteria state, inter alia, that this determination should not be based solely upon the linguistic interpretation of the contract, but instead should be answered by focusing on what the parties could reasonably take the meaning of these provisions to be.[23] However, in determining the 'intention' of the parties, it has been stated that attention must be paid to the fact that, when the parties agreed upon these contractual agreements, the Act on Netting Covenants was not in force and therefore one must instead bear in mind that these contractual provisions were made on the basis of the case-law pertaining to *periodical netting arrangements*.[24]

IV THE BEGINNING OF THE MIDDLE: WHEN THE CHILDREN ARRIVE

Parentage and adoption are two topics currently dominating the news in The Netherlands.[25] In May 2007 uproar surfaced in relation to an Indian boy whose Indian birth mother alleged that she never actually placed her child for adoption.[26] She claimed that her child was stolen just after he was born, without her consent. In June 2007, the Dutch Minister of Justice announced that three separate investigations into the scandal would be launched. The first dealing with the operations of *Stichting Meiling* (research under the supervision of the Child Care Office), the second investigation would focus on the role that the Ministry of Justice played (research under the supervision of the Council of State), and the third investigation would concentrate on the legal implications as to whether these adoptions should be regarded as illegal (research carried out by Professor Vlaardingerbroek, the President of the International Society of Family Law). These three reports were published in September 2007. As a result of this research, the Minister has proposed a number of measures to ensure that such incidents do not happen again in the future, namely:

- strengthen the quality control of the accredited authorities;
- intensify the contact with the foreign authorities; and
- amend the Law Regulating the Adoption of Foreign Children (abbreviated as *Wobka*).[27]

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[23] HR, 13 March 1981, *NJ* 1981, 635.

[24] J Van-Duivendijk Brand 'Uitleg van huwelijkse voorwaarden: Haviltex, standaard of beide?' *WPNR*, 2007, 388-397.

[25] For a very informative and extensive overview of Dutch and English law with regard to parentage and parental responsibility, see M Vonk *Children and their parents* (Intersentia, Antwerp, 2007).

[26] *Dutch Parliamentary Proceedings (Kamerstukken)* 2006-2007, 28 457, nr 28.

[27] Directoraat-Generaal Preventie, Jeugd en Sancties, 7 November 2007, Reference 5508188/07/DJJ.

The exact nature of the strengthened quality control of the accredited bodies involves the formulation of criteria for more detailed research into the ultimate destination of all money spent abroad in relation to the adoption procedure, as well as more inspection of the quality and expertise of the staff working in the foreign adoption bureaux. These criteria have now been made known and involve, inter alia, an extension of the revocation period granted to the birth mother. In determining the period of time that a birth mother should be granted in order to revoke her consent, it is important to note that there are obviously competing interests. On the one hand, it is essential that the birth mother is granted enough time in order to fully assess the importance and impact of her decision. On the other hand, a lengthy period in which the mother can change her mind is not always in the best interests of the child, since it increases uncertainty. With this in mind, it is to be regretted that the Dutch Government has recommended that the revocation period be set at 90 days, with an absolute minimum of 60 days (the previous period had been set at 60 and 30 days respectively). Alongside the fact that the adoptive parents and the child will remain *in dubio* with regard to the finality of the decision for at least 60 days after the birth mother has granted her consent, other practical issues arise, for example, with regard to the interim care for the child. Although the need to ensure that the birth mother is provided with ample opportunity and time to revoke her consent is understandable, to prohibit all revocation periods shorter than 60 days is perhaps not the best method of achieving this aim. What exactly is to be achieved in the extra 30 days granted to the birth mother? A 2-month revocation period not only amplifies uncertainty for all concerned, but also delays the closure that the birth mother often so desperately needs.

Although the Minister does indicate that research will be conducted into the exact role of the current Central Authority, no clear indications are provided as to how contact with foreign authorities will be intensified. It is hoped that any intensification in the contact between the Dutch and foreign agencies will not simply lead to more bureaucracy and a more time-consuming process. Nevertheless, only time will tell how exactly these measures will affect the 1,000 Dutch couples who adopt a child from abroad every year.[28]

Another seemingly never-ending story is that of the baby Donna case. The facts of the case are as follows. Whilst surfing the internet, a Belgian woman, who had already been sterilised after having had three children of her own, found a woman willing to act as a surrogate for her and her new partner. The couple (ie the commissioning parents) sent a sample of sperm to the surrogate and the surrogate became pregnant. Everything went smoothly until the sixth month when the two couples began to quarrel. The surrogate claimed the commissioning father was not the father and that she had never used the sperm. She subsequently informed the commissioning parents that she had lost the baby. This last fact was a blatant lie since on 26 February 2005 the surrogate gave birth to baby Donna. The surrogate and her husband were registered as

[28] See www.cbs.nl for more Dutch statistics.

the parents on the birth certificate. Nonetheless, the child was immediately handed over to a childless Dutch couple, who became the child's foster parents (*pleegouders*).

On 26 October 2005, the District Court in Utrecht rejected the foster parents claim to have the parents (the surrogate mother and her husband) divested of their parental authority.[29] The District Court confirmed that family life existed between the child and the foster parents, but at the same time could find no ground to discharge the parents of parental authority. In 2007, the case gained a new twist, when DNA evidence surfaced confirming that the Belgian commissioning father was indeed the biological father of the child. In August 2007, the Belgian commissioning (and also biological) father requested the Utrecht District Court to vest him with guardianship over the child.[30] In their interim decision on 1 August 2007, the District Court held that the legal parents of baby Donna must be granted the possibility to be heard. On 24 October 2007, the District Court heard all the parties concerned (the commissioning parents (the Belgian couple), the legal parents (the surrogate and her husband) and the foster parents (the Dutch couple)). The commissioning father claimed that the foster parents should be divested of their temporary guardianship of baby Donna and that the commissioning parents should be vested with parental authority, on the basis of Art 1:329, Dutch Civil Code. In order to bring a claim on the basis of this article, the claimant must be regarded as, inter alia, a blood relative. However, although the commissioning father was indeed the genetic father of the child, the term 'blood relative' is not defined in the Dutch Civil Code. Nonetheless, Art 1:3, Dutch Civil Code, does provide for the calculation of the degree of relationship. With this in mind, the term 'blood relative' must be regarded as being wider than the strict grammatical sense. The District Court, in determining that the commissioning father is indeed to be regarded as a 'blood relative', referred to the changes in Dutch parentage law in 1998 which brought with it new terms and definitions, but retained the wide overarching term '*bloedverwant*' or 'blood relative' intact. Accordingly, the biological father's petition was deemed to be admissible. The question which remained was whether there were sufficient grounds to divest the foster parents of their temporary guardianship. Although the District Court held that the biological father had standing to bring a claim, the Court denied the claim on substantive grounds. Taking into account all the circumstances, the Court held that there were not sufficient reasons for divesting the foster parents of the temporary guardianship. As a result, the Dutch couple retained parental authority over baby Donna.

Yet, it is not only news programmes that have dominated this field this year. The removal of the prohibition on same-sex couples jointly adopting in

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[29] Rb Utrecht, 26 October 2005, *LJN: AU4934*.

[30] Since the dramatic changes to the law of parentage and parental authority in The Netherlands in 1998, the term 'parental authority' can only be used when referring to legal parents, whereas the term guardianship must be used when referring to a case where neither adult is the legal parent of the child.

international cases has also hit the headlines.[31] At present although same-sex couples habitually resident in The Netherlands are permitted to jointly adopt a child who is also habitually resident in The Netherlands, joint adoption of a child habitually resident abroad is prohibited.[32] Instead same-sex couples are forced to first adopt a child individually, and subsequently via a step-parent adoption, the non-adopting parent is able to gain the same rights with regard to the child. This roundabout procedure has drawn intensive criticism, not least from this author.[33] Since 2001, more than 25 same-sex couples habitually resident in The Netherlands have adopted children via this mechanism. In all these cases, it concerned children from the United States. How exactly these procedures will be affected by the recent ratification by the United States of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption is unclear.[34] At present all adoptions in the US have proceeded via the so-called 'do-it-yourself method'. This procedure involves a same-sex couple finding an adoption bureau or attorney in the US and having this contact verified by the relevant Dutch Accredited Body (currently S*tichting Kind en Toekomst*/Foundation Child and Future) and the Central Authority (the Dutch Ministry of Justice). In principle such procedures are not permitted according to the Hague Adoption Convention. For these procedures to remain operational, the contracting state (ie the United States) must deposit a declaration with the Hague Conference including a list of all the accredited bodies permitted to perform the duties of the Central Authority. At present, such a list has not yet been deposited. If such a list is not deposited, then all 'do-it-yourself' adoptions in the US by same-sex couples living in The Netherlands will no longer be possible. It is, therefore, hoped that such a list will soon be deposited and same-sex couples will continue to be able to adopt children from the US.

Perhaps the most important development of 2007 was the Kalsbeek report, *Rapport Lesbisch Ouderschap* (Report Lesbian Parentage). The Commission was established as a result of a motion (the so-called Pechtold Motion),[35] in which the Dutch Second Chamber of Parliament voted in favour of allowing two women to be recognised as the parents of a child either automatically or by means of recognition. The task of the Commission was twofold: first, to advise the Government with respect to the possibilities for lesbian parentage; and, secondly, to report on the situation with regard to intercountry adoption. The report published in October 2007 is, however, only related to the first topic; the second part of the report will be published in the course of 2008. The central point of departure for the Commission is that the best interests of the child on

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31 *Dutch Parliamentary Proceedings (Kamerstukken)* 2006-2007, 30 551, nr 3, Wijziging van boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptieprocedure en wijziging van de WOBKA in verband met adoptie door echtgenoten van gelijk geslacht tezamen.

32 The definition of 'adoptive parents' in Art 1, *Wet opneming buitenlandse kinderen ter adoptie* is restricted to married couples of opposite-sex.

33 I Curry-Sumner and M Vonk 'Adoptie door paren van hetzelfde geslacht' *Tijdschrift voor familie- en jeugdrecht*, 2006, 39-44.

34 For more ratification information, see www.hcch.net.

35 *Dutch Parliamentary Proceedings (Kamerstukken)* 2006-2007, 30 800 VI, nr 60, and as a result, *Dutch Parliamentary Proceedings (Kamerstukken)* 2006-2007, 30 551, nr 8.

the one hand and the principle of equal treatment on the other should be determinative in resolving issues with respect to lesbian parentage. After first dealing with the different terms to be used in the report (including the rather strange distinction in Dutch law between a begetter and a donor), the report turns to the central topic of the report, namely lesbian parentage. Two main possibilities are sketched:

(1) that the non-biological mother (regardless of marital status) be granted the right 'to recognise' the child; and

(2) that the unmarried non-biological mother be granted the right 'to recognise' the child and a married non-biological mother would automatically become the legal parent of the child.

In sketching these two options, the Commission explicitly states that it believes that the non-biological mother should be granted the right to recognise the child.[36] It is perhaps interesting to note the Commission made explicit reference to the fact that 'recognition' is regarded as the 'acceptance' of a child as one's own.[37] The instrument of recognition is therefore not meant to reflect the biological truth, and thus by extending the instrument to lesbian couples, the home situation for the child is better protected by ensuring that those persons who 'accept' the child as their own are in fact 'recognised' as having done so.

The position of the biological father is also expressly dealt with in section 5.2.5 of the report. The Commission felt that the position of the biological father and his right to family life is most often transposed in the form of a contact arrangement on the basis of Art 1:377f, Dutch Civil Code. Although attention is paid to the position of the biological father, it is to be regretted that it has been dealt with so briefly. There are many different situations that must be treated differently; not all biological fathers can be tarred with the same brush. Some biological fathers will indeed be anonymous; others may be known to the lesbian couples, yet may not wish to have any part in the child's life; whereas others may have come to an arrangement with the mother whereby they wish to share parental responsibility. Hence, it is not entirely true to say that 'there are normally no problems between the lesbian couple and the biological father', since this will inevitably depend on the case one is dealing with. This is especially relevant when one considers the recent Dutch Supreme Court decision with regard to a contact arrangement between a biological father and a child born within a lesbian relationship.[38]

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[36] These arguments are convincingly listed in Kalsbeek Commissie, *Rapport Lesbisch Ouderschap*, 2007, §5.2, 27-31.

[37] Kalsbeek Commissie, *Rapport Lesbisch Ouderschap*, 2007, §5.2.1, 27. For a somewhat negative response to the report see A Nuytinck 'Lesbisch ouderschp. Bespreking van het rapport van de Commissie lesbisch ouderschap en interlandelijke adoptie (Commissie-Kalsbeek)' *WPNR*, 2007, 44-48.

[38] HR, 30 November 2007, *LJN: BB9094*.

The case involved a lesbian woman who gave birth to a child by means of artificial insemination using the sperm of man in a homosexual relationship. During the pregnancy it became clear that the parties had very different ideas with regard to the relationship the man was to have with the child. After the child was born, the man requested the District Court of Amsterdam (on the basis of Art 1:377f, Dutch Civil Code) to determine that he was entitled to contact with the child. The District Court declared that the man neither had a sufficiently close personal relationship with the child, nor family life in the sense of Art 8, ECHR. Accordingly, the District Court declared his petition inadmissible. On appeal, the Court of Appeal of Amsterdam referred to the circumstances prior to the birth of the child. The Court of Appeal stated:

> 'In the current situation, in which the man (bearing in mind the statements of both the mother and the man) is not a random donor, but instead has been deliberately selected by the mother to be the father of her child and whereby the man has deliberately chosen the mother to be the mother of his child; whereby the parties had a close bond during the conception of the child, throughout which time they saw each other regularly and had the intention to continue this contact after the birth of the child, and whereby they both intended that the man would fulfil a role in the child's life (although they disagree with regard to the degree to which that should be the case), and it was the intention that the man would recognise the child, this court holds that a close personal relationship existed between the man and the child prior to the birth of the child.'

Furthermore, the Court of Appeal went on to argue that the fact that the relationship between the mother and the man had already been terminated prior to the birth of the child was not sufficient to establish that the close personal relationship between the unborn child and the man had also been terminated. The Dutch Supreme Court upheld the Court of Appeal's decision. As a result, it is fair to say that the precise nature of the relationship between the biological father and the mother is essential in determining whether or not the biological father can be regarded as satisfying the condition that he has a 'close personal relationship' in the sense of Art 1:377f, Dutch Civil Code, in order to request a contact arrangement with the child. It is regrettable that these nuances are absent from the Kalsbeek Commission's report. It is essential that before implementing the suggestions of the Kalsbeek Commission, the Government first pays more attention to the role and importance of the biological father. This is not only in his best interests, but also in the best interests of all concerned, especially the child.

Another interesting discussion is what happens when the non-biological mother refuses to recognise the child. In this situation, the Commission felt it necessary that the biological mother and the child be granted the right to have the parentage of the non-biological mother determined judicially (in a similar manner to the judicial determination procedure for the biological father on the basis of Art 1:207(1), Dutch Civil Code). The basis for this determination would be the original consent that the non-biological mother had granted with regard to the conception of the child. Obviously, procedural and evidential problems will abound here should a biological mother or child wish to have this

judicially determined. However, the principle is such that a non-biological mother should be able to be held accountable for her decision to be involved in the conception of a child.

Although the argumentation of the Commission is sometimes slightly brief and in this author's opinion more attention should have been paid to the position of the biological father (as well as the discussion surrounding the right to know one's origins), these proposals should be welcomed since they ensure that children born within lesbian relationships will be granted more legal certainty with regard to their *legal* relationship to the persons who have assumed responsibility for them.[39] Instead of a post-birth adoption procedure (as is currently required), everything will be able to be legally arranged prior to the birth of the child, thus resulting in a situation akin to that for opposite-sex married couples.

All these cases concern the central question: what is in the best interests of the child? At least, the Minister of Justice has acknowledged that international adoption should not be abolished (as has been suggested by certain members of the community), since it has been proven to be in the best interests of the children that children grow up in familial surroundings instead of in an orphanage.[40] With the Dutch international adoption procedure already characterised by long waiting lists and excessive waiting periods, the question arises whether these measures will simply lead to further delays in a bottlenecked procedure, and thus whether the measures to be taken will ultimately work in the best interests of the child.[41]

V THE END OF THE MIDDLE: THE LEGAL CONSEQUENCES

A remarkable ping-pong discussion is currently taking place with respect to the acquisition of Dutch nationality. Since 1 April 2003, a child does not automatically acquire Dutch nationality via his or her Dutch father, if that man recognises the child. Instead, the child acquires a right to acquire Dutch nationality, should his or her legal father (the recogniser) take care of and raise the child for a period of 3 years.[42] Nonetheless, a child whose father has been

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[39] At present the adoption procedure is not normally completed until at least 6 weeks after the request has been submitted to the District Court. The current procedure costs approximately €900.

[40] Directoraat-Generaal Preventie, Jeugd en Sancties, 7 November 2007, Reference 5508188/07/DJJ, 10, where reference is made to the research of F Juffer and M H van IJzendoorn 'The importance of parenting in the development of disorganized attachment: Evidence from a preventive intervention study in adoptive families' *Journal of Child Psychology and Psychiatry, 2005,* Vol 46, 263-274.

[41] All nine branches of the Dutch Child Care and Protection Board, the organisation responsible for conducting the home study in relation to international adoption, are experiencing excessive and extensive delays. The Dutch part of an international adoption procedure currently takes approximately two and a half years.

[42] Art 6(1)(c), Kingdom Act governing Dutch nationality (*Rijkswet op het Nederlanderschap*).

determined judicially is entitled to automatically acquire Dutch nationality, as long as his or her father possesses Dutch nationality.[43] In 2006, a legislative proposal was introduced which aimed to remove this distinction. If this legislative proposal becomes law, a child who is recognised before he or she reaches the age of 7 will be able to automatically acquire Dutch nationality, subject to the condition that his or her Dutch father can provide evidence that he is the biological father of the child. Considering the tendency in Dutch case-law in this direction,[44] it is more than likely that this legislative proposal will ultimately make it onto the statute books. In its decision of 26 January 2007, the *Hoge Raad* stated that, in light of the obligation laid down in Art 26, ICCPR, it was legally unjustifiable to continue to draw a distinction between children born during a marriage and those born outside of wedlock, nor between children recognised prior to their birth and those recognised after their birth.[45] For these reasons, the *Hoge Raad* held that with respect to a child recognised after its birth in Aruba,[46] as long as the father could provide evidence that he was indeed the biological father of the child, the child was entitled to automatically acquire Dutch nationality.

VI THE BEGINNING OF THE END: WHEN THE WHOLE THING GOES PEAR-SHAPED

As discussed extensively in the 2006 Survey,[47] Dutch divorce law has also been a recent topic for extensive deliberation. In 2004 and 2005, two different legislative proposals were introduced in the Dutch Parliament:

- Bill to promote continuation of parenthood and responsible divorce (the so-called 'Donner Bill', named after the former Minister of Justice who initiated the Bill);[48] and

- Bill to terminate marriage without judicial intervention and to embody in legal form the continuation of parenthood after divorce (the so-called 'Luchtenveld Bill', named after the Member of Parliament who initiated the Bill).[49]

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43 Art 4(1), Kingdom Act governing Dutch nationality (*Rijkswet op het Nederlanderschap*).

44 HR, 26 January 2007, *LJN: AZ1624*.

45 HR, 26 January 2007, *LJN: AZ1624*, §§4.4 and 4.5.

46 Unlike The Netherlands, Aruba does not provide for the judicial determination of paternity. Therefore, as a result of the legislative amendments in 2003, children born in Aruba outside of marriage were not entitled to automatically acquire Dutch citizenship.

47 I Sumner and C Forder 'The Dutch Family Law Chronicles: Continued parenthood notwithstanding divorce' in A Bainham (ed) *International Survey of Family Law 2006 Edition* (Jordan Publishing, 2006) 262-304, at 270-284. For a good overview of the issues, history and legal consequences of these proposals see M Antokolskaia (ed) *Herziening van het echtscheidingsrecht* (SWP Amsterdam, 2006).

48 *Dutch Parliamentary Proceedings (Kamerstukken II)*, 2004-2005, 30 145, nrs 1-2.

49 *Dutch Parliamentary Proceedings (Kamerstukken II)* 2003-2004, 29 676, nrs 1-2.

Although both Bills aimed to reinforce the basic rule that joint parental responsibility should continue after divorce, the Bills took very different routes to achieve these aims. On 20 June 2006 the First Chamber of the Dutch Parliament rejected the Luchtenveld Bill.[50] As a result, attention has since shifted to the 'Donner Bill'. The Bill was orally discussed in the Second Chamber of Parliament on 21 March 2007 and subsequently passed (in altered form) by the Second Chamber on 12 June 2007.[51] The first set of written questions in the First Chamber was published on 11 October 2007.[52]

With respect to the content of these legislative proposals, both proposals aimed to abolish the 'lightning divorce' (*flitsscheiding*). This was also a recommendation put forward in the evaluation of the Act opening up same-sex marriage and the Act introducing registered partnership.[53] According to the Donner Bill the possibility to convert a registered partnership into a marriage will remain. It would thus be safe to assume that the loophole in Dutch law whereby a marriage can be converted into a registered partnership, shortly followed by the administrative termination of that registered partnership, will soon be abolished, especially if one considers the fact that the Dutch Second Chamber has already voted positively in this respect.[54] The main changes as a result of this proposal arise in relation to the conditions which will need to be satisfied prior to a divorce being decreed. The main change relates to the introduction of a 'parenting plan' with respect to couples with children. This will be discussed below (VII). At this stage, it is important to note that the introduction of a requirement to formally enter into a parenting plan before spouses are entitled to divorce or dissolve their registered partnership will inevitably lead to a more difficult divorce law.[55] According to current Dutch divorce law parties may terminate their marriage without first determining the legal consequences. Although this ensures that parties may divorce quickly and easily, it also does not prevent couples from facing many years of post-divorce procedures involving property settlements, maintenance and other matters.

Another aspect of the Donner Bill relates to the codification of recent Dutch Supreme Court decisions relating to the award of sole parental authority after divorce.[56] As a general rule, joint parental authority continues after divorce.[57] Nonetheless, this can be terminated should the best interests of the child require it. Regardless of the way in which parental authority came to be exercised jointly – whether automatically, by virtue of registration or by means of a judicial determination – the same rule applies with regard to the

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50 *Dutch Parliamentary Proceedings (Handelingen I)* 2005-2006, 29 676, 1482-1483.

51 *Dutch Parliamentary Proceedings (Kamerstukken I)* 2006-2007, 30 145, nr 26.

52 *Dutch Parliamentary Proceedings (Kamerstukken I)* 2006-2007, 30 145, nr B.

53 K Boele-Woelki, I Curry-Sumner, M Jansen and W Schrama *Huwelijk of geregistreerd partnerschap? Evaluatie van de wet openstelling huwelijk en de wet geregistreerd partnerschap* (Kluwer, Ars Notarius nr 134, 2007) 277.

54 *Dutch Parliamentary Proceedings (Kamerstukken II)* 2006-2007, 30 145 and *Dutch Parliamentary Proceedings (Handelingen II)* 2006-2007, 30 145, 4214-4215.

55 M Antokolskaia (ed) *Herziening van het echtscheidingsrecht* (SWP, Amsterdam, 2006).

56 Proposed Art 251a, Dutch Civil Code.

57 Art 251(2), Dutch Civil Code.

termination of joint parental authority and its replacement with sole parental authority. Furthermore, as laid down in a recent decision of the Dutch Supreme Court,[58] the Donner Bill also makes a distinction with respect to the *right* to have contact with a child between, on the one hand, parents with parental authority and, on the other, parents without parental authority.[59] A parent without parental authority (for example, an unmarried biological father who has recognised his child, but has not registered his parental authority with the mother in accordance with Art 1:252(1), Dutch Civil Code) can lose his or her right to contact for an undeterminable period of time, whereas it is not permitted to permanently deprive parents with parental authority of their right to contact. A further distinction cemented in this Bill is the distinction between legal parents and biological parents with respect to the *duty* to maintain contact with a child. Only legal parents will be under the duty to have contact with their children.

VII THE END OF THE END: THE LEGAL CONSEQUENCES OF DIVORCE

One of the most difficult aspects upon separation entails agreements with respect to child maintenance. Although the Dutch child maintenance system has come under fierce attack in recent years, a legislative proposal aimed at improving the system was removed from the parliamentary agenda on 9 November 2006. The proposal would have introduced a sliding-scale fixed-rate system, akin to the Danish model. However, such a system proved not to have the necessary support, with many believing that this would not adequately take into account the individual circumstances of the persons involved. One aspect of this proposal has, however, been seized upon and has instead found its way into the previous mentioned Donner Bill (ie Legislative Proposal number 30145). From now on, children and stepchildren under the age of 20 who are entitled to child maintenance payments will receive priority with respect to these payments above and beyond all other maintenance creditors, eg spouses.

The Donner Bill also contains provisions in relation to the so-called 'parenting plan' (*ouderschapsplan*). The Bill would force divorcing and separating parents with joint parental authority to reach an agreement in the form of a parenting plan should their relationship break down. The obligation would not, however, be restricted to married couples, but would also extend to unmarried cohabiting couples.[60] Many questions and reservations have been raised with respect to these plans. For example, a parenting plan will always be a snapshot of a particular time and place and will not be able to take all factors into account, especially with regard to the ever-changing familial needs and

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58 HR, 23 March 2007, *LJN: AZ 5443*.

59 Proposed Art 377a, Dutch Civil Code.

60 Proposed Art 1:247a, Dutch Civil Code. In accordance with current Art 1:252, Dutch Civil Code, unmarried couples may exercise joint parental authority if this has been recorded in the custody registers (as provided for in Art 1:244, Dutch Civil Code).

requirements. Another important point regards the *control* or enforcement issues. Take, for example, the following three scenarios.

(1) Annemarieke and Bram are a married couple with two children. After 10 years of marriage, they decide to get divorced. According to Dutch law, the couple must go to court.

(2) Claudia and David registered their partnership 10 years ago and live together with their two children. They decide to dissolve their partnership. In order to do so, they must either go to court (if the dissolution is non-consensual) or the local Registrar (if the dissolution is consensual).

(3) Ewoud and Florence are a cohabiting unmarried couple with two children. After 10 years of living together, they decide to split up. Ewoud moves out and rents an apartment.

As these examples indicate, both married couples and registered partners must embark upon a formal procedure in order to get divorced or dissolve their partnership, whether this is via the court or the local registrar. It is, therefore, relatively straightforward to introduce an obligation for the couple to produce a parenting plan, since this can be adjoined to the divorce or dissolution procedure. Unmarried cohabiting couples, on the other hand, can dissolve their relationship without any formal procedure. The main legal issue in relation to the introduction of an obligatory parenting plan for separating unmarried couples has, therefore, been in relation to the moment in time at which this can be enforced or controlled. Some authors have suggested that it will only become problematic when a problem arises at a later date, for example when requesting that the court resolve a particular dispute in relation to the exercise of parental authority.[61] Other suggestions could include coupling the parenting plan to state benefits such as child benefit, although this would mean radical changes to the current benefits system.

Questions have, moreover, also been raised with regard to the current plans and their relationship to the United Nations Convention on the Rights of the Child (UNCRC). According to Art 12(2), UNCRC, a child who is capable of forming his or her own views should have the right to express those views freely in all matters affecting him or her. His or her views should be given due weight in accordance with the age and maturity of the child. This principle has also been adopted by the recent Principles of the Commission on European Family Law (CEFL).[62] In view of the fact that Dutch law imposes no obligation to hear children during divorce proceedings, nor upon the dissolution of a registered partnership,[63] questions have been raised as to whether these new procedures

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[61] M Vonk 'Kroniek Personen- en Familierecht 2007' *NJB* 2007, 1832, who discusses the problems that may be encountered when filing for a judicial decision with respect to Art 1:253a, Dutch Civil Code.

[62] Principle 3:37, K Boele-Woelki et al *Principles of European Family Law regarding Parental Responsibilities (*Intersentia, Antwerp, 2007).

[63] In practice, judges tend not to hear children, especially when the parents agree on all the

will improve this situation, or in fact make things worse.[64] In those cases involving minors, Dutch courts tend to hear children over the age of 12. If the judge does decide to allow the child to express his or her opinion, this is done in a manner determined by the judge.[65]

Finally, the Dutch Parliament has also seen a long list of legislative proposals in 2007 in the field of child protection. On 8 March 2007, a new law entered into force aimed at contributing to the prevention of child abuse in the raising of children. The Act also forms part of a larger package of child protection measures introduced by the Minister of Youth and the Family, André Rouvoet (Christian Union/ChristenUnie). The Youth and Family Programme 2007–2011, *Every opportunity for every child*, lays down a number of key strategic aims for the coming years. The Government's programme consists of three strategies, namely:

(1) Growing up is something you do in a family: In order to achieve this aim the government intends, for example, to offer parenting support to all families. This will be provided through a national network of youth and family centres (to be created by 2011) to provide advice and help on parenting at the local level. Parents will also be provided with a means-tested child allowance to minimise financial obstacles to adequate child-rearing.

(2) Focus on prevention: Identifying and tackling problems earlier. In order to achieve this aim, the government intends to introduce youth health care and development assessments for each child during the child's first 4 years. Furthermore, an electronic database and a register of juveniles-at-risk will be created.

(3) Binding commitments: The government recognises that solving the problems of children and families requires the input of many different actors. Perhaps one of the most discussed topics at the moment in Dutch literature and society is the extent to which the state will, and should, be able to force parents to actively improve their parenting skills, when they would appear to be unwilling to do so.

Since 8 March 2007, neither physical punishment nor any other form of degrading treatment may constitute a part of the raising of children, as a result of an amendment to Art 1:247(2), Dutch Civil Code.[66] The intention of the proposal was to send a clear signal that violence should not constitute any part of a child's upbringing. However, the exact boundary of this provision is not

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relevant issues, B E S Chin-A-Fat *Scheiden (ter)echter zonder rechter, een onderzoek naar de meerwaarde van scheidingsbemiddeling* (SDU, The Hague, 2004) 432-433.

64 *Dutch Parliamentary Proceedings (Kamerstukken I)* 2006-2007, 30 145, nr B, 6.

65 Art 809(1), Dutch Code of Civil Procedure. See further, K Boele-Woelki, W Schrama and M Vonk 'The Netherlands National Report' at www.law.uu.nl/priv/cefl (Parental Responsibilities/ The Netherlands).

66 *Staatsblad* 2007, nr 145.

entirely clear. With the Minister having declared that preventative measures do not fall within the scope the provision,[67] debate has now centred on the exact difference between actions intended to *prevent* behaviour and actions intended to *punish* behaviour. Is there a difference between a parent who slaps his or her child on the fingers to prevent a biscuit being taken from the jar, and a parent who slaps his or her child on the fingers after they have already taken a biscuit and attempts to take a second?

VIII CONCLUSION

2007 has been a year characterised by unsuccessful legislative proposals with respect to divorce, child maintenance and adoption. Nonetheless, two clear themes can be distilled from the spurious activity in the field of family law. First, Dutch family lawyers appear to be paying ever-increasing attention to the responsibility of parents towards their children. The European trend away from parental power and towards parental responsibility is thus taking on a new form in The Netherlands; the child as a holder of rights is increasing in importance. This is apparent not only in relation to the formalisation of the law with respect to sole parental authority and the prohibition of physical violence towards children, but also with respect to the recent suggestions of the Kalsbeek Commission pertaining to parentage in lesbian relationships.

Secondly, Dutch family law is being increasingly characterised by plurality and party autonomy, with adults being granted more ways in which they can not only formalise their relationship, but also ways in which they can organise their financial and proprietary affairs. The main question is whether this increase in choice is actually beneficial to those it is aiming to serve. As pointed out in the evaluation of the same-sex marriage and registered partnership legislation, choice is all well and good, so long as that choice is a real choice, rather than simply a hollow shell. Is Dutch law now better off having two formal relationship institutions with more-or-less identical legal consequences? The answer is: it depends on whom you ask!

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[67] *Dutch Parliamentary Proceedings (Kamerstukken I)* 2006-2007, 30 316, nr 3.

New Zealand

CHILDREN: NEW DEVELOPMENTS

John Caldwell[*]

Résumé

Cet article examine dans quelle mesure la *Loi sur la protection des enfants* de 2004 a eu un impact important sur le processus décisionnel judiciaire au cours des deux premières années de sa mise en vigueur. La loi met clairement l'accent sur la responsabilité parentale conjointe et elle fait la promotion des droits de l'enfant. L'auteur soumet que s'il y a bien eu des changements perceptibles dans la pensée et les pratiques judiciaires en ce qui a trait aux droits de participation de l'enfant (incluant les droits d'enfants très jeunes), le maintien du principe du meilleur intérêt de l'enfant a pourtant eu pour effet qu'il n'y a eu que peu de changements dans l'approche judiciaire dans des domaines comme celui des autorisations de déménagement ou des ordonnances de responsabilité parentale partagée. Finalement, cet article traite du débat social et politique très chaud à propos des propositions visant à interdire les gestes parentaux de punition physique et il conclut que le résultat législatif sur ce sujet est plutôt décevant.

I BACKGROUND

The enactment of the Care of Children Act 2004, which came into force on 1 July 2005, was intended to introduce changes of both a cosmetic and substantive nature into New Zealand child law. At the cosmetic level, the Act was designed to remove the unfortunate connotations of property rights that could arise, linguistically at least, from judicial grants of orders of 'custody'. To this end, the Act substituted the new terminological labels of 'day-to-day care' and 'contact' for the previous terms of 'custody' and 'access'. The hope here was that the Family Court would thereby be rid of the previous problems associated with the public perception of custody orders.[1]

At the more substantive level, the Act bravely attempted to provide, as one judge was to put it:[2]

> '. . . a platform from which can be launched an entirely new child focused approach to parenting, one which recognises the ongoing parenting and guardianship responsibilities of parents and guardians.'

* Associate Professor, School of Law, University of Canterbury, Christchurch.

1 As noted by Heath J in *G v G [Parenting orders]* [2006] NZFLR 453, at [30].

2 *P v K* [2006] NZFLR 22, at [33] per Judge von Dadelszen.

Or, using the words of another judge, the Act aimed to introduce 'significant changes reflecting advances in thinking both here and overseas'.[3]

As a few years have now elapsed since the commencement of this new statutory regime, it has become timely to consider the Act's overall impact and effectiveness, and to reflect upon whether the nomenclature changes and other substantive advances in legislative thinking have proven to have had any especially marked influence on judicial decision-making within the New Zealand jurisdiction. In particular, it is useful to consider whether a distinct legislative emphasis on co-parenting and the enhanced recognition of children's rights has resulted in any discernible shifts and trends in the relevant case-law.

II JOINT PARENTING FOCUS

The underlying increased legislative emphasis on co-parenting becomes readily apparent from a cursory examination of a number of sections within the Care of Children Act 2004. For example, s 49 expressly requires an applicant for a parenting order to include a statement on how other persons will be involved in the child's care. Likewise, s 52 requires any court that proposes to make a parenting order which does not give a parent the role of day-to-day care to consider whether and how that order will provide for that parent to have contact with the child.

Less specifically, though potentially significantly, s 5 of the Act also lays down, for the first time, non-exhaustive principles that are designated to be relevant to the court's determination of the child's welfare and best interests.[4] Here, the principles of continuity, co-operation, and consultation in the provision of care arrangements for the child are clearly favoured and promoted.[5]

This statutory articulation of the desired and preferable approach to welfare issues is certainly important, but two qualifying caveats must be immediately lodged. First, the statutory declarations of s 5 could, at least to some extent, reasonably be viewed as a statutory codification of various factors that the judges had previously identified as implicitly relevant in the application of the paramountcy principle under the Guardianship Act 1968.[6] Secondly, the instruction found in s 4(2) of the current Act that 'the welfare and best interests of the particular child in his or her particular circumstances' must be considered (which once again is no more than a statutory endorsement of the previous judicial approach) inevitably means that the weight attached to any one particular factor will be entirely dependent upon the particular circumstances and vagaries of a particular case. Hence, as Priestley J has

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3 *C v S [Parenting Orders]* [2006] NZFLR 745, at [24] per Randerson J.

4 See s 4(5) and (6) of the Care of Children Act 2004.

5 See, for instance, paras (a)–(d) of s 5 of the Care of Children Act 2004.

6 A much cited judgment of Fisher J in *D v W* (1995) 13 FRNZ 336 had laid down a number of pertinent considerations (at 349–350), and Judge von Dadelszen agreed that these principles had essentially been codified in s 5: *DLS v DLB [Parenting orders]* [2006] NZFLR 533, at [24].

warned, a judge's consideration of the s 5 principles will not necessarily clarify his or her decision-making process.[7] Child law remains wholly fact specific.

Accordingly, as Priestley J also intimated, the co-parenting principle might often fall as a casualty to the circumstances of parental conflict in a particular case.[8] For precisely this reason nothing approaching an actual legal presumption in favour of shared parenting is to be discovered within the Care of Children Act. To the contrary, a number of predisposing factors have recently been identified by John Hansen J as remaining important and necessary in any judicial consideration of the viability of 'shared' or 'parallel' parenting orders under the Act.[9] The various factors his Honour traversed were: (i) a good working relationship between the parents; (ii) the parents living within close proximity of each other; (iii) each parent having the same routine in each house; (iv) the children having sufficient cognitive maturity to understand the concept of time and the concept of object permanency; (v) the children having unlimited telephone access to the other parent; and (vi) the children having established a secure attachment relationship with both the primary caregiver and the secondary attachment figure.[10]

Consistent with the drift of findings from earlier New Zealand High Court authority, John Hansen J did acknowledge that social science research suggested joint day-to-day care could operate even in the absence of a high level of harmony and co-operation between the parents. Nevertheless, it is apparent from the dicta already noted above of Priestley J (and other judicial pronouncements to similar effect), that shared parenting arrangements will not be countenanced under this Act where parental conflict is at the higher end of the scale. Not too much change from the past is detectable in terms of general approach.

One specific area of child law in which the statutory emphasis on joint parenting responsibilities and continuity of a child's relationships might be usefully evaluated for its practical impact is that of relocation. With any application to relocate the courts have always had to undertake the excruciatingly difficult balancing exercise of weighing the principles of continuity and co-parenting against the countervailing factor of the applicant 'custodial' parent's psychological well-being. However, with reference to s 5 and the other new provisions in the Care of Children Act 2004, Principal Family Court Judge Boshier did argue, extra-curially, that when the courts came to deal with relocation disputes the new Care of Children Act might now require greatest weight to be accorded to retention of contact with both parents.[11] His Honour therefore seemed to conclude, albeit tentatively, that an applicant parent under this Act was unlikely to be permitted to relocate if the move would have a detrimental impact on the child's relationship with the other

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7 *Brown v Argyll* [2006] NZFLR 705, at [39].
8 Ibid, at [39].
9 *A v G* (High Court, Invercargill, 21 December 2006).
10 Ibid, at [67].
11 'Relocation cases: an international view from the bench' (2005) 5 NZFLJ 77.

parent, even if the presence of other competing considerations might have allowed the application under the repealed Guardianship Act 1968.[12] Subsequently, in a judicial opinion from the bench, Judge Boshier similarly declared that the importance accorded to the principle of continuity and stability in parenting arrangements under the Care of Children Act 2004 was 'unmistakable'.[13]

However, the High Court has now firmly decreed that the enactment of the new Act is not to be seen as heralding any change in substantive approach to relocation disputes. In a number of judgments made under the previous Guardianship Act 1968 the Court of Appeal had persistently insisted that pursuant to the paramountcy principle a multi-faceted analysis of the child's welfare was required, without any a priori assumptions or particular weight being given to one factor over another. This entirely neutral approach, the High Court averred, is to continue unabated. While the High Court did concede that the principles of s 5 might provide a degree of sharper focus than existed before with respect to the paramountcy principle, the High Court could simply find no tension between the new s 5 principles and those earlier Court of Appeal decisions. Accordingly, the Act does not seem to have produced a qualitative change in the manner in which the New Zealand judiciary will approach relocation cases.[14] As before, there are to be no preconceptions or presumptions. As before, neither party will carry a legal onus.

III THE RELUCTANT PARENT

When we turn to other discrete issues of child law, we can occasionally find some quite significant substantive changes in approach arising from a judge's interpretation and application of the statute's new provisions and emphases. For instance, one Family Court judge, Judge Burns, has determined that the courts are now empowered to impose coercive contact orders on a reluctant parent, if such contact would be regarded as in the welfare and best interests of the child.[15] While such a prospect had been decisively eschewed by Family Court judges in earlier decisions under the Guardianship Act 1968, Judge Burns, with reference to the reforms of the Care of Children Act 2004, believed the new Act encouraged the adoption of a quite different approach.

In support of this unexpected finding, the Judge highlighted a number of provisions that were without any counterpart in the predecessor legislation, these included: s 3(1)(b), which states that one of the purposes of the Act is to

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12 Ibid, at 79 and 81.

13 *BDD v IBG [Relocation]* [2007] NZFLR 1, at [50].

14 See, for example, *ACCS v AVMB [Parenting orders]* [2006] NZFLR 986, at [52] and [55] per Panckhurst J, *Brown v Argyll* [2006] NZFLR 705, at [60] per Priestley J, *V v F* (High Court, Wellington, CIV-2006–485–1573, 1 December 2006), at para [130] per Clifford J, *NW v MW [Parenting order]* [2006] NZFLR 485, at para [27] per Judge Burns, and *LH v PH [Relocation]* [2007] NZFLR 737.

15 *PN v BN [Parenting orders]* [2007] NZFLR 320.

'recognise certain rights' of children; s 6, which gives enhanced importance to the child's views; s 5, which, as earlier seen, sets out the principles in favour of co-parenting; and s 52 (which, as also seen, provides that the court must consider contact arrangements when it does not give a parent the role of providing day-to-day care). As well, Judge Burns placed considerable reliance on the enhanced enforcement provisions in the statute. Although this decision has been followed by other Family Court judges, and has not yet been overruled by the High Court,[16] it must, as a matter of practical reality, be thought open to question whether an uninterested parent can ever be effectively coerced to assume a greater level of love and care for the child. It must also be questionable whether a child's welfare and best interests (always the ultimate determinant in these cases) will inevitably be promoted by the application of stringent enforcement measures against a reluctant parent.

IV CHILDREN'S RIGHTS GENERALLY, AND THE RIGHT TO BE HEARD

One of the most significant features of the Act is the statutory denotation early in the statute that a child's rights are to be treated as of equivalent importance to the child's welfare and best interests (see s 3(1)(b): the general 'purpose section'). Following on from the generalised statement of statutory purpose concerning recognition of the child's rights, the Act then proceeds to propound some particularised rights. For instance, the Act creates an entirely new right for the child himself or herself to lodge an appeal to the High Court (s 143(2)). Understandably, this latter right comes with some qualifications: the statute provides in s 143(2) that both a child and adult party require leave to appeal where the issue involved is one of guardianship, and the High Court has recently held that the appointment of a litigation guardian would normally be required for any appeal by the child.[17]

Perhaps even more importantly, the Act now provides enhanced rights for the child to participate and be heard in the proceedings. Hence, s 6(2)(a) states that a child must be given 'reasonable opportunities to express views on matters affecting the child', and s 6(2)(b) states that 'any views the child expresses (either directly or through a representative) must be taken into account'. These statutory participation rights and entitlements are of crucial importance, and their provenance is traceable to Art 12 of the 1989 United Nations Convention on the Rights of the Child. Interestingly, though, s 6, in contrast to both Art 12(1) and s 23(2) of the Guardianship Act 1968, omits any reference to the age and maturity of the child as relevant factors to be taken into account in

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[16] Miller J discussed the issue of the reluctant parent in *NDB v RFH* (High Court, Wellington, CIV 2007–485–628). On the facts of this particular case, however, Miller J was simply able to rule that the Court was empowered to make a contact order without consent, and his Honour was not required to determine the additional question of whether a parent could be compelled to exercise contact pursuant to that order.

[17] See *C v S [Care of Children]* [2007] NZFLR 583 and *M and D v S and H* (High Court, Auckland, CIV 2007–404–1624, 12 October 2007, Potter J).

deciding upon judicial weight accorded to the views. That omission might well have been perceived to have been deliberate and pointed, but, in what has become a landmark decision under the Care of Children Act, Randerson J has ruled in the High Court that 'the legislature cannot have intended that a Court should not have regard to those factors [age and maturity] along with such other considerations as may be relevant to an assessment of the weight to be given to the child's views'.[18]

While that particular dictum suggests the previous judicial weighting of a child's age and maturity will continue much as before, albeit on an implicit rather than explicit basis, Randerson J's judgment taken as a whole provides a dramatic indicator that some professional practices formerly regarded as both adequate and appropriate will need to be rapidly abandoned in view of the stronger statutory focus in s 6 on a child's right to participate and be heard. In the particular case before his Honour, a little girl aged 4 years and 3 months had, within a few months of her birth, been placed in the care of the father's niece. The essential issue before the Family Court judge had been whether the girl's father or his niece should have day-to-day care. The assessment of both a very experienced lawyer for the child and the Family Court judge was that this 4-year-old child was too young for her views to be sought directly, and accordingly neither the lawyer nor judge spoke directly to the little girl about her views. The lawyer for the child had, though, met the child on three occasions prior to the hearing, and during the hearing the lawyer had accompanied the judge to the child's preschool where the child was observed playing for a 20 minute period and the judge had held a conversation with the supervisor as to how the child was fitting into the preschool. Randerson J believed that in these circumstances there had been a failure to comply with s 6 of the Act: in his Honour's view, the girl had simply not been given a reasonable opportunity to express her views on the care arrangements.

While Randerson J in his judgment did accept that not every 4-year-old child would need to be asked to express his or her views verbally, he considered that this particular girl was capable of expressing herself verbally and should therefore have been given the opportunity. As earlier noted, the question of weight to be accorded to the views was, in his Honour's view, a different matter. And ordinarily, the judge held, s 6 would not only require a child capable of expressing views to be given the opportunity of so doing but a failure to meet the obligation would warrant the case being remitted back to the Family Court for that purpose and a rehearing in whole or in part. Nonetheless, in the 'special circumstances' of this case Randerson J was prepared to hold that a failure to comply with s 6 was immaterial as, in his Honour's opinion, there was 'no reasonable prospect that any views obtained could have affected the outcome of the case'.[19]

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[18] *C v S [Parenting Orders]* [2006] NZFLR 745, at [31(h)].
[19] Ibid, at [36] and [40].

The latter finding was challenged on appeal to the Court of Appeal, and counsel for the father contended that a failure to comply with s 6 inevitably rendered the Family Court's decision void and ultra vires. This contention was, however, rejected by the Court of Appeal.[20] William Young P, delivering the judgment of the Court of Appeal, held that the direction in s 6 to take the child's views into account suggested the ultimate purpose of the exercise was associated with outcomes, not just process, and that the adjudicating judge enjoyed a discretion as to the appropriate outcome once non-compliance had been found. In exercising that discretion, William Young P declared, considerations of the child's welfare would obviously play an important part, and, on the facts of this particular case, the Court of Appeal concluded that a rehearing would be inconsistent with the best interests of the child.

The ruling of Randerson J, as upheld by the Court of Appeal, that compliance with s 6 ceased to be essential where the substantive outcome on the parenting order was deemed inevitable, was to result in some strong academic criticism,[21] with family law commentators arguing that an independent substantive value should be attached to a child's participation rights. Moreover, if administrative lawyers were to have turned their minds to this ruling, they might have also wished to add that any assumption of inevitability about an outcome reached without the benefits of due process was almost always a dangerous one to make.

Overall, however, Randerson J's judgment has provided a strong and confident marker of a new judicial respect for children's rights engendered by the new Act. Within his judgment is to be found one particularly valuable passage where the judge lays down an extensive series of principles to govern the future methodology for the ascertainment and use of the child's views. This is a passage destined for frequent citation. Here his Honour held, inter alia, that the concept of 'reasonable opportunities' might necessitate the provision of more than one opportunity for the child to express his or her views. Following on from that, his Honour stated that an opportunity to express views reasonably close to the time of the hearing would usually be essential, given the distinct possibility that the views of a child could change over time. Indeed, as Cooper J was to intimate in a later case, there could, over a significant period of time, also be the potential for change in a child's *capacity* to express views.[22]

In his subsequent judgment, also involving a four-and-a-half-year-old girl, Cooper J explained that the 'views' encompassed in the requirements of s 6(2)(a) were not confined to the subject matter of the dispute, and that even in

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[20] *HC v PS* (Court of Appeal, CA 115/06, 18 October 2006).

[21] See, for instance, Henaghan 'Case Note: Children's views – two steps forwards, one step backwards' (2006) 5 NZFLJ 154. Henaghan describes this analysis as a 'fundamental misunderstanding of the reason why age and maturity were removed'(ibid). See also, more generally, Tapp 'A child's right to express views: a focus on process, outcome or a balance?' (2006) 5 NZFLJ 209.

[22] *DLB v DLS [Care of children]* [2007] NZFLR 263, at [45]. See also *B v K [Custody]* [2006] NZFLR 1040, at [25] per Rodney Hansen J.

the case of a very young child the child's views on a range of matters might be directly or indirectly relevant for the Court's decision.[23] While acknowledging that it might be 'unrealistic' to expect information from a four-and-a-half-year-old on the issues that the Court had to decide,[24] Cooper J expressly endorsed Randerson J's important judgment. A need for some new thinking and practices in relation to children's participation rights has been plainly signalled by these High Court judges.

V METHODOLOGY FOR OBTAINING A CHILD'S VIEWS

(a) Psychologists' reports

In the course of the key explanatory passage in his judgment, Randerson J chanced to observe that the opportunity to give views could be provided either through the lawyer appointed to act for the child, or through an interview with the judge, or, finally, through a report from a child's psychologist. A combination of the three methods was also envisaged by his Honour. The incidental reference to involvement by psychologists in this context would probably appear slight and inconsequential to an overseas reader. However, because an earlier ruling of the Full Court of the High Court[25] had been widely interpreted to have effectively excluded psychologists from the role of eliciting children's wishes and views (with considerable confusion and concern amongst Family Court professionals thereupon ensuing) the dictum of Randerson J assumed some importance in the New Zealand context.

In his judgment Randerson J elucidated that the earlier High Court decision had merely ruled out psychologists' reports that had been obtained *solely* for the purpose of ascertaining a child's views. He thus implied that the Family Court was empowered to commission a psychologist's report on the child, provided only that the judicial brief extended to matters additional to the ascertainment of the child's views.

In a similar vein, Heath J, one of the two sitting judges in the earlier High Court decision, has declared that nothing in the dicta of that earlier controversial judgment 'was intended to affect the ability of a child psychologist to use special skills to interpret what has been said to confirm that what a child is saying is what he or she means and to convey the results of the use of that expertise to the Court'.[26] It can thus be seen that the earlier High Court dicta are in the process of being rapidly distinguished to the point of

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[23] Ibid, at [44]. Randerson J also distinguished a child's 'views' from a child's 'wishes' and indicated 'views' could embraced a wide range of matters: *C v S [Parenting orders]* [2006] NZFLR 745, at [31(e)].

[24] Ibid, at [51].

[25] See *K v K* [2005] NZFLR 28, at [92] per Heath and Venning JJ.

[26] See *C v S [Care of children]* [2007] NZFLR 583, at [78].

extinction.[27] On the other hand, a different High Court judge, MacKenzie J, has cautioned that the step of subjecting a child to examination by a child psychologist is not a step to be undertaken lightly.[28]

(b) Judicial interview

One of the available methods for ascertaining a child's views alluded to by Randerson J in his judgment is by way of an 'interview' with the adjudicating judge. Perhaps in part because of the increased emphasis on participation rights in the new statute, this option of a judicial 'interview', increasingly termed a judicial 'conversation', has become increasingly favoured by both commentators and judges in New Zealand. Indeed, one High Court judge, Priestley J, has argued that 'where a child has firm views and/or maturity it might be unwise for a Judge not to see the child'.[29] On the other hand, Priestley J did observe that, although the use of the verb 'directly' in s 6(2)(b) of the Care of Children Act certainly envisaged the child expressing views personally to the presiding judge, the final decision on whether or not a judge should see the child ultimately had to remain a matter of individual discretion and judgment.

In the exercise of this judicial discretion a number of competing factors will inevitably come into play. Certain benefits, of both a child welfare and juristic kind, can be readily advanced in favour of a judicial conversation with the child. For instance, it can be postulated that a child who talks directly to the judge would feel valued and respected, as he or she is being treated as an autonomous person who is worthy of being heard without the perceived need for some potentially diluting and distorting filter. In a similar vein, it could be argued that the child may thereupon feel more inclined to accept the final outcome than a child who feels marginalised by the process. From the purely juristic point of view, it is also evident that judges who talk directly with the child often feel the conversation provides them with an enhanced appreciation of the child as a person, and with a better understanding of the child's maturity, and of the strength and independence of the expressed views.

On the other hand, a number of undoubted risks attach to judicial interviewing, with three risks in particular often being identified. First, there is a concern, shared by both commentators and the judges themselves, that judges lack the necessary psychological expertise and interviewing skills to elicit a child's views and wishes. Secondly, there is some anxiety that the prestige and innate authority attaching to the office of the judge might mean that any conversation conducted in the formal environs of a court could prove highly stressful and intimidating for the child. Thirdly, there is the worry that any

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[27] See further *DLB v DLS [Care of children]* [2007] NZFLR 263.
[28] *A v S [Custody]* [2006] NZFLR 216, at [14] per MacKenzie J.
[29] *Brown v Argyll* [2006] NZFLR 705, at [48].

private, confidential conversation with the child could result in a breach of the rules of natural justice vis-à-vis any adult parties to whom the conversation is not disclosed.

The Family Court judges have recently been grappling with the latter concern in particular. In one unreported case Principal Family Court Judge Boshier held it was important that any impressions and views obtained by an adjudicating judge were later able to be scrutinised by the parties, and that it was therefore desirable for the judicial interview to be recorded and made available, in either transcript or audio form, for comment by the parties. In a later, different High Court judgment Chisholm J agreed that parties not participating in the child's interview should be given an opportunity to comment before judgment was delivered, and his Honour proceeded to endorse Judge Boshier's procedural steps as being, generally speaking, 'sensible and desirable'.[30] Following on from these judicial developments, Principal Family Court Judge, Judge Boshier, exercising his executive responsibilities as the Principal Family Court Judge, in 2007 released some Guidelines for judges, *Discussions with Children*. The Guidelines were specifically stated not to constitute a Practice Note, and, unsurprisingly, continue to leave considerable room for the exercise of judicial discretion.

(c) Lawyer for the child

Principal Family Court Judge, Judge Boshier, did release one formal Practice Note in 2007: *Practice Note – Lawyer for the child: code of conduct*. In New Zealand, as in so many other jurisdictions, the precise role and responsibilities of the child's lawyer have long been the subject of vexed and protracted debate. Some lawyers have favoured a role of 'child advocacy' for the child's lawyer, while others have preferred the role of advocacy for the child's welfare. To some extent, this reflects the inherent tension between a 'child's rights' approach and a 'child welfare approach'.[31] Resolution of this longstanding debate had unfortunately never been achieved by earlier Practice Notes, with the role having been stated in rather vague, ambiguous and hybrid ways. In this most recent Practice Note, however, Judge Boshier did attempt to nudge professional practice and thinking towards a more traditional client-based advocacy model of practice.

The 2007 Practice Note does, however, contain a number of paragraphs that authorise the child's lawyer to follow a welfare approach**.** Most especially, para 6.1 and para 6.2 of the Code of Conduct provide that the lawyer shall represent the child in accordance with the child's welfare and best interests if the child, by virtue of age, maturity or disability, is unable to express a view, or if the child is able to express a view but because of age, maturity or disability

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[30] *W v N [Child Abduction]* [2006] NZFLR 793, at [63], approving *J v M* (Family Court, North Shore, 2004–044–001857, 20 April 2005, Judge Boshier).

[31] As identified by Potter J in *M and D v S and H* (High Court, Auckland, CIV 2007–404–1624, 12 October 2007), at [51].

any view should be treated with caution, or if any child is unable or unwilling to express a view or in any way guide representation. Then, para 6.3 provides, crucially, that in deciding whether or not the child falls within one of the aforementioned categories, the lawyer shall be guided by the presumptions that 'first, the older the child, the more representation shall be in accordance with the child's instructions (irrespective of the child's welfare and best interests) and, secondly, the younger the child, the more representation shall be in accordance with the child's welfare and best interests'. These paragraphs, and the Practice Note as a whole, will certainly not satisfy the purists who believe that the traditional legal representation model should invariably be adopted by a legal representative of the child (and that separate appointment of a counsel to assist is needed should the judge wish to hear a lawyer's submissions on child welfare). Nevertheless, it can be acknowledged that the Note does provide a more distinct advocacy focus than has previously been evident.

The role of the child's lawyer has also been the subject of some recent High Court comment. For instance, in the course of delivering his leading judgment on children's views, Randerson J opined that the Act did not require the lawyer for the child to ascertain the child's wishes, but merely to facilitate the same.[32] Priestley J has indicated that s 7(3) of the Act made it clear that the child's lawyer was to be the conduit for the child's views, subject to practical considerations.[33] Heath J has ruled, however, that those very same practical considerations would obviously preclude use of that conduit if the child were to refuse to engage with the lawyer appointed for him or her.[34] Regrettably, however, Heath J declined to make a final ruling on the pivotal question of whether s 7 of the Care of Children Act 2004 had finally resolved the debate of whether the child lawyer's role was one of welfare or instructions advocacy,[35] and likewise, in a case dealing with issues relating to a child's litigation guardian, Potter J decided to circumvent this contentious issue.[36] Perhaps, as Rodney Hansen J has declared, the role of the lawyer for the child is, in truth, 'multi-faceted'.[37] Continuing debate on the role can be anticipated.

VI WELFARE CONSIDERATIONS IN CHILD ABDUCTION CASES

One part of the Care of Children Act 2004 where the 'welfare of the individual child' approach appears to be definitively subordinated is subpart 4 of Part 2 of the Act, dealing with international child abduction. This subpart of the Act

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32 *C v S [Parenting orders]* [2006] NZFLR 745, at [31(f)].

33 *Brown v Argyll* [2006] NZFLR 705, at [46]. See also the discussion of Cooper J in *DLB v DLS* [2007] NZFLR 263, at [46]–[48].

34 See *C v S [Care of children]* [2007] NZFLR 583.

35 Ibid, at [70].

36 *M and D v S and H* (High Court, Auckland, CIV 2007–404–1624, 12 October 2007), at [53].

37 *B v K [Custody]* [2006] NZFLR 1040 at [24]. His Honour did, however, veer towards the welfare model in expounding that the role 'requires the exercise of an independent judgment as to what is in the child's best interests' (at [24]).

comprises a number of provisions that contain the essential principles of the Hague Convention on the Civil Aspects of International Child Abduction and accordingly embraces the Convention's emphasis on deterrence and presumptive return of an unlawfully abducted child to the state of his or her habitual residence.[38] As can be imagined, the various provisions found in this subpart of the Act fit rather awkwardly into a statute otherwise concerned with promotion of the welfare and best interests of the individual child, and the mismatch is most vividly highlighted by the earlier s 4(7) of the Act which (echoing an equivalent provision of the earlier Guardianship Act 1968) expressly subordinates the paramountcy principle in any cases concerning applications to return children under subpart 4 of Part 2. Nonetheless, there have been some early tentative signs from the courts that the new thinking on a child's welfare and rights found in the Act as a whole could have the potential to spill over, at least to some limited extent, to decisions made in Hague Convention cases.

Of particular significance in this context, the majority of the Supreme Court of New Zealand has now decreed that once the Court comes to exercise its judicial discretion following the respondent successfully making out the statutory defence of a child being settled in his or her environment for over a year,[39] the Court is thereupon required to balance the deterrent policy of the Convention against the best interests of the child.[40] Most especially, the Supreme Court majority held that once return of the child was found not to be in that child's best interests, then some special competing factor, such as concealment by the abducting parent, would be needed to justify the discretion being exercised in favour of return.[41]

While the majority of the Supreme Court in this case did reject the suggestions of the Chief Justice, Elias CJ, that the judicial discretion should be determined *principally* in accordance with the child's welfare and best interests, the majority's approach toward the balancing exercise in discretion was certainly more child-oriented than might have been anticipated from a reading of earlier New Zealand authorities. Perhaps the new pervasive thinking on children evidenced in the Care of Children Act 2004 has had some subliminal impact. It must be here noted, though, that the majority's specific ruling applies only to the 'settlement' exception, and that Tipping J was very careful to hold that curial statements made in relation to one exception should not be applied automatically or uncritically to another.[42] Nonetheless, and unsurprisingly, the Court of Appeal has now intimated, obiter dicta, that a similar balancing

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38 The twin goals of the Convention were noted in *Punter v Secretary for Justice* [2007] 1 NZLR 40 (CA), at [17] and [185].

39 The exception is found in s 106(1)(a) of the Care of Children Act 2004. See also Art 12 of the Convention of the Civil Aspects of International Child Abduction (the Convention is appended as Sch 1 to the Care of Children Act 2004).

40 *Secretary for Justice v HJ* [2007] NZFLR 195.

41 Ibid, at [87].

42 Ibid, at [39].

exercise involving the child's best interests is to be taken in the exercise of discretion if the 'grave risk' exception has been established.[43]

While this important Supreme Court judgment certainly insists upon greater heed being paid to child welfare considerations in the context of the exercise of judicial discretion than would normally be associated with Hague Convention cases, the overall practical impact on applications to return under the Convention should not be over-stated. Thus, subsequent to the Supreme Court judgment, the Court of Appeal has reaffirmed its earlier findings that the 'grave risk' exception itself would never be easy to establish.[44] Moreover, in another case that accentuates the general dissonance between the paramountcy philosophy of the Act as a whole and the provisions of subpart 4 of Part 2, the Court of Appeal has found that s 7(2) of the Act (which provides for the virtually mandatory appointment of a lawyer for the child in general childcare proceedings) does not apply to these child abduction cases.[45] Hence, even if, following the Supreme Court lead, the New Zealand courts were to adopt a more child-friendly approach to the exercise of the ultimate judicial discretion, it is clear the Court of Appeal will continue to apply principles consistent with the former New Zealand case-law (and the case-law from overseas) to eschew direct consideration of the individual child's welfare in determining the earlier critical jurisdictional questions. Such an outcome is, in fact, inevitable given that the key provisions on child abduction in this new Act replicate exactly those found in the old.

VII OPENNESS OF THE FAMILY COURT

On a quite different issue of media attendance at and reportage of Family Court proceedings, the normal paramountcy accorded to child welfare considerations seems also to have been now suppressed by the introduction of some entirely new statutory provisions in the Act. Following earlier intense news media attacks on the supposedly 'secret' Family Court, the arguments in favour of openness and transparency of judicial proceedings ultimately prevailed over those in favour of privacy for families and children.[46] Thus, s 137(1)(g) of the Act now allows accredited news media representatives to attend care of children proceedings unless the judge exercises his or her discretionary power to exclude under s 137(4). Likewise s 139(1) authorises the media, or indeed any person, to publish any reports of proceedings that do not

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43 *Smith v Adam* [2007] NZFLR 447, at [13].

44 See, for example, *Smith v Adam*, ibid, at [7] and *KMA v Secretary for Justice* [2007] NZFLR 891, at [51].

45 See *Butler v Secretary for Justice* [2007] NZFLR 791 and also *KMA v Secretary for Justice* [2007] NZFLR 891 at [16]-[24]. However, the possibility of a future change in judicial approach towards appointment of a lawyer for the child was alluded to by William Young P in *KMA v Secretary for Justice*, ibid, at [15] and [18].

46 For some reference to the debate and policy arguments see *Skelton v Family Court at Hamilton (No 2)* [2007] NZFLR 994, at [44]–[46].

include identifying particulars – but with the judge enjoying a discretion under s 139(2) to allow reporting of those particulars.[47]

In light of the previous media clamour for the doors of the Family Court to be opened, however, the most striking outcome of these new provisions has been the remarkable lack of interest from the media in either attending or reporting Family Court proceedings. For example, in the 12 months following the enactment of the Care of Children Act, on 1 July 2005, there were 40 requests by the media to attend a Family Court hearing, but only 12 recorded occasions on which a media representative actually did attend.[48] The argument from some within the media that there would have been greater interest if the Family Court had been opened for a greater range of proceedings than just those under the Care of Children Act 2004 will shortly be put to the test. The Family Courts Matters Bill 2007, if enacted, intends to open up Court proceedings under a much wider range of family law statutes.

VIII PARENTAL DISCIPLINE DEBATE AND LEGISLATIVE REFORM

Finally, no survey of recent developments in child law in New Zealand would be complete without some discussion and analysis of the Crimes (Substituted Section 59 Amendment) Act 2007, which amended s 59 of the Crimes Act 1961. The previous s 59 of the Crimes Act 1961 had provided a statutory defence for parents using physical domestic discipline, stating that '[e]very parent of a child and … every person in the place of a parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances'. Following extensive public debate, notable for its polemic rather than reasoned argument, s 59 was repealed and substituted by this new legislation.

In recent years there had been criminal cases which achieved some public notoriety where the former s 59 defence had been successfully invoked. One case in particular was often held up as the divining rod of this section's inadequacy: a woman charged with assault following her 'discipline' of her 12-year-old son with a cane and riding crop was eventually acquitted by a jury. The s 59 defence could also be ventilated in disputes of a family law kind: for example, in cases where allegations of violence against children by a parent were made in applications for parenting orders under the Care of Children Act 2004, where protection orders were sought under the Domestic Violence Act 1995, or where declarations were applied for under the Children, Young Persons and Their Children Act 1989. In 2005, a Member of Parliament from the Green Party, Sue Bradford, introduced a short and simple Private

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47 Heath J has ruled that this power must be exercised in compliance with the rules of natural justice: *Skelton v Family Court at Hamilton (No 2)*, ibid.

48 See the discussion of *The Family Court, Families, and the Public Gaze* (Families Commission, Blue Skies Report 16/07, 2007) esp Ch 5.

Member's Bill. This Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill proposed a simple repeal of s 59.

This Bill was referred to the Justice and Electoral Select Committee, and 1,718 submissions were received on it. The proponents of the Bill (including various august organisations such as the Families Commission, Children's Commissioner, Human Rights Commission and the New Zealand Psychological Society) often pointed to the alarmingly high rate of child abuse in New Zealand, and they frequently supported their submissions with reliance on the new thinking of children's rights that was promoted by the UN Convention on the Rights of the Child. Particular reference was sometimes made to the UN Committee on the Rights of the Child's expression of 'deep concern' over the s 59 defence and its ensuing recommendation for repeal.[49] Contending that physical discipline was linked with longer-term psychological and developmental problems, the Bill's supporters argued that repeal of the s 59 defence would both transmit a strong anti-violence message to the wider community and encourage positive behavioural changes.

Opponents of the Bill, however, tended to rely upon one major counter-argument. In New Zealand there was measurably wide and deep public opposition to the repeal of s 59, with public opinion polls consistently reporting that around 85–90% of New Zealanders were opposed to repeal and reform. In their submissions against repeal, the Bill's detractors also predicted serious detrimental effects would ensue for parents, children and society generally if the s 59 defence were to be removed.

In response to the various submissions, and the surrounding bitter public debate, the Justice and Electoral Committee reported back to the House of Representatives with a proposal for a new Bill under a new title. The Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill had transmuted into the Crimes (Substituted Section 59 Amendment) Bill, and it was this latter Bill that was ultimately enacted into New Zealand statute law (113 Members of Parliament finally voted in support, and only seven against).

A titular change to the original Bill was well justified, as, under the reformulated proposals put forward by the Select Committee, certain types of parental force were now to remain legally allowable in the child discipline context. While smacking or the use of reasonable force was to be prohibited under the new s 59 for the specific purpose of 'correction' (a concept which has always been far from crystalline in its clarity), the use of 'reasonable' parental force against a 'child' (the age of whom is left undefined) would henceforth be permissible in a number of defined circumstances. These lawful circumstances were where the purpose of the force was for one of the following: (a) preventing or minimising harm to the child or another person; or (b) preventing the child from engaging or continuing to engage in conduct that amounted to a criminal

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[49] See UN Committee on the Rights of the Child 'Concluding Observations of the Committee on the Rights of the Child, New Zealand' (UN Doc CRC/C/15/Add.216 (2003) at paras 29 and 30).

offence; or (c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or (d) performing the normal daily tasks that are incidental to good care and parenting. Hence, to clarify, a parent was henceforth to possess a perfectly good defence to a charge of assault against his or her child provided only that the purpose of the parental act of 'reasonable force', presumably here encompassing a 'smack', could be properly regarded as being preventative in nature or incidental to good care and parenting.

Given that the overt intention of Sue Bradford MP's original Bill was to remove all legal justifications for the use of force in the course of parenting a child, the new substituted provision appeared to proclaim an extraordinary and fundamental change of direction. For, as was pointed out by the Chair of the Family Law Section of the New Zealand Law Society and a number of other legal commentators, the new s 59 would actually appear to have widened rather than restricted the circumstances in which parental force is permissible. The outcome and chances of success for prosecutions brought against parents in the future would seemingly have been rendered less certain than before.

An overseas reader of the above narrative might here reasonably hypothesise that this peculiar and unexpected state of affairs came about through a conscious decision on Parliament's part to reflect the apparently clear wishes of over 85–90% of the public, as measured in the public opinion polls, and to retain and reinforce parental 'rights' to discipline their children in a physical way. Confusingly, this would be a misreading of the New Zealand political debate. When the reformulated Bill was put before the House, opponents of repeal of s 59 immediately portrayed it as a legislative measure that, as with the original Bill itself, removed the parental right to use physical force, and this quite inaccurate depiction became the assumed postulate for the wider public debate. Both Sue Bradford MP's own party, the Green Party, and the majority Labour Party announced that they would vote, essentially on party lines, for the new legislation. The Opposition National Party, and some other minor political groups within Parliament initially announced that, in accordance with the measurable public mood, most of their members would vote against this new Bill.

The final impressive parliamentary cross-party majority of 113–7 in favour of the new law was only achieved by way of an eleventh hour agreement in which the Prime Minister and the Leader of the Opposition agreed to the inclusion in the Bill of a so-called 'compromise clause'. The wording of this clause, the new s 59(4) of the Crimes Act 1961, read as follows:

> '. . . [t]o avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or a person in the place of a parent of a child in relation to an offence involving the use of force against a child where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.'

Most beginner law students would readily detect that such a clause was otiose, in that it merely affirmed an inherent prosecutorial discretion pertaining to any

statutory offence. However, New Zealand's somewhat anxious political leaders chose, whether through guile or ignorance, to represent this obviously tautologous provision rather differently. With some considerable fanfare, they hailed the new s 59(4) as a masterly political breakthrough that deftly met the major concerns of those members of the public who believed (albeit quite erroneously, as seen) that the parental right to smack was being removed by the new provisions.

Given that no offence would be committed under the new s 59 where a parent had employed reasonable force for purposes that could be broadly categorised as 'preventative', and given that the inherent discretion of the police not to mount prosecutions had received some statutory affirmation, it might reasonably have been assumed that the widely expressed parental fears that minor 'smacking' could become subject to state investigation and formal responses would prove groundless. Surprisingly, not so. One further unexpected development was yet to unfold. A few weeks after the Bill had received its Third Reading, the police released a *Police Practice Guide for new Section 59* in which guidance was given as to how the police intended to apply the Act. Within that Guide there were indications that a parental smack could indeed become the subject of investigation and formal record. In particular, the Practice Guide explicitly stated that where following police investigation the parental 'force' (presumably by way of prohibited correction) was found to be 'minor, trivial, or inconsequential' it would be appropriate for the event to be recorded on a family violence form and for the file to be forwarded to the Family Violence Coordinator, with the outcome expected to be one of guidance and support. This certainly constitutes a most significant shift in direction for official thinking and approach. And in repeat events involving the same family, the Police Practice Guide stated, consideration should then be given as to whether prosecution was appropriate.

IX CONCLUSION

Both the Care of Children Act 2004 and the Crimes (Substituted Section 59) Amendment Act 2007 explicitly attempted to facilitate and promote the interests of children. Accordingly, the Care of Children Act 2004 specifically states in s 3(1)(a) that one of the prescribed statutory purposes is to 'promote children's welfare and best interests' and s 4 entrenches the familiar paramountcy principle in relation to the individual child. While various provisions and principles in the new Act suggest that co-parenting is generally to be weighted heavily by the courts, it has been seen that the continuing existence of the overriding paramountcy principle has resulted in few detectable changes in approach from the High Court towards issues such as the making of 'shared', or 'parallel', parenting orders or the handling of relocation disputes.

Section 3(1)(b) of the Care of Children Act 2004, however, also affirms that recognition of 'certain rights of children' ranks alongside promotion of the

child's welfare as a key statutory purpose. And here the increased importance attached to children's rights generally, and participation rights in particular, can be seen to have produced some distinctive changes in judicial thinking. Perhaps rights, unlike principles, do have potency.

Section 4 of the Crimes (Substituted Section 59) Amendment Act stated that the purpose of the amending statute was to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purpose of correction. Whether the curiously ambiguous wording of the new s 59 will enable that particular purpose to be achieved remains to be seen. Tellingly, a survey, published in *The New Zealand Herald* in the week of the commencement of the new regime, indicated that 78% of surveyed adults would continue to smack their children for the now prohibited purpose of 'correction' if they believed it was reasonable to do so. The specific response of the judiciary and police to the new s 59 is as yet unknown, but this early survey of public opinion must surely suggest that it would be unsafe to place too much reliance on statutory provisions alone in changing entrenched adult attitudinal thinking on the rights and personhood of children.

Puerto Rico

FAMILY FINANCES IN PUERTO RICO

Dr Pedro F Silva-Ruiz[*]

Résumé

Cette présentation s'intéresse aux récents développements du droit de la famille portoricain, notamment en matière de divorce, d'aliments pour enfants, de mariage et de propriété foncière. Par exemple, les tribunaux, qui avaient introduit dès 1978 le divorce par consentement mutuel, acceptent désormais l'idée d'un divorce pour cause d'échec irrémédiable du mariage. Il y a eu des débats sur la question de l'union entre personnes de même sexe, marqués par une opposition forte à l'idée d'une quelconque reconnaissance, que ce soit par le mariage ou par une forme d'union civile. Par ailleurs, une nouvelle disposition a été introduite dans le Code civil accordant la possession de la résidence familiale au parent gardien.

I INTRODUCTION

This chapter studies recent developments, both in law and case-law, that affect families in Puerto Rico, mainly in the areas of divorce, child support and enforcement and homesteads.

II DIVORCE

In 1978, the Supreme Court of Puerto Rico[1] ruled that although it was not recognised by express written law, mutual consent could be a ground for divorce, under the right of privacy protected by the Constitution of the United States and the Commonwealth.[2] However, one of the questions that remained unanswered by the case was whether the irretrievable breakdown of a marriage was, along with mutual consent, also a ground for divorce. As a matter of fact,

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* Retired Professor of Law, Lawyer, Arbitrator and Special Commissioner, Member of the Academy of Private Law Jurists (Pavia, Italy), the National Academy of Law and Social Sciences (Cordova, Argentina) and the International Academy of Commercial and Consumer Law.

1 *Figueroa Ferrer v Estado Libre Asociado de Puerto Rico* 107 DPR 250 (1978). For a comment of the case, see P F Silva-Ruiz and J L A de Passalacqua 'Derecho de familia' vol 2 of *Derecho de las Personas y de la Familia en Puerto Rico (Casosy Materiales)* (Equity Publishing Co/Butterworth Legal Publishers (now Lexis Nexis), USA, 1991) 191–331.

2 The name 'Estado Libre Asociado' of Puerto Rico is officially translated as 'Commonwealth

after the case had continued for many years, the only lady governor of the island was granted a divorce, by the court of first instance, because of the irretrievable breakdown of her marriage.

In 2007, the island's higher court stated that in 1978 no-fault irretrievable breakdown had been made part of mutual consent for divorce.[3] Mutual consent, then, could be developed in two contexts: (i) both spouses express their wish and agree to divorce by mutual consent, filing a joint petition for such purpose at the court (joint petition for divorce by mutual consent); and (ii) both spouses agree to divorce by mutual consent citing irretrievable breakdown of marriage (joint petition for divorce by mutual consent because of irretrievable breakdown of marriage).[4] The petition needs to be signed by both spouses and must also include two stipulations: (i) an agreement as to the division of matrimonial property, as most marriages are contracted under conjugal partnership;[5] and (ii) the parent-child relations, namely, patria potestas, child custody, and visitation rights of their minor children.[6]

Divorce brings about the question of alimony for the former spouse who does not have sufficient means for subsistence once it is granted. The court may grant alimony from the income, earnings, salary or property of the other spouse, taking into account any of the following circumstances, among others: the agreements reached by the former spouses; age and state of health; professional qualifications and likelihood of access to employment; participation with regard to work in the commercial, industrial or professional activities of the other spouse; past and future commitment to the family; duration of marriage and marital cohabitation; financial wealth and means of each of the spouses; as well as any other factor deemed appropriate within the circumstances of the case. Once fixed, alimony may be modified on the grounds of substantial change in the situation, income and wealth of one or the other

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of Puerto Rico'. It is misleading. The British Commonwealth and the Commonwealth (states) of the United States of America are politically different. Puerto Rico is a territory of the United States.

3 In Spanish: 'consentimiento mutuo mediante la expresion de la mutua decision de divorciarse o consentimiento mutuo mediante la consignacion de la existencia de una ruptura irreparasble del vinculo matrimonial'.

4 *Salva Santiago v Torres Padro*, 2007 TSPR 101. Irretrievable breakdown of marriage by itself as a no-fault ground for divorce does not exist in Puerto Rico. It exists within the context of mutual consent.

5 In Spanish: 'sociedad legal de gananciales'. Art 1295 of the Civil Code, 31 LPRA 3621, reads: 'Conjugal partnership; ownership of earnings and profits – By virtue of the conjugal partnership the earnings and profits indiscriminately obtained by either of the spouses during the marriage shall belong to the husband and wife, share and share alike, upon the dissolution of the marriage'. See also, P F Silva-Ruiz 'Regimenes Economicos Matrimoniales en Puerto Rico' in *Regimenes economicos matrimoniales en Iboeramerica y España* (Internacional Union of Latin Notaries (UINL) and the General Council of the Spanish Notaries, Madrid, Spain, 1966) 283–314.

6 See Art 152 of the Civil Code, 31 LPRA 591 et seq. Majority begins at the age of 21. Art 247 of the Civil Code, 31 LPRA 971. Many attempts to reduce the age to 18 have failed.

spouse. Alimony shall be revoked by judicial order only if it becomes unnecessary or if the divorced spouse entitled to it contracts a new marriage or lives in public concubinage.[7]

III CHILD SUPPORT AND ENFORCEMENT

Late in December 1986 a special law for child support was approved.[8] Regulations[9] have established guidelines to determine and modify the amount of money to be paid as child support. Those guidelines require numerical criteria to be used to establish or modify the amount of money to be paid. Child support enforcement is a headache for both the judiciary and the Administration for Child Maintenance and Support,[10] as irresponsible and unconscientious parents, mostly men, must be forced to comply with their natural and civil obligations and duties to provide food, shelter and other basic needs to their progeny.

IV MARRIAGE

The state protects marriage.[11] Marriage is only allowed between a man and a woman. Transsexual marriages are not recognised. Homosexual unions are not valid and are thus neither recognised nor protected by the state. Some recent proposals for the recognition and protection of homosexual unions, whether as a marriage or partnership, have been strongly rejected by a good number of institutions and individuals appearing at legislative hearings on the question. Public opinion polls have also rejected them. Negotiations are being carried out to accommodate some sort of protection for homosexual unions. As general elections will be held in 2008, no final compromise, if any, will be reached until 2009 or thereafter.

V HOMESTEAD

Article 109-A was added to the Civil Code. It provides for the possession of the home by the custodial parent after divorce. It reads:[12]

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7 Art 109 of the Civil Code, 31 LPRA 385.

8 Act no 5 of 30 December 1986, 8 LPRA 518. Also see, P F Silva-Ruiz 'Alimentos Para Menores de Edad en Puerto Rico. Las Guias Mandatorias, Basadas en Criterios Numericos, para la Determinacion y Modificacion de Pensiones Alimenticias para Menores de Edad' (1991) 52–1 *Revista Colegio de Abogados de Puerto Rico* 109–139.

9 Reglamento (Regulation) no 4070 (1989) and Reglamento (Regulation) no 7135 (2006). Needless to say, both the law (Act) and the regulations followed initiatives of the Federal (US) Government.

10 In Spanish: ASUME, an administration under the Ministry of Family Affairs.

11 See, among many others, *Salva Santiago v Torres Padro*, above n 4.

12 31 LPRA 385 A. Also see, *Candelario Vargas v Muniz Diaz*, 2007 TSPR 117 (7 June 2007) and *Cruz Cruz v Irizarry Tirado*, 107 DPR 655 (1978).

'(a) The spouse to whom custody is granted as a result of a divorce of the minor children of a married couple, or the physically or mentally disabled children, whether of legal age or minors or who are dependants as students until the age of twenty-five (25) years, shall have the right to claim the dwelling which constituted the home of the married couple and which is part of their partnership property, during the minority of the children, during their studies or because of the disability of the children who remained in his/her custody due to a divorce.

The community property which constitutes the homestead shall not be subject to partition while any of the conditions by virtue of which the former was granted exists. Provided that the right to a homestead may be claimed from the moment it is needed, and may be claimed in the divorce suit, during the process thereof, or after the same has been decreed. Once claimed, the judge shall determine what, in fairness, is proper according to the special circumstances of each situation.

The spouse who claims the right to a homestead may retain all those goods regularly used in the home.

When the right to a homestead after the divorce has been decreed, the same may be granted by the Court that heard the divorce case.'

VI REVISION OF FAMILY LAW

Finally, a word about the revision of the Civil Code, family law included.[13] The Code in force is the 1930 revised edition, as amended, of the Spanish Civil Code of 1888–89, extended to Puerto Rico, Cuba and the Philippines. It took effect in Puerto Rico on 1 January 1890.

The Legislative Assembly of Puerto Rico established an office for the reform and revision of the Civil Code. Changes proposed, particularly in the area of persons and the family, have been questioned, criticised and rejected by many scholars.

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[13] The law of persons, the family, property, obligations and contracts, estates and trusts, civil responsibility (torts), as well as the prescription of actions.

Samoa

GETTING A FAIR SHARE: FINANCIAL RELIEF ON BREAKDOWN OF MARRIAGE IN SAMOA

Jennifer Corrin[*]

Résumé

Ce texte s'intéresse au secours financier dans le cadre de la dissolution du mariage aux Samoa. Le pays ne jouit pas d'un régime de droit familial cohérent et il doit vivre avec les difficultés inhérentes à la cohabitation du droit coutumier et du droit formel. Un des défis majeurs qui se posent aux tribunaux appelés à se prononcer sur des mesures financières, est que les terres autochtones ne font pas l'objet d'une appropriation individuelle. Au contraire, elles appartiennent à la communauté et sont «attachées» au titre matai (principalement); le matai détient le pule (l'autorité) sur celles-ci. En commençant par une brève description du système juridique et judiciaire des Samoa, ce texte examine les questions relatives à l'obligation alimentaires entre époux et aux aliments pour enfants, ainsi qu'au partage des biens. Il met en lumière quelques problèmes causés par la désuétude de certaines législations et il analyse la jurisprudence pertinente. Ce texte s'intéresse également à la question du secours financier en droit coutumier et aux difficultés générées par la complexité du statut des terres autochtones.

I INTRODUCTION

Samoa, known formerly as Western Samoa,[1] is located about half way between Hawaii and New Zealand.[2] Samoa has a plural legal system, with customary law operating alongside the formal common law.[3] Under the formal system, family matters are governed by legislation.[4] However, this does not form a coherent regime. There are also difficulties arising from the interrelationship between customary law and the formal system in the realm of family law. One

* Dr Jennifer Corrin is Executive Director of the Asia Pacific Law, Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland. The author would like to thank Lauren Zanetti for her painstaking research assistance.

1 Samoa (Constitution Amendment) Act (No 2) 1997.

2 It consists of two main islands, Savai'i and Upolu, as well as seven small islets. It has a land area of 2,934 square kilometres and a population of approximately 214,000.

3 See Constitution of the Independent State of Western Samoa 1962 ('Constitution of Samoa 1962'), Arts 2, 100, 111 and 114.

4 Marriage Act 1961 (Samoa); Marriage Ordinance 1961 (Samoa); Maintenance and Affiliation Act 1967 (Samoa); Divorce and Matrimonial Causes Ordinance 1961 (Samoa).

of the principal difficulties where the court is considering financial relief is that customary land is not individually owned. Rather, it belongs to the community as it is 'attached' to the *matai* (chiefs) title and the matai has *pule* (authority) over it. Communities are usually established on a village basis, with each village being made up of several *aiga* (extended families).

This chapter discusses financial relief on breakdown of marriage in Samoa. Commencing with a brief outline of the Samoan legal system and the courts, it examines the provisions governing maintenance of spouses and children and property division. In particular, this chapter discusses some of the problems caused by outdated legislation and analyses the applicable case-law. The chapter also considers financial relief under the customary regime and the difficulties raised by the complexities of customary land tenure.

II BACKGROUND TO GOVERNMENT AND THE LEGAL SYSTEM

Samoa has been inhabited by Polynesian people since at least 1000 BC.[5] Before Europeans arrived, laws were pronounced orally by traditional leaders of individual communities. In the 1880s, Malietoa claimed to be the paramount chief and king of Samoa and he issued laws that purported to apply throughout the whole country.[6] In 1899, Samoa became a German colony, but after the outbreak of World War I New Zealand assumed control. This arrangement was continued after World War II, when New Zealand was authorised to administer Samoa as a United Nations trust territory. The colonisers brought with them their own laws and enacted 'colonial' laws to deal with local matters. Decrees were made by the German Governor between 1900 and 1919. These were substantially repealed by the Samoa Constitution Order 1920 (NZ), which applied the principles of common law of England to Samoa.[7] However, custom was retained as the law governing rights to customary titles and land[8] and the validity of marriages prior to 1921.[9] In 1962, Samoa became the first Pacific Island country to gain independence and it now has a Westminster system of government with a unicameral Parliament. Until 1990, when universal suffrage was introduced,[10] only matai could vote.[11] Candidates are currently still required to hold matai titles to be eligible for election.[12]

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5 G Turner *Samoa: a Hundred Years Ago and Long Before* (MacMillan, London, 1884).

6 J Corrin and D Paterson *Introduction to South Pacific Law* (Cavendish-Routledge, London, 2007) 2.

7 See also the Samoa Act 1921 (NZ).

8 Samoa Act 1921 (NZ), s 278 and Samoan Land and Titles Ordinance 1934, s 37.

9 Samoa Act 1921 (NZ), s 372.

10 Electoral Amendment Act 1990 (Samoa).

11 Except for two seats, where members were elected on the basis of universal suffrage by the citizens of non-Samoan descent: Electoral Act 1963 (Samoa), s 16.

12 Electoral Act 1963 (Samoa), s 5.

The Samoan population of about 182,000 is divided amongst 11 traditional districts within which there are about 330 villages. Society is governed by a complex code of social rules. Within each village, the aiga wields power in proportion to the size of the family group. At the head of each aiga is the matai who has authority over all its affairs. Each village has a fono (council) made up of the matai, as representatives of their aiga. The fono is responsible for governing village affairs but the church is a strong influence in the village and is the focus of social life.[13]

The law of Samoa includes formal laws made locally, that is, the Constitution (which is the supreme law); legislation made locally by the appropriate authority prior to independence ('colonial legislation'); and legislation made by Parliament or under delegated authority since independence. It also includes common law developed by the Samoan courts.[14] In addition, English common law and equity remains in force, so far as it is not excluded by any other law and so far as applicable to the circumstances of Samoa.[15] Customary law is also formally recognised by the Constitution as a source of law.[16] Other sources of law include introduced laws applying at the time of independence, which were 'saved' as an interim measure. These saved laws included English legislation in force in Samoa at independence in 1962[17] and some specific New Zealand Acts. In contrast to some of the other countries of the region, Samoa has taken steps to patriate (localise) its laws and in 1972 the Reprint of Statutes Act 1972 abolished all English Acts except those specified in the Schedule to the Act[18] and some of the New Zealand Acts.[19] Since then, other Acts have been repealed and replaced by local legislation.[20]

The law governing financial relief on breakdown of marriage in Samoa is contained in locally enacted legislation and in some of the remaining colonial legislation. Where there are 'gaps' in the legislative regime, which is particularly the case with respect to division of matrimonial property, the common law applies.[21] Unfortunately, the precise relationship between the different sources of law is not always clear.[22] Whilst the Constitution and legislation are

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13 About 47% of the population belongs to the Congregational Christian Church of Samoa, while the Roman Catholic and Methodist Churches each account for 20% of the population.

14 See further J Corrin Care *Civil Procedure and Courts in the South Pacific* (Cavendish, London, 2005) 32, 37–38.

15 Constitution of Samoa 1962, Art 111(1); Samoa Act 1921 (NZ), s 349(1).

16 See Constitution of Samoa 1962, Art 111.

17 Constitution of Samoa 1962, Art 114.

18 Only the Wills Act 1837 (UK) was so specified.

19 In 1977, 27 New Zealand Acts of Parliament remained in force: Notes to the Reprint of Statutes Act 1972 (NZ).

20 For example, the Wills Act 1837 (UK) was repealed by the Wills Act 1975 (Samoa).

21 International Women's Rights Watch Asia Pacific 'NGO Shadow Report on the Status of Women in Samoa' (2004), available at: www.iwraw-ap.org/resources/samoa(English).pdf (accessed 30 July 2007).

22 J Corrin and D Paterson *Introduction to South Pacific Law* (Cavendish-Routledge, London, 2007) chs 2 and 3.

generally stated to be superior to other sources of law, the relationship between customary law and common law is not so straightforward.[23]

III COURTS AND FAMILY LAW JURISDICTION

The formal court hierarchy in Samoa follows the standard three tier model. At the bottom is the District Court,[24] from which appeal lies to the Supreme Court[25] and then to the Court of Appeal. The Supreme Court has unlimited jurisdiction and may hear applications for divorce, separation, alimony and maintenance.[26] The District Court may make maintenance and affiliation orders.[27]

In addition to the formal courts introduced during the colonial period, traditional[28] forums continue to exist at village level to deal with minor disputes, including family matters. These forums are called village fonos (translated loosely as 'council'), and have been given statutory recognition by the Village Fono Act 1990. They consist of the assembly of the alii ma faipule or matais (chiefly heads of families or 'aiga') from the village in which the family resides.[29] The fono must exercise its powers in accordance with custom and usage.[30] The jurisdiction of the village fono is limited to persons living on customary land within the village and to all matai residing there, even if they are living on non-customary land.[31] The outcome of any dispute regarding financial matters would, in general, be unlikely to be generous to a wife, due to the male domination of both substantive law and processes.[32] The fono is presided over by senior matai, who are usually men. Women may be largely excluded from the process or have no right to speak except through a male representative.[33]

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23 Ibid 42.

24 Established pursuant to s 74 of the Constitution. They are governed by the District Courts Act 1969 (Samoa). The District Courts Amendment Act 1992/3 (Samoa) renamed the 'Magistrates' Courts as District Courts. It came into force on 1 February 1999: Commencement Order 1999/2. Thus, where the Maintenance and Affiliation Act 1967 (Samoa) refers to the 'Magistrates Courts' it is in fact a reference to District Courts.

25 Maintenance and Affiliation Act 1967 (Samoa), s 61.

26 Divorce and Matrimonial Causes Ordinance 1961 (Samoa).

27 Maintenance and Affiliation Act 1967 (Samoa), ss 2 and 3.

28 There is some dispute as to whether the village fonos are still traditional. See further J Corrin 'A Green Stick or a Fresh Stick? Locating Customary Penalties in the Post-Colonial Era' (2006) 6(1) *Oxford University Commonwealth Law Journal* 27, 32.

29 Village Fono Act 1990 (Samoa), s 2.

30 Ibid, s 3(2).

31 Village Fono Act 1990 (Samoa), s 9. Non-matai living on government, freehold or leasehold land will only be subject to the authority of the village fono if they are liable in custom to render tautua (service) to a matai of that village.

32 Only a small percentage of women are matai, and the majority of these hold lesser matai titles bestowed solely for the purpose of standing for election to Parliament: F Aiono 'Western Samoa: The Sacred Covenant' in University of the South Pacific (ed) *Land Rights of Pacific Women* (Institute of Pacific Studies, Suva, Fiji, 1986) 102.

33 N Mitchell 'Participatory Approaches for Environmental Initiatives – Community Consultation in Samoa' (2006) 7 Samoan Environment Forum, *Proceedings of the 2005*

IV MAINTENANCE

(a) Introduction

As in most countries of the region, in Samoa a maintenance order may be made in favour of a spouse or child.[34] The relevant law is found in the Maintenance and Affiliation Act 1967 and colonial legislation in the form of the Divorce and Matrimonial Causes Ordinance 1961, which is continued in force.[35] Unfortunately, neither of these Acts provides proper guidance as to the principles governing the award of maintenance which is left to the discretion of the courts.

An order may be made either during or on termination of marriage. The term 'alimony', which is largely obsolete elsewhere, is still used to refer to financial provision made during the marriage.[36] In Samoa, a maintenance order may also be made in favour of close relatives, if they are destitute.[37]

(b) Grounds for awarding maintenance

(i) Spouses

Either party may apply to the District Court for a maintenance order against their spouse during the course of the marriage.[38] The grounds on which an order may be made depend on whether the application is made by the husband or the wife. An order may be made in favour of a wife if the husband has not provided her with adequate maintenance or intends not to do so.[39] If the wife has reasonable cause for living apart from the husband, he cannot avoid an order being made by offering to maintain the wife provided that she returns to live with him.[40] No order will be made against the husband if he does not have the means to pay unless the wife is destitute.[41]

An order will only be made in favour of a husband if the judge is satisfied, first, that the husband is destitute and that the wife has sufficient means to contribute to his maintenance. Secondly, it must be established that the failure to provide adequate maintenance was wilful and without reasonable cause[42]

National Environment Summit, Apia, Ministry of Natural Resources and Environment, 23–31, 25, available at: www.mnre.gov.ws/documents/forum/2006/5-natalie.pdf (accessed 14 December 2007).

34 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 22.

35 Constitution of Samoa 1962, Art 111(1).

36 See, eg, Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 22.

37 Maintenance and Affiliation Act 1967 (Samoa), ss 5, 6 and 7.

38 Maintenance and Affiliation Act 1967 (Samoa), ss 16 and 17.

39 Maintenance and Affiliation Act 1967 (Samoa), s 16(1) as amended by as amended by the District Courts Amendment Act 1993 (Samoa), s 28.

40 Maintenance and Affiliation Act 1967 (Samoa), s 16(3).

41 Maintenance and Affiliation Act 1967 (Samoa), s 16(2).

42 Maintenance and Affiliation Act 1967 (Samoa), s 17(2) as amended by the District Courts Amendment Act 1993 (Samoa), s 28.

and the burden of proof is on the husband to establish these grounds.[43] Destitute is defined by the Act as being 'unable, whether permanently or temporarily, to support himself by his own means or labour'.[44] If the husband is shown to have a disposable income, an order is unlikely to be made. For example, in *Soavele v Lilii*[45] the husband's claim for maintenance was refused. Chief Justice Sapolu held that, while it was clear that the husband's income from working as a carpenter and builder and from his plantation was irregular, he was not convinced that he was destitute 'as he is shown to be spending money on beer'.

Maintenance orders made during the marriage remain in force even if the marriage is terminated.[46] However, a party may apply for a 'rehearing', which the District Court judge may grant at his or her discretion.[47] At such hearing the Court may cancel, vary, or suspend an order.[48]

An application for maintenance may also be made by a wife as an ancillary claim in proceedings for divorce or nullity.[49] However, the grounds for application are not laid down by the Act so the matter is entirely at the discretion of the court. It appears that there is no power to make an order in favour of a husband in those proceedings. Although this position may be contrary to the constitutional guarantee of equality,[50] it does not appear to have been challenged.

Failing to maintain a wife without just cause during separation, whether by agreement, decree or otherwise, is deemed to be desertion and will found a divorce application.[51]

(ii) Children

An application for maintenance of a child may be made during or on termination of the marriage. There is a right to maintenance irrespective of the circumstances under which the parents separate or divorce. An order may be made against either parent in favour of a child under 16 if the parent has failed to provide adequate maintenance or intends to do so and there is no lawful

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43 Maintenance and Affiliation Act 1967 (Samoa), s 17(3). Under s 59 the burden of proof is normally on the defendant.
44 Maintenance and Affiliation Act 1967 (Samoa), s 2.
45 (Unreported) Supreme Court of Samoa, Sapolu CJ, 11 March 1993, available at: www.paclii.org at [1993] WSSC 22.
46 Maintenance and Affiliation Act 1967 (Samoa), s 27.
47 Maintenance and Affiliation Act 1967 (Samoa), s 29.
48 Maintenance and Affiliation Act 1967 (Samoa), s 30.
49 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 22.
50 Constitution of Samoa 1962, Art 15.
51 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 23.

excuse for this.[52] An order may also be made for a child of 17 or 18 who is, or will be, engaged in education or training, if it is expedient for maintenance to be paid during that time.[53]

In the case of an illegitimate child, an affiliation order may be made against the father[54] within 6 years of the birth of the child.[55] Application may be made after the child is 6 if the putative father has, since the birth of the child and within 2 years immediately preceding the application, contributed to the child's maintenance or lived with the mother as man and wife.[56] The applicant is usually the mother, but may be the child's guardian if the mother is no longer alive. Maintenance is limited to children under 16[57] and an order will not be made on the evidence of the mother alone as corroboration is required.[58]

There is also a legal duty to maintain a child under 16. The extended family unit is recognised by imposing this duty not just on the parents but also on anyone who is in the position of a parent under Samoan custom.[59] Failure to provide the 'necessaries of life' without lawful excuse attracts a criminal sanction of a penalty of up to 7 years' imprisonment under the Crimes Ordinance 1961.[60] The 'necessaries of life' are defined as 'proper and adequate care and attention, food, drink, clothing, shelter and medical treatment'.[61]

(iii) Relatives

The extended family unit and the system of social responsibility in Samoa are also recognised by legislation imposing liability for maintenance of 'destitute near relatives'.[62] Near relatives include parents, grandparents, whole or half siblings.[63]

Similarly, anyone charged with responsibility for a person who cannot provide for themselves and are unable to withdraw from the dependent relationship, whether due to their age, sickness, insanity, or any other cause,[64] has a legal

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52 Maintenance and Affiliation Act 1967 (Samoa), s 12, as amended by the District Courts Amendment Act 1993 (Samoa), s 28.

53 Maintenance and Affiliation Act 1967 (Samoa), s 14(2), as amended by the District Courts Amendment Act 1993 (Samoa), s 28.

54 Maintenance and Affiliation Act 1967 (Samoa), s 9(1).

55 Maintenance and Affiliation Act 1967 (Samoa), s 9(2) as amended by the District Courts Amendment Act 1993 (Samoa), s 28.

56 Maintenance and Affiliation Act 1967 (Samoa), s 9(2).

57 Maintenance and Affiliation Act 1967 (Samoa), s 9(4).

58 Maintenance and Affiliation Act 1967 (Samoa), s 10(2) as amended by the District Courts Amendment Act 1993 (Samoa), s 28.

59 Crimes Ordinance (Samoa) 1961, s 77(1).

60 Crimes Ordinance (Samoa) 1961, s 77(2).

61 Crimes Ordinance (Samoa) 1961, s 76(3).

62 Maintenance and Affiliation Act 1967 (Samoa), ss 5, 6 and 7.

63 Maintenance and Affiliation Act 1967 (Samoa), s 2. There are slight differences where the person is illegitimate see further s 2.

64 Crimes Ordinance 1961 (Samoa), s 76(1).

duty to provide that person with the necessaries of life.[65] This duty extends to situations where the responsibility arises under Samoan custom.[66] Importantly, a person who endangers the life or impairs the health of a person in their charge by neglecting this duty is liable to a criminal penalty of up to 7 years' imprisonment.[67]

(c) Type and amount of awards

(i) Maintenance generally

Maintenance is defined to include 'lodging, feeding, clothing, teaching, training, attendance and medical and surgical relief'.[68] The court has discretion to award what it considers to be adequate maintenance.[69] Adequate maintenance is defined as an amount 'reasonably sufficient for the necessities of the person to be maintained, irrespective of the means or ability of the person who is bound to afford such maintenance'.[70] Other than this, there is no guidance as to how the court's discretion should be exercised. The lack of clear guidelines has been criticised by Chief Justice Sapolu in the following words:[71]

> 'I must point out that maintenance is one area of our law where the relevant legislations calls for urgent revision and updating in view of the number of maintenance cases which come before the Courts … [there is] an obvious absence from the Maintenance and Affiliation Act 1967 of any guidelines as to how the Court is to decide whether a maintenance order should be made, the amount of the maintenance to be paid under such an order, and the periodic intervals the maintenance is to be paid.'

(ii) Maintenance during the marriage

Maintenance orders made during the course of the marriage may be in the form of periodic payments or a lump sum.[72] The court may direct alimony be paid to the wife or to a trustee approved by the court and may impose terms and restrictions or appoint a new trustee at any time, if it thinks it expedient to do so.[73] The Maintenance and Affiliation Act 1967 provides that 'the exercise by the court of its jurisdiction to make a maintenance order shall in all cases be discretionary'.[74] There is a wide discretion for the judge to determine the amount and manner of such payment as he or she 'thinks reasonable'[75] at such

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65 Crimes Ordinance 1961 (Samoa), s 76(1).
66 Crimes Ordinance 1961 (Samoa), s 76(1).
67 Crimes Ordinance 1961 (Samoa), s 76(2).
68 Maintenance and Affiliation Act 1967 (Samoa), s 2.
69 Maintenance and Affiliation Act 1967 (Samoa), s 18(1) as amended by the District Courts Amendment Act 1993 (Samoa), s 28.
70 Maintenance and Affiliation Act 1967 (Samoa), s 2.
71 *Soavele v Lilii* (unreported), Supreme Court of Samoa, Sapolu CJ, 11 March 1993, available at: www.paclii.org at [1993] WSSC 22.
72 Maintenance and Affiliation Act 1967 (Samoa), s 22.
73 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 22(3).
74 Maintenance and Affiliation Act 1967 (Samoa), s 4.
75 Maintenance and Affiliation Act 1967 (Samoa), s 18(1).

time or times as he or she thinks fit.[76] Where the order provides for future periodic payments the intervals between payments must not exceed one month.[77]

The court may also make a retrospective order for payment of up to $100,[78] even if the payee who obtained the order made is dead.[79] Interestingly, the limit of $100 has not been altered since its introduction and, as Nelson DCJ noted in *SV v SV*,[80] 'the princely sum of $100 … may have been a significant sum in 1967 when this legislation came into being but such a sum is grossly antiquated now and serious consideration should be given to reviewing same'.[81]

In *SV v SV*[82] Nelson DCJ also considered the meaning of 'adequate maintenance' in a case involving an application by the mother for a maintenance order against the father of the two children of the marriage. It was held that the means and ability of the husband to pay were not the determining factors but that the focus was on what was reasonably sufficient for the children's needs:[83]

> '[W]hat constitutes "adequate maintenance" is an objective test that requires an objective assessment of what is reasonably sufficient to meet "the necessities of the person to be maintained" … The law clearly is that his means and ability to pay are not the test for determining what is an adequate amount that he must pay. The legal test to be applied revolves around what would be reasonably sufficient for the children's needs, subject to the over-riding requirement of section 18(1) that the maintenance order be for a sum that is "reasonable in all the circumstances" of the case. In my view, this does not mean the respondent must necessarily be made liable for all the necessities of the children or even all the reasonable necessities of the children. It means however that he must bear a reasonable proportion thereof.'

The Maintenance and Affiliation Act 1967 relaxes the rules of evidence in maintenance proceedings by providing that the judge may receive such evidence as he or she sees fit, whether or not it is strictly admissible.[84] Additionally, a maintenance order may be varied if circumstances change.[85]

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76 Maintenance and Affiliation Act 1967 (Samoa), s 18(2).
77 Maintenance and Affiliation Act 1967 (Samoa), s 19(1).
78 Maintenance and Affiliation Act 1967 (Samoa), s 20(1).
79 Maintenance and Affiliation Act 1967 (Samoa), s 20(2).
80 (Unreported) District Court of Samoa, Nelson DCJ, 23 December 2004, available at: www.paclii.org at [2004] WSDC 11.
81 *SV v SV* (unreported) District Court of Samoa, Nelson DCJ, 23 December 2004, available at: www.paclii.org at [2004] WSDC 11.
82 (Unreported) District Court of Samoa, Nelson DCJ, 23 December 2004, available at: paclii.org at [2004] WSDC 11.
83 *SV v SV* (unreported) District Court of Samoa, Nelson DCJ, 23 December 2004, available at: www.paclii.org at [2004] WSDC 11.
84 Maintenance and Affiliation Act 1967 (Samoa), s 56.
85 Maintenance and Affiliation Act 1967 (Samoa), ss 29, 30

(iii) Maintenance on termination of marriage

On termination of the marriage the Supreme Court may order the husband (or his personal representatives) to pay to the wife either:

- a lump sum or annuity in such amount as the Court considers reasonable having regard to the wife's assets, the ability of the husband to pay, and the conduct of the parties; or[86]

- a monthly or weekly sum in such amount as the Court thinks reasonable.[87]

Like the Maintenance and Affiliation Act, the Divorce and Matrimonial Causes Ordinance gives little guidance on how the amount of maintenance should be awarded. This can be compared with other jurisdictions, such as Australia, where the Family Law Act 1975 contains an extensive list of considerations to be taken into account when a judge makes a maintenance order.[88] In response to the absence of legislative guidelines, in *Soavele v Lilii*[89] Chief Justice Sapolu set out the following list of factors which the Court should take into account:

- the needs of the person seeking maintenance;

- the ability of that person to provide for themselves;

- the means and potential earning capacity of the person against whom maintenance is sought;

- the other responsibilities of the person against whom maintenance is sought, including responsibilities to any person he or she is supporting or has a legal obligation to support;

- the ability of the person seeking maintenance to increase his or her earning capacity;

- the duration of the marriage;

- the extent to which it has affected the earning capacity of the person who is seeking maintenance; and

- any other matter the Court considers to be relevant.[90]

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86 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 22(1).

87 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 22(2).

88 P I Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva, Fiji, 1998) 376.

89 (Unreported) Supreme Court of Samoa, Sapolu CJ, 11 March 1993, available at: www.paclii.org at [1993] WSSC 22; Misc 15431.

90 *Soavele v Lilii* (unreported) Supreme Court of Samoa, Sapolu CJ, 11 March 1993, available at: www.paclii.org at [1993] WSSC 22; Misc 15431.

Where the parties come to an agreement about maintenance this may be taken into account by the Court in deciding whether or not to make and order.[91] However, the jurisdiction of the Court cannot be excluded.

An example of the type of award made can be found in *Betham v Betham*,[92] where the husband was ordered to pay $190 a week to the wife as maintenance for herself and the children aged 7 and 10. His weekly earnings were $380. The wife was unemployed and living with her children at her sister's house. The family had previously lived together in the house which the wife said she and her husband had built on land which belonged to the husband's family.

An interim maintenance order may be made pending the determination of the principal proceedings.[93] For example, in the case of *Betham v Betham*[94] the husband was ordered to pay maintenance for the wife and children pending determination of the divorce application.

The court has power to vary an order if it thinks just if circumstances have changed.[95] An application to vary an order may be made by the payee, the payer or his personal representative, creditor or other person interested in the distribution of the payer's estate.[96]

(iv) Enforcing maintenance orders

The money payable under the order may be imposed as a charge on the defendant's real or personal property, conferring an equitable charge in favour of the payee.[97] The court may cancel or vary the charging order at any time.[98] Where a charge is made over a registered estate or interest in land, a duplicate of the order endorsed by the judge is delivered to the Registrar of Land for registration[99] whereupon it becomes a legal charge on the land.[100] A maintenance order may also be enforced through an attachment order against the payer's employer, declaring money due and payable under the maintenance order to be a charge on the payer's salary.[101]

Samoa is one of the only island countries in the South Pacific region to provide for the appointment of a Maintenance Officer who is responsible for enforcing

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91 Maintenance and Affiliation Act 1967 (Samoa), s 22.

92 (Unreported) Supreme Court of Samoa, Sapolu CJ, 26 January 1994, available at: www.paclii.org at [1994] WSSC 1; DIV 045 1993.

93 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 22(3).

94 (Unreported) Supreme Court of Samoa, Sapolu CJ, 26 January 1994, available at: www.paclii.org at [1994] WSSC 1; DIV 045 1993.

95 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 25(1).

96 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 25(2).

97 Maintenance and Affiliation Act 1967 (Samoa), s 38(1).

98 Maintenance and Affiliation Act 1967 (Samoa), s 38(3).

99 Maintenance and Affiliation Act 1967 (Samoa), s 38(5).

100 Maintenance and Affiliation Act 1967 (Samoa), s 38(7).

101 Maintenance and Affiliation Act 1967 (Samoa), s 37(4). Such order may be made ex parte: Maintenance and Affiliation Act 1967 (Samoa), s 37(3).

maintenance orders made by the District Court.[102] When requested in writing by the payee, the Officer has a duty to take proceedings for the recovery of money payable or otherwise enforce maintenance orders.[103] However, money recovered is applied to pay legal costs and incidental expenses of recovery before the balance is paid to the person entitled under the maintenance order.[104] The Maintenance Officer may also institute and appear at maintenance hearings.[105]

In spite of this, there are still problems with enforcement of maintenance orders in Samoa. The Officer would not appear to have any jurisdiction in relation to Supreme Court orders. Moreover, confusion is caused by the overlapping jurisdiction of the Supreme and District Courts.[106] Jalal presents a case study from the Maintenance Office files in Samoa which highlights this problem. In the case cited, the Supreme Court was unaware of the District Court maintenance order in favour of the wife or the fact that there were outstanding interim maintenance payments, when it granted a divorce to the husband. After the divorce, the District Court held that it had no jurisdiction to enforce the interim order, in spite of the fact that the wife claimed to have been unaware of the divorce proceedings against her.[107] Other problems are caused by unemployment and difficulties with service, particularly where the defendant has left the jurisdiction or cannot be found.[108]

Coercive pressure to pay maintenance is also applied through penalties which exist for non-payment of orders made under the Maintenance and Affiliation Act. It is an offence to:

- fail to provide adequate maintenance for a spouse or children without reasonable cause. A penalty of up to 6 months' imprisonment applies;[109]

- fail to make payment without reasonable cause for 14 days. A penalty of up to 3 months' imprisonment or a fine of up to $100 or both applies.[110] A warrant may be issued for the arrest of the defaulting party;[111]

- leave Samoa while maintenance payments are in arrears;[112]

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102 Maintenance and Affiliation Act 1967 (Samoa), s 36(1).
103 Maintenance and Affiliation Act 1967 (Samoa), s 36(5).
104 Maintenance and Affiliation Act 1967 (Samoa), s 36(11).
105 Maintenance and Affiliation Act 1967 (Samoa), s 36(3).
106 P I Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva, Fiji, 1998) 385.
107 See 'Maintenance Office Files 1993' in P I Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva, Fiji, 1998) 385.
108 P I Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva, Fiji, 1998) 384.
109 Maintenance and Affiliation Act 1967 (Samoa), s 77(1).
110 Maintenance and Affiliation Act 1967 (Samoa), s 78.
111 Maintenance and Affiliation Act 1967 (Samoa), s 49.
112 Maintenance and Affiliation Act 1967 (Samoa), s 79.

- leave Samoa with intent to disobey a maintenance order;[113]
- leave Samoa while proceedings are pending under the Act with an intent to disobey any order;[114]
- leave or attempt to leave Samoa without written permission from the court and without making adequate provision for maintenance of a spouse or child, without reasonable cause;[115]
- leave Samoa with the intention not to provide adequate maintenance for a spouse or child during the absence, and without reasonable cause.

In all but the first two cases, a penalty of up to one year's imprisonment applies.[116] However, Jalal suggests that the penalty of imprisonment is rarely applied for these offences.[117]

V PROPERTY DIVISION

(a) Introduction

Maintenance must be distinguished from property division, which alters the interests of the parties in property and is usually final.[118] Matrimonial property is property acquired by the parties after the marriage either jointly or in their sole names. As in many island countries in the South Pacific region, the position regarding division of matrimonial property in Samoa is very unclear. Since independence, no legislation has been passed to deal with property division and no British or New Zealand Acts appear to be in force.[119] As noted by Sapolu CJ in *Elisara v Elisara*,[120] the lack of 'legislative or judicial guidance … as to how to deal [with] matrimonial property disputes between married couples' has led to uncertainty.

(b) Division of property

In the absence of legislative provision, the parties are forced to rely on the common law. Unfortunately, this has its own shortcomings. One question which arises is whether it is the common law of England that is to be applied. Under Art 111(1) of the Constitution 'English' common law and equity remain

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113 Maintenance and Affiliation Act 1967 (Samoa), s 80.
114 Maintenance and Affiliation Act 1967 (Samoa), s 81.
115 Maintenance and Affiliation Act 1967 (Samoa), ss 2 and 83.
116 Maintenance and Affiliation Act 1967 (Samoa), ss 9–85.
117 P I J *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva, Fiji, 1998) 394.
118 Maintenance and Affiliation Act 1967 (Samoa), ss 29 and 30.
119 The Appendix to the Reprint of Statutes Act 1972 lists the statutes which continue to apply.
120 (Unreported) Supreme Court of Samoa, Sapolu CJ, 22 November 1994, available at: www.paclii.org at [1994] WSSC 14.

in force, 'so far as they are not excluded by any other law in force'. Although the word 'English' is used to describe the applicable common law, the Court of Appeal held in *L v L*[121] that this adjective was 'descriptive of a system and body of law which originated in England and … not descriptive of the courts which declare such law'. The Court went on to say that:[122]

> '. . . in determining the common law applicable in Western Samoa, the courts of this country are free to draw on decisions in common law jurisdictions other than England itself, although English precedents will always be among the primary sources. Where, for instance, there are differences of approach in the other jurisdictions, the Western Samoan Courts will select or evolve the solution which they adjudge to be most suitable for the society of Western Samoa … It would seem … a distortion of constitutional interpretation to hold that atrophied areas of law be preferred to those which have continued to fulfil the essential characteristics of the common law system – adaptation to changing conditions of society … There is room for continued development of the common law in this country.'

Another major problem is that the common law relies on the complicated notion of a constructive trust. In Solomon Islands, another small island country struggling with a colonial legacy of outdated matrimonial law, recourse to the common law is also required in order to adjust property rights.[123]

The High Court held in *Tavake v Tavake*[124] that a constructive trust requires an actual, or at least apparent, common intention by the parties for the property to be held jointly. In *Tavake v Tavake*[125] the judge refused to make any order as the wife had made no direct financial contribution to the purchase of the matrimonial home and the intention had always been that the husband should

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121 *L v L* (unreported) Court of Appeal of Samoa, Sir Robin Cooke, 28 March 1994, available at: www.paclii.org at [1994] WSCA 3; 21 1993.

122 *L v L* (unreported) Court of Appeal of Samoa, Sir Robin Cooke, 28 March 1994, available at: www.paclii.org at [1994] WSCA 3; 21 1993.

123 The only formal legislation governing property division in Solomon Islands is the Married Woman's Property Act 1882 (UK). However, this Act does not give the court power to change defined rights. In theory, this reduces parties seeking property division to invoking the aid of equitable doctrines, such as the constructive trust, to obtain redress. However, some Solomon Islands courts appear to have interpreted the 1882 Act as conferring wider powers, allowing them to divide property between the parties. For example, in *Kuper v Kuper* [1991] SBHC 50, the wife was given a half share in a registered estate held in the husband's name. However, more recently, in *Pusau v Pusau* [2001] SBHC 86, Kabui J acknowledged the jurisdictional difficulties when he observed that he was unable to make a 'clean break' order as there was no legislative authority for him to do so. However, even though he found that he could only proceed under the 1882 Act, he ordered that the wife be given a half share of the former matrimonial home held in the husband's sole name. This action appears to have been taken on the basis that there was a constructive trust, although the judge did not expressly say so. However, this decision conflicts with the decision of the same judge in *Tavake v Tavake* High Court, Solomon Islands (unreported) Kabui J, 19 August 1998, which is discussed above.

124 (Unreported) High Court of Solomon Islands, Kabui J, 19 August 1998.

125 (Unreported) High Court of Solomon Islands, Kabui J, 19 August 1998.

be the sole owner of the property. In the Samoan case of *Elisara v Elisara*,[126] Sapolu CJ considered that there were alternatives to applying the common intention test to determine whether a constructive trust should be imposed. He considered that the options available to choose from were: 'reasonable expectations', 'unconscionable conduct', 'unjust enrichment' and 'estoppel'. The Chief Justice expressed a preference for the unjust enrichment and the reasonable expectations tests, but said that he was not making a final decision on this.

The English common law has also failed to give due recognition to the value of unpaid work, which contributes to the economic security of families.[127] This approach, which clearly puts women at a disadvantage when determining contributions to property acquired during the marriage, has been followed in Samoa. In *Nickel v Nickel*,[128] for example, the Supreme Court of Samoa was called upon to consider a spouse's contribution to matrimonial property when determining how it should be divided. Whilst stating that contributions might be 'direct or indirect' and might be 'financial contributions or in the form of services' Sapolu CJ stressed that '[t]o qualify contributions must assist in the acquisition, improvement or maintenance of the relevant property asset. They must clearly exceed the benefits which the relationship itself conferred upon the claimant'. The Chief Justice went on to assess contributions purely on a financial basis without taking into account the value of clearance and cultivation of the land with food crops by one party. Similarly, in *Elisara v Elisara*[129] Sapolu CJ refused to make any order in favour of the wife even though she had carried out secretarial work in the surveying firm owned by her husband and 'performed the normal duties of a housewife'.

(c) Occupation of the matrimonial home

The courts have also had to deal with applications for sole occupation of the matrimonial home during the subsistence of the marriage. The common law position in other countries has been changed by legislation and Samoan judges have to take a creative approach to avoid the application of outdated and discriminatory principles. The case of *Lauofo v Croker*[130] illustrates the difficulties that such applications raise in Samoa, due to the lack of relevant legislation. There, the petitioner husband's application for judicial separation on the basis of cruelty was refused. The court then considered the accompanying application for vacant possession of the matrimonial home, which was occupied by the wife. The Supreme Court recognised that there was

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[126] (Unreported) Supreme Court of Samoa, Sapolu CJ, 22 November 1994, available at: www.paclii.org at [1994] WSSC 14.

[127] See, eg, *Gissing v Gissing* [1971] AC 889.

[128] (Unreported) Supreme Court of Samoa, Sapolu CJ, 18 November 2005, available at: www.paclii.org at [2005] WSSC 26.

[129] (Unreported) Supreme Court of Samoa, Sapolu CJ, 22 November 1994, available at: www.paclii.org at [1994] WSSC 14.

[130] (Unreported) Supreme Court of Samoa, Sapolu CJ, 29 November 1993, available at: www.paclii.org at [1993] WSSC 5; Misc 159 14.

no legislation in Samoa governing this issue. Sapolu CJ noted that, in England, the position was governed by the Matrimonial Homes Act 1967 (UK), which gave the wife certain 'rights of occupation' during the marriage. Whilst conceding that the UK statute had no application in Samoa, Sapolu CJ considered that the Act was largely based on the pre-1967 English common law, developed through cases such as *National Provincial Bank Ltd v Ainsworth*.[131] His Honour then proceeded to apply what he considered to be the 'modern English position', 'instead of the old English common law position'. He considered that this approach was 'not unprecedented' as the courts had 'already followed the English law in numerous other respects'.[132] The modern position under the UK Act prevents the eviction of a spouse in occupation of the matrimonial home except by court order during the subsistence of the marriage. It also allows the court to order that a spouse who is not in occupation of the matrimonial home be reinstated. The courts are to be guided by what is just and reasonable, having regard to the conduct of the spouses, their needs and financial resources and those of any children, and all the relevant circumstances. Orders for periodical payments in respect of the accommodation, maintenance obligations or for the discharge of liabilities relating to the matrimonial home may also be made, together with any other order which is just and reasonable in the circumstances.[133]

This approach was upheld on appeal in the Court of Appeal[134] which noted the Matrimonial Homes Act 1967 (UK) largely covered the principles of common law in the area, and thus, in effect, the Chief Justice had applied the English Act by analogy. Furthermore to the extent that there were differences between the English common law, and the contemporary English legislation on point, the Chief Justice was entitled, in the absence of any express Western Samoan legislation on the subject, to formulate the relevant common law as he did.[135]

In *L v L*,[136] the husband appealed from the Supreme Court order denying him the right to evict his wife from the matrimonial home, which he had purchased prior to the marriage. The Court of Appeal upheld the first instance decision, noting that, as there was no statutory definition of 'matrimonial home' or any provision for division of matrimonial property, Art 111(1) required recourse to English common law and equity. They regarded this essentially as a process of 'development of the basic common law emerging from the House of Lords' decision' in *National Provincial Bank Ltd v Ainsworth*,[137] which they considered

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131 [1965] AC 1175.

132 *Lauofo v Croker* (unreported) Supreme Court of Samoa, Sapolu CJ, 29 November 1993, available at: www.paclii.org at [1993] WSSC 5; Misc 159 14.

133 *Lauofo v Croker* (unreported) Supreme Court of Samoa, Sapolu CJ, 29 November 1993, available at: www.paclii.org at [1993] WSSC 5; Misc 159 14.

134 *L v L* (unreported) Court of Appeal of Samoa, Sir Robin Cooke, 28 March 1994, available at: www.paclii.org at [1994] WSCA 3; 21 1993.

135 *L v L* (unreported) Court of Appeal of Samoa, Sir Robin Cooke, 28 March 1994, available at: www.paclii.org at [1994] WSCA 3; 21 1993.

136 *L v L* (unreported) Court of Appeal of Samoa, Sir Robin Cooke, 28 March 1994, available at: www.paclii.org at [1994] WSCA 3; 21 1993.

137 [1965] AC 1175.

to be 'well within the judicial function'. The Court also agreed with the Chief Justice that the great variety of matrimonial circumstances made it unwise to lay down fixed rules.

Thus, it appears that the Samoan judiciary has taken an active approach to matrimonial property disputes and used the common law and equity to make appropriate orders in the absence of relevant legislation.

(d) Bars to the sale of matrimonial property

Where a divorce petition is based on adultery, the alleged third party may be made a co-respondent to the proceedings.[138] Where there are reasonable grounds to believe that real property is about to be sold by a respondent or co-respondent with intent to defeat a petitioner's claim, the court may restrain the sale, or order the proceeds to be paid into court.[139] Any sale made after an order restraining the sale has been served on, or come to the notice of, the person selling the property will be void.[140] The court may consider the claim of any bona fide purchaser or other interested person and make such order regarding the property as it thinks just.[141]

Similarly, where the court is satisfied that any instrument has been made in order to defeat a petitioner's claim, it may set the instrument aside on such terms as it thinks proper.[142] Again, the court may make an order for the protection of a bona fide purchaser.[143]

(e) International law

In 1992, Samoa acceded to the International Convention on Elimination of All Forms of Discrimination Against Women (CEDAW).[144] Article 16(1) requires state parties to 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations'. The CEDAW Shadow report on Samoa,[145] published in 2004 by the International Women's Rights Watch Asia Pacific, a peak NGO body, noted the potential for discrimination against women due to the lack of legislation governing the

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138 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 11(1), (2).
139 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 19(1).
140 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 19(2).
141 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 19(2).
142 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 26(1).
143 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 26(3).
144 Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 34 UNTS 180 (entered into force 25 September 1992).
145 International Women's Rights Watch Asia Pacific 'NGO Shadow Report on the Status of Women in Samoa' (2004), available at: www.iwraw-ap.org/resources/samoa(English).pdf (accessed 30 July 2007).

division of matrimonial property in Samoa, and recommended reform by way of legislation that provided for equal division of matrimonial property.[146]

VI FINANCIAL RELIEF UNDER THE CUSTOMARY REGIME

Traditionally, the only item of significant value likely to have been owned by parties to a marriage in Samoa was customary land. About 80% of the land in Samoa is held under customary tenure.[147] This poses particular problems for property division on the breakdown of marriage as customary land is not owned by an individual or even by an aiga or village community. Rather it is attached to the matai title with the matai having pule (authority) over the land. As it is impossible to define the extent or value of an individual's interest, this asset does not lend itself to division between a husband and wife. Further, the Constitution prohibits alienation of customary land,[148] except by compulsory acquisition under the Taking of Lands Act 1964 or leasing or licensing under the Alienation of Customary Land Act 1965.[149] Jalal suggests that the law relating to matrimonial property division may only apply to non-customary land and that, on divorce, women are simply expected to return to their parents' home.[150] Traditionally, the only other property resources of a divisible nature usually consisted of mats, cooking utensils, livestock, crops and other garden produce.

Property division takes on a more serious aspect in modern society. Since independence, there has been a surge of economic growth in Samoa and many people have acquired substantial wealth. As illustrated, the present regime does not allow a wife to gain a fair share of this on divorce.

VII CONCLUSION

Reform is obviously required in the area of financial relief in Samoa. The opportunity might also be taken to review the law relating to the family more

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146 International Women's Rights Watch Asia Pacific 'NGO Shadow Report on the Status of Women in Samoa' (2004), available at: www.iwraw-ap.org/resources/samoa(English).pdf (accessed 30 July 2007).

147 Tu'u'u leti Taule'alo, So'oialo David Fong, Patea Malo Stefano 'Samoan customary lands at the crossroads – options for sustainable management' (Proceedings of the National Environment Forum Department of Lands Surveys and Environment, Apia, 2002).

148 Art 102 – the only article in the Constitution that requires a referendum in order to be changed: Constitution of Samoa 1963, s 109.

149 The proviso to Art 102, Constitution of Samoa 1963 permits a statute to provide for a lease or licence or acquisition in the public interest.

150 P I Jalal 'Ethnic and Cultural Issues in Determining Family Disputes in Pacific Island Courts' (Paper presented at the 17th LAWASIA Biennial Conference & New Zealand Law Conference Christchurch, NZ, 8 October 2001) 14, available at: www.rrrt.org/assets/Ethnic%20and%20Cultural%20Issues%20in%20Determining%20Family%20Disputes%20%E2%80%A6.pdf (accessed 30 July 2007).

generally. With regard to maintenance, there is a lack of legislative guidance on the exercise of judicial discretion when making orders. Although the position has been ameliorated by the guidelines provided in *Soavele v Lilii*,[151] legislative provision would bring certainty in this area. Further, the legislative ceiling on the amount of 'past maintenance' requires lifting to take account of inflation and reflect contemporary realities.

As noted by the Chief Justice of Samoa, the legislative lacunae in the law governing division of matrimonial property have left the courts struggling to justify creative approaches. Recourse to English common law to fill the gaps in this area, as required by the Constitution, is inadequate, as it is no longer developing due to the fact that it has been superseded by legislation. This leaves the potential for the adoption of outdated and discriminatory common law notions to the detriment of Samoan women. If Samoa is to honour its obligations under CEDAW, legislative action is required to ensure that women are not discriminated against when matrimonial property is divided.[152]

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[151] (Unreported) Supreme Court of Samoa, Sapolu CJ, 11 March 1993, available at www.paclii.org at [1993] WSSC 22; Misc 15431.

[152] International Women's Rights Watch Asia Pacific 'NGO Shadow Report on the Status of Women in Samoa' (2004), available at: www.iwraw-ap.org/resources/samoa(English).pdf (accessed 30 July 2007).

Serbia I

PROTECTION FROM DOMESTIC VIOLENCE

*Olga Cvejić Jančić**

Résumé

La question de la violence familiale est plutôt récente en droit de la famille serbe puisqu'elle n'est prise en considération par notre *Loi du droit de la famille* que depuis 2005. Auparavant, elle n'était réglée que par le biais du droit criminel alors que les lois pénales n'étaient pas assez efficaces. C'est la raison pour laquelle il devint nécessaire de mettre en place une protection meilleure et plus rapide. Il est de commune renommée que les victimes de la violence familiale sont surtout les femmes et les enfants et que ces victimes, particulièrement les femmes mariées, ne réclament que rarement des mesures de protection. Plusieurs raisons expliquent ce comportement. Premièrement, les maris violents sont souvent les seuls pourvoyeurs et les femmes craignent donc de perdre le soutien financier nécessaire pour la famille. Deuxièmement, elles craignent les représailles de l'époux en cas de dénonciation et elles pensent souvent qu'une telle dénonciation peut aggraver les choses. Quoi qu'il en soit, cette abstention s'explique aussi par la conviction patriarcale qu'il est honteux de parler de la violence familiale étant donné qu'il s'agit d'une question purement privée qui ne regarde que la famille. Toutefois, depuis à peu près deux ans certaines agences, tant gouvernementales que non gouvernementales, ont commencé à s'occuper de femmes et d'enfants négligés et cela a permis la construction de maisons sûres pour les femmes et les enfants victimes de violence familiale. La capacité d'accueil de ces maisons est loin d'être suffisante mais il s'agit tout de même d'un pas significatif en faveur d'une meilleure protection des personnes faibles et vulnérables.

La nouvelle *Loi sur le droit de la famille* de Serbie définit les actes violents, indique quelles personnes peuvent bénéficier de la protection de la loi et quelles mesures peuvent être imposées par les tribunaux. Les procédures relatives à la violence familiale sont urgentes et la première audition doit se tenir dans les huit jours de l'introduction de la demande. La décision d'appel de la Cour d'appel doit, quant à elle, être rendue dans les quinze jours. Nous présenterons quelques jugements relatifs à ces questions rendus par la Cour municipale de Novi Sad.

Par ailleurs, pour protéger efficacement les personnes contre la violence familiale, la seule intervention du droit criminel et du droit de la famille est insuffisante. Tout

* Professor, Department of Civil Law, Faculty of Law, University of Novi Sad. This paper was presented at the European Regional Conference of the International Society of Family Law (ISFL) 'Family Justice: for Whom and How?' which took place at the University of Chester, UK on 17–21 July 2007.

aussi important est le rôle des médias qui peuvent sensibiliser le public à l'impact de la violence familiale sur les enfants, leur santé, leur vie, leur bonne éducation et la vie de toute la famille. Ayant à l'esprit que la violence domestique constitue une violation flagrante des droits de l'enfant, il convient de souligner que le rôle de l'ombudsman des enfants est également important comme outil de prévention.

I INTRODUCTION – FAMILY VIOLENCE AS A UNIVERSAL PROBLEM

Violence among family members is neither a new topic nor a new phenomenon, nor is it specific only to our area and our mentality. It can be said that it is a phenomenon of universal character known to all societies[1] across all historic time-periods. It is a worldwide occurrence known in developed countries as well as in undeveloped ones, in rich and poor families, among educated people as well as among uneducated.[2] At the same time, the most common victims of domestic violence are wives[3] and children,[4] although there are instances in which other members of the family are victims. For a long time, attention was not paid to this phenomenon nor was such behaviour sanctioned.[5] Authors Wardle and Nolan point out that 'at common law, the husband could "correct" his wife by "moderate" and "reasonable" correction without incurring legal liability'.[6] The same authors also mention that 'until recently, many American states followed the English common law "rule of thumb" – that it was not unlawful for a husband to correct his wife with a rod or switch if it was no thicker than his thumb'.[7] This is no longer the situation in the United States (or indeed in the United Kingdom) and domestic violence is now punishable. In some federal states in the United States, such as California, Colorado, Kentucky and Rhode Island, the legislation has prescribed mandatory reporting of each instance of domestic violence to the police even if it is against the will of the victim of the violence. American legal literature is critical of such legal protection from domestic violence which can cause undesired consequences, especially when instances of domestic violence must be *ex officio* reported and when such violence has occurred sporadically and by accident,

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1 See L Wardle and L Nolan 'Spouse Abuse; Consequences of Quasi-Marriage' Chapter 19 in *Fundamental Principles of Family Law* (Buffalo, New York, 2006) 457–481.

2 See Quansak 'Progress and Retrogression on Domestic Violence in Ghana' in A Bainham (ed) *The International Survey of Family Law 2006 Edition* (Jordan Publishing, 2006) 235–244.

3 B Kascelan *Zlostavljanje žene u braku, Pravni život no 10/2006* (Abuse of the Wife within Marriage, Legal life no 10/2006) 129–143.

4 N Ljubojev *Zlostavljanje i zanemarivanje deteta unutar porodice, Pravni život no 10/2006* (Abuse and Neglect of the Child within a Family, Legal life no 10/2006) 145–160.

5 In the People's Republic of China the increasing incidences of domestic violence were one of the reasons for revision of the marriage code. 'In the revised marriage code, there is now recognition not only that domestic violence is a serious social problem but also that people's mediation … has proved an inadequate and inappropriate processual mechanism for dealing with incidents of domestic trouble', in Palmer 'Marriage Reform and Population Control: Changing Family Law in Contemporary China' in A Bainham (ed) *The International Survey of Family Law 2005 Edition* (Jordan Publishing, 2005) 186 and 187.

6 L Wardle and L Nolan, above n 1, 457.

7 Ibid.

that is to say when the victim of the violence is vigorously objecting to the initiation of any procedure against the perpetrator of 'the violence'.[8]

As already mentioned, not only are women the victims of domestic violence, but children are also often maltreated by their parents. It happens very often that acts of domestic violence are directed towards children, but they are also victims of domestic violence as witnesses of violence perpetrated against other members of the family, especially against their mother. Even the most temperate measures of parental violence towards children cannot be justified and it is advised to forbid any physical punishment of children not only regarding their parents but also at school and on any other occasion. The Family Act of Serbia unfortunately does not prescribe this explicitly but rather indirectly by saying that 'parents may not subject the child to humiliating actions and punishments that insult human dignity of child and shall be under the obligation to protect the child from such actions of other persons'.[9] It would be much better to emphasise, through law, that any physical punishment of the child is explicitly forbidden.[10]

The question of violence directed towards children is, however, a very important issue of child protection, and it was the very reason why the Dutch Minister of Justice apropos the 100 Years of Child Protection emphasised that he 'submitted the bill to prohibit parental violence, whether physical or mental, or any other form of humiliation brought to bear in child-rearing. It is often ridiculed as a proposal to prohibit a so called "corrective slap" […] practically, it is intended as a warning to parents that parental correction cannot be an excuse for domestic violence'.[11]

Child protection was also a topic of the Belfast Declaration adopted at the XVIIth World Congress of the International Association of Youth and Family Judges and Magistrates (IAYFJM).[12] Two paragraphs of this Declaration are

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8 For example, Prof L G Mills points out an example from American law practice where a husband and wife have gotten into a fight and the husband, by accident, had pushed the wife who 'stumbled into a lamp and suffered a bruise and severe headache. To be safe, she went to an emergency room for evaluation and treatment, and responded truthfully to the doctor's question about what had happened'. The doctor was obliged to report the case of domestic violence to the police and, although the wife was against that, her husband was arrested and put in jail where he spent 3 days. Her allegation that he was a good man and that was not violent was useless. But, 'because he was arrested and missed work they faced the possibility that Tom might lose the job and with it the crucial health benefits their daughter needs', cited from L Wardle and L Nolan, above n 1, 462.

9 Serbian Family Law Act, Art 69, para 3. The Family Law Act is published in Official Herald of Republic of Serbia no 18/2005.

10 The Commission for drafting new Serbian Civil Code (of which the author of this article is a member) is agreed on that issue.

11 Introductory speech of the Dutch Minister of Justice, Mr Piet Hein Donner, at the International Conference '100 Years of Child Protection' which was held on 28–30 November 2005, in Amsterdam (the Netherlands).

12 The Congress of IAYJM was held from 28 August to 1 September 2006 in Belfast; see 'Belfast Declaration' [2006] International Family Law 177 178–180.

dedicated to this question: para 5 (Violence against children)[13] and para 6 (Domestic violence).[14] Bearing in mind the considerable significance of the questions which are treated by this Declaration, this document has been sent to the United Nations and the Council of Europe.

II FAMILY VIOLENCE IN THE SERBIAN LEGISLATION

(a) Criminal law protection against family violence

Domestic violence is not, as we have already mentioned, a new occurrence. New is only the interest of the state to extend protection to the victims of family violence and to fight against it. In our country, until recently,[15] it was deemed that the general criminal law protection was enough for the prevention of violence in the family, but very often the police did not make any effort to intervene after being notified about the violence. The excuse was that there were no grounds in the law for such intervention and that it was a family matter.

The first success in better protection for the victims of the family violence was achieved in 2002 through the introduction of the provisions on the explicit protection from domestic violence in the Criminal Code of Serbia, so that we now have two kinds of protection: criminal and family law protection.

In the view of criminal law protection, it should be emphasised that our new Criminal Code (2005) provides for a special criminal act (domestic violence) that punishes the act of violence towards family members.[16] The sanctions

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[13] Paragraph 5 of the Belfast Declaration: 'a) Children have the right to be protected from all forms of violence on an equal footing with adults. Due to their vulnerability, children must be protected from all forms of violence in all settings stipulated by the UN Secretary General (UNSG) study on violence including within the family, the school, institutions and the community, including within the workplace. b) The outcome of the UNSG study on violence against children should be fully supported and all measures must be taken to insure the implementation of its recommendations', ibid 178.

[14] Paragraph 6 of the above-mentioned Declaration: 'Measures to combat and prevent domestic violence must be taken; recognizing human rights standards, children and non-abusive parents and guardians must be given support in a culturally sensitive manner', ibid.

[15] Criminal law protection was first introduced in the Criminal Code of 2002 whilst the family law protection was introduced by the Family Code of 2005.

[16] Article 194 of the Criminal Code: 'Domestic Violence. (1) Whoever by use of violence, threat of attacks against life or body, insolent or ruthless behaviour endangers the tranquility, physical integrity or mental condition of a member of his family shall be punished with a fine or imprisonment up to one year. (2) If in committing the offence specified in paragraph 1 of this Article weapons, dangerous implements or other means suitable to inflict serious injury to body or seriously impair health are used, the offender shall be punished with imprisonment from three months to three years. (3) If the offence specified in paragraphs 1 and 2 of this Article results in grievous bodily harm or serious health impairment or if committed against a minor, the offender shall be punished with imprisonment from one to eight years. (4) If the offence specified in paragraphs 1, 2 and 3 of this Article results in death of a family member, the offender shall be punished with imprisonment from three to twelve years. (5) Whoever violates a measure against domestic violence that was imposed on them by the court in accordance with the law shall be punished with a fine or imprisonment up to six months.'

range from a pecuniary fine combined with a maximum of one year's imprisonment, as the mildest form of punishment, for instance, of endangered tranquility and physical integrity or mental state of a family member, to imprisonment of 3 months to 3 years for instances when, due to domestic violence, severe consequences, or severe injury, or serious impairment of health occurred. Finally, a sentence of imprisonment for a period of between 3 and 12 years can be invoked for a criminal act of domestic violence when such violence has resulted in the death of a family member.[17] It is also important to mention that the Criminal Code of 2005 in Chapter XVIII – sexual offences, has condemned rape (Art 178) and sexual intercourse with a helpless person (Art 179), and also between spouses (Art 186). The prescribed sanctions are the same regardless of the fact that the offence was directed towards the spouse or some other individual.

The Criminal Code does not define 'family members', however, this was done in the Family Act of Serbia, which defines family members who are protected from domestic violence, and also gives a detailed list of actions which are to be considered instances of domestic violence.

(b) Family law protection against family violence

(i) Definition of domestic violence

Pursuant to Art 197, para 1 of the Family Act, 'violence' is considered to be the behaviour of one family member that endangers the physical integrity, mental health and tranquility of another member.[18] Such behaviour is especially considered to be:

(1) causing or attempting to cause bodily harm;

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[17] Forty criminal proceedings have been initiated before the Municipal Court of Novi Sad in 2006 for domestic violence cases. However, only in 17 cases were the procedures brought to a conclusion, while in 23 of the cases the procedure is still ongoing. Of those 17 concluded cases, the sentence of imprisonment for the period of one year was given in two cases – in one case (K 525–06), together with a prison sentence, the measure of mandatory treatment for alcoholism was also pronounced, while in the other case (K 954–06) only a one-year prison sentence was pronounced. In two cases, the sentence of imprisonment is shorter and amounts to 6 months (K 1051–06) together with a measure of mandatory treatment for alcoholism in the first case and in the second (K 1636–06), imprisonment for 2 months together with a measure of mandatory treatment for drug addiction. In 10 cases, a conditional prison sentence was pronounced and in 3 cases a conditional prison sentence was given together with a measure of mandatory treatment for alcoholism or drug addiction. In the first 3 months of 2007 out of 14 initiated proceedings only one was brought to a conclusion where a sentence of 3 years' imprisonment was given (K 284–07) for inflicting serious bodily injury to the head of the victim. The victim of the violence was a mother. In the remaining 13 cases the proceedings are still ongoing.

[18] In I Schwenzer, in collaboration with M Dimsey *Model Family Code* (Intersentia, Antwerpen–Oxford, 2006) Art 2.1. para 2 provides a definition of domestic violence in a very general manner: 'Domestic violence includes all acts of physical and psychological violence' (at 87).

(2) instilling fear under threat of murder or causing bodily harm to a family member or a person close to him or her;

(3) forcing one to have sexual relations;

(4) prompting one to have sexual intercourse or actually having sexual intercourse with a person under the age of 14 or a helpless person;

(5) restricting the freedom of movement or communication with third persons;

(6) insults, as well as other arrogant, careless and malicious behaviour.

(ii) Persons considered being family members for the purpose of protection from domestic violence

The Family Act in the same Article, para 3, provides for individuals who are considered family members enjoying special family law protection against domestic violence.[19] Those are:

(1) spouses or former spouses;

(2) cohabiting partners and former ones;

(3) children, parents and other blood relatives, in-laws and adoptive relatives, as well as persons from foster care relations;

(4) persons who live or have lived in the same family household; and finally

(5) persons who have had or still have an emotional or sexual relationship, or persons who have had a child together or are about to have one, despite never living in the same family household together.

The violent person and the victim can therefore be any member of the family, man or woman, young or old, etc.

The Family Act, in listing those who have special protection against domestic violence, did not include guardian and ward among persons enjoying special family law protection as was the case, for example, in the Croatian Domestic Violence Protection Law (Art 3)[20] and the Belfast Declaration (Art 6).[21] Therefore, why were they left out of the Serbian Family Act provision? The reason could be that guardians and wards do not necessarily live in the same

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[19] *Model Family Code* does not provide for the persons who shall be considered as members of the family enjoying special family law protection.

[20] See Hrabar 'The Protection of Weaker Family Members: The Ombudsman for Children, Same-sex Union, Family Violence and Family Law' in A Bainham (ed) *The International Survey of Family Law 2004 Edition* (Jordan Publishing, 2004) 118.

[21] See n 14 above.

household; hence, they are not exposed to violent behaviour on a day-to-day basis. A ward, even when a minor, does not have to live with a guardian. This is in contrast with minors who are in the custody of their parents, because the child has a right to live with parents unless a court has limited this right in the child's best interests.[22]

Was the legislator of the opinion that the guardian and the ward should not enjoy this type of protection if they do not live in the same household? Whereas, if they live in the same family household, as members of the family household, Art 197, para 3, line 3 extends protection to them. Or, did the legislator assume that a spouse or close relatives of the ward would be the most common choice for guardians, if the ward consents and his interests do not require a different solution (Art 126, paras 1 and 2 of the Family Act)? Hence, the guardian and the ward would fall within the legal definition of the persons enjoying such protection. However, none of the previously stated possible reasons justifies the exclusion of the guardian and the ward from the category of persons who should enjoy specific family law protection from domestic violence, since a person who does not fall under any of the legally protected categories can be instituted as a guardian. Furthermore, relations between a guardian and a ward are very much prone to violence, as is the case with other persons who enjoy legal protection, and for that reason, they should be specifically protected by an amendment to the Family Act.

(iii) Measures for protection from domestic violence

Types of measures

Apart from criminal law protection regulated by criminal legislation, family law envisages certain measures of protection against domestic violence that can be pronounced through the use of a civil procedure. The possibility of family law protection from domestic violence inflicted by one family member on the other has significantly increased the level of protection that endangered family members have. Until the present time (and it is still the case) the level of tolerance of domestic violence in our society has been very high and for that reason the victims of such violence were very reluctant to seek protection.

It is still a widespread opinion that a certain degree of violence is still present in some families and that it falls under the scope of family privacy and should not be known to outsiders, such as neighbours, relatives and friends. In other words, everything stays within the family. The violator, therefore, remains unpunished and encouraged to pursue measures of 'domestic correction of disobedient family members'.

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[22] Article 60, para 1 of the Family Act states that: 'A child has a right to live with his parents and be under their custody rather than in the custody of anyone else.' According to para 3 of the same Article, the court may decide to separate a child from his parents for reasons that justify complete or partial deprivation of parental authority or in the case of domestic violence.

It was often the case that, even when the victim of violence reported it to the police, the victim did not receive adequate protection or was criticised for wasting police time. It seems that such a negative response from the police is not unusual and there are similarities with other countries. For example, Goldfarb mentions that in the United States '[v]ictims of domestic violence have brought a number of successful lawsuits against police departments that have failed to protect them'. In the case of *Thurman v City of Torrington*,[23] Tracey Thurman sued the city of Torrington, Connecticut 'whose police officers repeatedly ignored her complaints about violence by her estranged husband and even stood by and watched as he savagely attacked her. A jury awarded her 2.3 million dollars in damages. This huge award was widely publicized, and many police departments immediately strengthened their policies on domestic violence'.[24] Such an outcome would be welcomed in other countries.

It is not uncommon for the victim to endure further violence, either for reasons of shame or from fear of being left without the family provider if, for example, the husband–violator is the only employed member of the family, and also from fear that, after reporting, the violence would be even more harsh. The truth is that until severe bodily injuries occurred, or even the death of a family member, the police did not intervene, giving the explanation that it had no legal basis to do so. Family legislation now envisages measures for the protection from domestic violence that provide better protection for the weaker members of the family.

Pursuant to Art 198, the court in civil law proceedings can issue one or more of the following measures for protection from domestic violence:

(1) a warrant to vacate the family household, regardless of the right to ownership or lease;

(2) a warrant to move into a family household, regardless of the right to ownership or lease;

(3) a restraining order preventing the approach of a certain family member up to a certain distance;

(4) a restraining order preventing access to or near the residence or place of work of a family member;

(5) prevention of further harassment of a family member.[25]

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[23] 595 F Supp 1521 (D Conn 1984).

[24] See more in Goldfarb 'Good Practices in the Legal Response to Domestic Violence in the United States' in L D Wardle and C S Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* (William S Hein, Buffalo, 2007) 346.

[25] The measures proposed by the Model Family Code (Art 2.2) are similar: 'In particular, the court may order that the respondent: a) leave, remain away and refrain from entering the dwelling of the aggrieved person, b) refrain from approaching the aggrieved person, c) refrain

In regards to a warrant to move into a family household, legal literature has pointed to an incorrect formulation of Art 198, para 2, line 2, since such a measure can only relate to the plaintiff–victim of the violence who had to leave the family household in order to obtain protection from the violence the person had been exposed to. The court can order the victim to return to the house the victim was forced to leave. However, such a court order is not consistent with decisions that are pronounced in civil law proceedings where the plaintiff can only be ordered to pay the costs of judicial proceedings and no other obligations can fall upon him or her. However, due to the need to enable the unfettered return to the family household, the court order should order the defendant to allow the return of the plaintiff to the family household, that is to order him to refrain from any action that would prevent the return of the plaintiff.[26]

On the other hand, apart from the measures mentioned above, measures such as mandatory treatment from alcoholism or other substance abuse, illness and mandatory psychiatric counselling or treatment could also prove to be important, since domestic violence is often caused by persons under the influence of alcohol or drugs. Without mandatory treatment it is unreasonable to expect that the impact of other ordered measures would be long-lasting and that violence would not recur after the expiration of the term for which the protective measures were set. According to our legislation, mandatory measures mentioned above can only be ordered in criminal proceedings. However, civil law proceedings are just as fast and effective. In addition, criminal proceedings are not initiated in every instance of domestic violence, especially if the victim of violence deems that the protection offered by civil law proceedings is sufficient. For these reasons, the civil court should have jurisdiction to order mandatory treatment for alcoholism or other substance abuse, illness and mandatory psychiatric counselling or treatment.

Duration of measures for the protection from domestic violence

The measure can last for up to one year, while time spent in custody, as well as under arrest in relation to a criminal act or offence connected with domestic violence is included in the time for which the protective measure against domestic violence is prescribed.[27] The question is whether the protective measure against domestic violence can, if necessary, be extended, or end prior to the expiration of the prescribed time period? Our law provides for both

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from establishing contact with the aggrieved person in any way, and d) refrain from being in certain locations.' Neither Serbian law nor the Model Family Code prescribes measures such as the mandatory treatment for alcoholism or other substance abuse, illness and mandatory psychiatric counselling or treatment, although these can very often be the reason why family violence occurs.

[26] See Petrusic 'Porodičnopravna zaštita od nasilja porodici u pravu Republike Srbije' in *Novo porodično zakonodavstvo* (Zbornik radova sa Savetovanja, Kragujevac 2006) 32 ('Legal Protection against Family Violence in the New Serbian Family Law' in *New Family Legislation* (Collection of Papers of the Conference in Vrnjacka Banja, Kragujevac, 2006) 32).

[27] The Model Family Code suggests that a protective order, in principle, may not exceed 2 years (Art 2.1, para 3) above n 18, 87.

possibilities. That means that the court's protective measure may be extended one or more times, or for as long as necessary until the reasons for which it was prescribed cease to exist (Art 199), as well ending prior to the expiration of the prescribed time period if the reasons no longer exist (Art 200).

(iv) Procedure in proceedings for protection from domestic violence

Proceedings for family law protection from domestic violence are civil law proceedings within the competence of municipal courts. Territorial jurisdiction is determined based on the place of domicile or residence of the defendant as well as on the place of domicile or residence of the victim of domestic violence. Therefore, the procedural position of the victim of violence has been improved with the possibility to file a lawsuit in the place of domicile or residence; however, if the victim deems the proceedings to be more effective or has other reasons for doing so, the victim can file a lawsuit before the court exercising jurisdiction over the place of domicile or residence of the violator.

The specialised panel of the court, composed of three judges, a professional judge and two lay judges, decides in the cases of domestic violence (Art 203). The specialised panel of the appellate court is composed of three professional judges. Judges in these proceedings, as in other cases related to family matters, can only be professional judges if they have acquired special knowledge in the field of children's rights.

Only a person with special experience in child and youth matters can be elected a lay judge. However, although special family courts have not been established in our legal system, a certain degree of specialisation does exist through specialisation of judges. This is only the first step in the process of judicial reform, and special divisions of the court have yet to be introduced in order to deal exclusively with the protection of family relations.[28] Due to the particular nature of family disputes and the need to have special understanding of personal relations when dealing with these proceedings, which are quite different from typical civil law proceedings, as well as a need for better understanding and protection of the child's rights, it would be good to introduce specialised family courts. However, as a result of transitional matters and other issues present in our country, it is unrealistic to expect such changes in the near future.[29]

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[28] See O Cvejić Jančić Nadležnost u porodičnim postupcima, obj. u Pravo – Družina – Civlna družba (Naučna monografija, izd. Pravna fakulteta Univerze v Mariboru, 2004) 293–307 (Jurisdiction in the Family Law procedures, Law – Family- Civil Society (Faculty of Law in Maribor, 2004)).

[29] Some improvement has been witnessed only in the Municipal Court of Novi Sad, where the president of the Court, based on his discretionary powers, has created a Family Division of the Court, composed of judges who have undergone special training for family disputes and received licences to preside over such cases. The same goes for lay judges who have special experience in work with children and youth matters.

(v) Initiation and duration of the proceedings

Proceedings for protection from domestic violence are initiated by an action that can be filed by the following persons: a member of the family who was a victim of the violence; a statutory representative of the victim of domestic violence; the public prosecutor; and the State Guardian.[30] An action for cessation of measures of protection from domestic violence can be filed, apart from the persons mentioned above, by a member of the family against whom such a measure was introduced.

Broadening the circle of individuals entrusted with the right to initiate proceedings for the protection from domestic violence to the State Guardian and the Public Prosecutor was envisaged for the better protection of the victims of violence. This is due to the fact that they often lack courage to initiate proceedings because of fear of revenge or harsher consequences or because of the inconvenience caused by the initiation of proceedings against their loved ones (eg when a parent has to initiate proceedings against his child, or when a child initiates proceedings against his parents, etc). It is believed that if the proceedings are initiated by state organs and not by the victim the violator would take the consequences of his behaviour more seriously, hence such action would produce a better result than when the victim alone has the right to initiate the proceedings. However, case-law of the Municipal Court of Novi Sad and the State Guardian Office in Novi Sad[31] indicates that the Public Prosecutor and the State Guardian Organ have not yet exercised these authorities. We have researched the court practice from 2006 and the first 3 months of 2007[32] and found that none of the 62 proceedings was initiated by these organs. In 2006 there was a total of 46 cases, actions for family law protection from domestic violence, out of which 44 were analysed, while the remaining two cases were unavailable due to undergoing appellate proceedings. In the first 3 months of 2007 there was a total of 16 cases.

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[30] The Model Family Code prescribes (Art 2.1, para 1) that: 'In cases of domestic violence, the aggrieved person can apply to the court for a protection order.' Other persons such as a public authority (the Public Prosecutor or the State Guardian) are not mentioned as authorised to apply to the court for the protective measures, but the national legislator can broaden the list of authorised persons in the national law. It can only strengthen the legal protection against family violence.

[31] Novi Sad is the capital city of Vojvodina Province situated in the north of Serbia, with a population of about 350,000 people.

[32] The Serbian Family Act, which for the first time introduced protection from domestic violence, has been in force since 1 July 2005. Therefore, this procedure represents a completely new form of protection.

Family law protection from domestic violence in 2006 in the Municipal Court of Novi Sad

Plaintiff	Cases
Ex-wife against ex-husband	14
Wife against husband	11
Female ex-cohabiting partner against male ex-cohabiting partner	6
Mother against son	3
Daughter against father	2
Father against son	2
Female cohabiting partner against male cohabiting partner	1
Sister against brother	1
Husband against wife	1
Grandson against grandfather	1
Grandmother against grandson	1
Woman against man (who were in extended emotional sexual relationship)	1
Total	**44**

Family law protection from domestic violence in 2007 in the Municipal Court of Novi Sad

2007 (January to end of March) Plaintiff:	Cases
Wife against husband	6
Wife and children against husband and father	5
Ex-wife against ex-husband	3
Female ex-cohabiting partner against male ex-cohabiting partner	1
Underage child against father	1
Total	**16**

As can be seen from the above, in none of the cases was the procedure initiated by either the State Guardian or the Public Prosecutor. The Public Prosecutor may not have understood the importance of his new powers in relation to protection from and the fight against violence that was envisaged by the new Family Act of 2005, and the same could be said for the State Guardian. It appears that these organs still believe that it is family matter and that a victim of violence is the party that should come forward and seek protection. These organs have not yet prepared for the exercise of the new powers vested in them

and therefore do not react ex officio even when asked to do so by the victim.[33] Some federal states in the United States such as California, Colorado, Kentucky and Rhode Island envisage mandatory reporting of spousal violence injuries to the police.[34] Although reporting to the police of each incident of domestic violence against the will of the victim is not the best solution, efforts have to be made to lower the tolerance level of state organs that should provide certain protection for victims as well as for the general public. Raising public awareness against unbearable levels of tolerance for violence through mass media can result in certain attitudes towards domestic violence.

Analysis of court practice of the Municipal Court of Novi Sad pointed to other interesting data. Namely, out of 46 initiated civil law proceedings in family matters in 2006, 20 were stayed after the wife dropped an action in 6 cases, an ex-wife in 4 cases, a female cohabiting partner in 3 cases, close relatives – victims of violence – in 7 cases. In 7 out of 16 cases in 2007 action was dropped. In 3 cases a wife and an ex-wife dropped the action and in one case a female ex-cohabiting partner did the same.

Abuse of alcohol was the most common cause of domestic violence, although there were incidents caused by drug addicts also. Incidents were carried out in the form of threats, infliction of bodily harm, slapping, hair-pulling, harassment on a daily basis, phone call disturbance, prohibition of contact with other people such as with relatives and friends. Even though the Family Act does not specifically provide for the possibility of ordering provisional measures in such instances, the court used this measure of protection in 11 cases; in 8 cases in 2006 and in 3 cases in 2007. The effect of provisional measures is limited in time. Therefore, the court immediately ordered some of the measures for protection from domestic violence in emergency proceedings, effective until the final and binding completion of the civil proceedings, or ending prior to that, depending on the court's decision. Most often, there was a combination of several measures, such as the combination of an order to vacate the house and a restraining order for a certain distance for the duration of proceedings, that is until the final decision had been reached. On some occasions it was only a prohibition of further harassment.

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[33] In one instance a daughter who was an alcoholic, living in a family household with her mother and 8-year-old illegitimate child, while intoxicated, attacked her daughter, started to strangle her by placing a garbage bag over the child's head and squeezing around her neck. The grandmother reacted and saved the child's life at the very last moment. The grandmother was also a victim of violence and she reported this incident to the Social Services, which in turn took the child away from the mother (and grandmother) and placed her in a home for children without parental care, without initiating judicial proceedings for protection from domestic violence. Furthermore, they did not acknowledge the gravity and significance of the problem which called for their action. The child's uncle went to the Public Prosecutor who also did not want to take action. The daughter consented to treatment for alcoholism, but left the hospital soon after because she could not be kept in the hospital without a court order. The question remains whether the violence will escalate and what will be the consequences, since the girl was returned from the home for children without parental care and remains living with her grandmother.

[34] L Wardle and L Nolan, above n 1, 462.

Court proceedings for protection from domestic violence are a type of emergency proceedings in our legal system and should take place within the period of 8 days from the day of the filing of the action in the court, and the appellate decision should be reached within 15 days from the day the appeal was filed in the appellate court (Art 285).

The State Guardian Organ has a significant role in the protection from domestic violence since the Family Act, in the instance when the State Guardian Organ has not itself initiated proceedings, provides for the possibility for the court to request two different types of assistance from the Organ. First, the court can ask for assistance from the State Guardian Organ in gathering necessary evidence on the committed act of violence and, secondly, the court can ask for its opinion on the suitability of measures requested by the plaintiff (Art 286).

The principle of the disposition of the parties in the proceedings for the protection from domestic violence is not of importance, that is to say, the court is not bound by the limits set by the party in its request, and can determine a measure of protection that the plaintiff has not asked for, if it considers that the protection is best achieved with that other measure. It is also important to point out that an appeal against the decision, by which a measure for the protection from domestic violence was instituted, does not prevent the execution of the judgment on the determination or the extension of the duration of such a measure.

(vi) Records on acts of domestic violence

The State Guardian Organ is obligated to keep records and documents on victims of domestic violence as well as on the persons against whom protective measures were determined. For effective exercise of such an obligation the court is ex officio obliged to immediately deliver its judgments in cases of domestic violence both to the State Guardian Organ in whose territory the victim has domicile or residence and to the State Guardian Organ in whose territory the member of the family that caused the violation has domicile or residence. The significance of these records lies in the fact that it enables tracking of the occurrence of domestic violence in the territory of the State Guardian Organ, especially the recording of the frequency of violent acts committed by the same violator or violence committed within the same family. This can have an effect on both the choice and the duration of the measure to be proposed to the court in the case of repeated violence. In this manner, the assistance of the State Guardian Organ can be very valuable for the court.

III PROTECTION FROM DOMESTIC VIOLENCE IN A WOMEN'S SAFE HOUSE

Together with family law and criminal law protection there is now another means of protection for women and children endangered by domestic violence.

The Safe Women's House, established in 2006 in Novi Sad,[35] represents the first and the only safe women's house not only in Novi Sad but in the whole of Vojvodina. Similar forms of protection exist such as the Belgrade's Women's Shelter, established in 1994 and still in operation, as well as the Safe Women's House in Užice (in the south-west part of Serbia).

The Safe Women's House in Novi Sad was built on the initiative of the Department for Labour, Employment, Gender Equality of the Autonomous Province of Vojvodina, joined by the municipal administration that took this project seriously and actively participated in its realisation. The building of the Safe Women's House commenced in 2003. By the end of 2006, the construction of the House was complete and it was ready to be opened.[36]

The work of the Safe Women's House as well as that of Counselling against Domestic Violence represents the good work of the City of Novi Sad and is organised within the framework of the Centre for Social Work. Their activities are fully financed from the budget of the City of Novi Sad, but only on temporary basis for the duration of the project. It is to be expected that the financing of the Safe Women's House will become a regular financial commitment of the City or that financial resources will be found within the budget of the Vojvodina Province.

The Safe Women's House is comprised of permanent and temporary shelter for women and children and represents a new, specialised and comprehensive form of social protection of women and children threatened by domestic violence.[37] This type of protection is tailored for women and children endangered by domestic violence who reside in the territory of Novi Sad and AP of Vojvodina, as well as in the whole territory of Serbia. The House offers support for those who have experienced violence but have not had traditional systems of support and assistance from parents, relatives, friends, and neighbours. Women and children, victims of domestic violence, are offered protection and support during their stay in the shelter that is part of the Safe Women's House. The women and children in the Safe Women's House can stay for a period of between a day and 3 months. The House can accommodate 10 women and 15 children, although the woman-child ratio is flexible.[38]

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[35] Novi Sad Mayor M Gojković turned over the Social Services keys to the Safe Women's House and stated that it signifies the beginning of the operation of the largest and best equipped facility for such purpose in Serbia (Report by Beta Agency: Safe Women's House Opened in Novi Sad, 5 December 2006).

[36] Report by J Rajaković Čapaković, MA, president of Democratic Vojvodina and the first Secretary of Department for Labour, Employment, and Gender Equality of the AP of Vojvodina in the previous session General Assembly of Vojvodina (personal correspondence, for which I am much obliged).

[37] See www.csrns.org.yu/sigurnakuca (accessed 2 June 2007). This website is that of the Safe Women's House. The website is in the Serbian language, written in Cyrillic letters. Different departments of the Safe Women's House have their separate websites, also in the Serbian language.

[38] See www.csrns.org.yu/sigurnakuca/Ciljna_populacija/ciljna_populacija.html (accessed 2 June 2007).

In the case of acute domestic violence, women and children are accommodated in the Safe Women's House and are offered protection within a temporary shelter where they receive immediate accommodation. In such situations, it is not necessary to provide documents otherwise necessary for admission. In the case of accommodation of victims of domestic violence in temporary shelter, the Safe Women's House team of experts is obligated to conduct a necessary assessment within the period of 7 days and recommend certain measures and forms of protection for the victim. Therefore, the difference between the temporary shelter and shelter lies in the duration of residency. Temporary shelter offers accommodation for up to a maximum of 7 days. It is a form of first aid in cases of domestic violence whereby members of the family are put out of reach of the violator. A stay in the shelter is of a more permanent character and can last up to 3 months.

Potential users of the permanent shelter of the Safe Women's House go through a well-established procedure which includes initial contact with the women from outside the Safe Women's House and the determination of the criteria for accommodation in the House through a special interview. Contact with a woman is established through local networks for the prevention of domestic violence and the protection of victims and the first interview is conducted by a coordinating multidisciplinary team.[39] This procedure is used to determine which cases need protection and accommodation the most, while other actions (if the victim so decides) and measures of legal protection (civil and criminal) are taken. The Safe Women's House offers women and children emotional, physical and human security together with help in the process of gaining independence and in organisation of life without violence.

The work of the expert team can be extended to the person who committed the violence, when such action is deemed useful. If that is the case, the family member who committed the violence is invited to undergo team treatment. He is then given special therapy for overcoming the problems of domestic violence, and, if the therapy yields results, the family is reunited and continues family life without violence.

Therefore, in order to have effective protection from domestic violence it is crucial to undertake all the measures that can contribute to protection from violence and, more importantly, prevent violence in the future. In that sense, the role of courts is very important. However, the court is not the only link in the fight against domestic violence and in the promotion of the policy of non-violence. Certain other agencies, such as the media and means of public communication, the ombudsman, safe women's houses, social services, and non-governmental organisations, are also important.

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[39] See www.csrns.org.yu/sigurnakuca/Kako_do_pomoci/kako_do_pomoci.html (accessed 2 June 2007).

IV THE ROLE OF THE PROVINCIAL OMBUDSMAN FOR CHILDREN

A significant role in the protection of children who have become victims of domestic violence can be played by the ombudsman for children, elected in the Province of Vojvodina in September 2004,[40] although Serbia elected its ombudsman much later, in 2007. The role of the children's ombudsman is especially important in the prevention of violence towards children in the sense that different activities are intended to warn of breaches of children's rights and to inform the public on issues of importance for the realisation of children's rights and problems connected to those rights.[41] Although he is not authorised to directly initiate court or other proceedings for the protection of violated children's rights, his role is still quite significant because he can undertake 'activities geared towards raising the level of public awareness in connection to the problems related to the realization of children's rights and the measures by which such rights can be improved'.[42]

In other words, the role of the ombudsman in mobilising the public for educational purposes and the promotion of the need to recognise children's rights, as well as to raise the standard of their protection in everyday life, should not be ignored. Traditional, patriarchal understandings of the position and rights of women and children in the family and society cannot be sidestepped easily and without pain. Persistent activity is needed in order to genuinely, and not only superficially, ensure acceptance and expansion of new family and social values in everyday life. In that sense the role of the ombudsman for children is very precious, since certain behaviour in the family, and outside of it, is often not recognised and acknowledged as forbidden and, as a result, the enthusiasm to change such behaviour is also not present. The activities of the ombudsman (both for children's rights and for gender equality) in creating a social climate in which every form of domestic and social violence, especially towards women and children, would be condemned need to be a priority. Hence, in co-operation with other social agencies (mass media, governmental and non-governmental organisations) these activities should contribute to the prevention of domestic violence and the protection of children's rights declared in the Family Act as well as in international conventions ratified by our country.

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[40] The Assembly of the Autonomous Province of Vojvodina, by virtue of Art 56 of the Law for the determination of certain jurisdiction of the Autonomous Province (Official Gazette of Republic of Serbia no 6/2002 dated 7 February 2002) in September 2003 adopted a Decision on the Provincial Ombudsman, and one of its five deputies had been elected for the area of children's rights in September 2004. Quoted from Dr P Teofilović, Pokrajinski ombudsman APV i zastita decijih prava, Pravni život no 10/2006 (Regional Ombudsman of Autonomous Province of Vojvodina and Protection of Children's Rights, Legal life no 10/2006) 164–165.

[41] Ibid.

[42] Ibid.

V CONCLUSION

In conclusion, we need to point again to the messages expressed on the topic of domestic violence at the Conference of Kopaonik School of Natural Law in 2006 as part of the section entitled 'Right to personal freedom'.[43]

First, the traditionally high degree of tolerance for domestic violence in our society, especially when women and children are victims, leads to the frequent absence of any reaction not only from state organs but also from the victims themselves. Such inaction leaves the violator unpunished for his misdeeds and encouraged to continue with violent behaviour. Tolerance towards violence should be further fought against and influence should be exercised towards eradicating domestic violence (as well as any other form) in the family and the whole of society.

It is of special importance to create a social climate in which every form of violence, especially family violence, is adequately dealt with and discouraged. The permanent task of all the relevant social agencies, first of all the courts, executive government, media, as well as, relatives, friends, school and pre-school institutions, and certainly political representatives, must contribute to this project. State organs should be especially encouraged and supported to act courageously for the protection of innocent family members. This is important because, although protection from domestic violence is regulated by both the Criminal Code and the Family Act, the level of domestic violence still remains high.

Furthermore, together with criminal and civil protection from domestic violence, other methods for overcoming violence need to be researched. Special attention needs to be given to the creation of an appropriate social and legal climate for alternative methods of settlement of conflicting domestic situations. One of these methods is mediation to help in the establishment of restorative justice, when deemed necessary and appropriate. The Serbian Law of Mediation points to this possibility while international documents also recommend and encourage this method. Caution needs to be exercised, since alternative methods of settlement of domestic disputes is not always considered appropriate, especially if such methods jeopardise the security of the victim(s) of domestic violence or if their position might worsen.

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[43] As the editor of this section (and author of these messages) we believe that the messages that were adopted at the previous Kopaonik Conference deserve to be dealt with and still supported since the problem of domestic violence is still present and protection from domestic violence is necessary, primarily for the realisation of many of the children's rights acknowledged in our new Family Act as well as in the UN Convention on the Rights of the Child. Those are, for example: the right of a child to the best possible living and health conditions for proper and full development (Art 62 of the Family Act); the right to the protection from harassment, neglect, etc, all envisaged by the UN Convention of the Rights of the Child (states parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child – Art 19), and many others.

Psycho-social therapy for the victim, as well as for the violator, together with the team of experts (psychologist, social workers, pedagogues, lawyers, etc) can also be one of the ways to overcome family violence and one of the methods of protection from violent behaviour. However, since the violators are often family members who are alcoholics or drug addicts, it should be recommended that they receive treatment too, for the sake of protection of their family members from unpredictable behaviour triggered by the use of alcohol or drugs as well as for the protection of their own health. As long as they do not endanger the rights and freedoms of others, medical treatment must be their choice, but, from the moment that others, especially close family members, wife, child, and others, start to suffer, medical treatment ceases to be their own concern. The court must have a legal basis to send them for mandatory treatment as a measure of protection from domestic violence.

Finally, we are witnesses to the fact that numerous rights of children, recognised by certain international documents, as well as, by domestic law, are not being treated as paramount. Breaches of children's rights occur often, and, when they do, it is not only the result of the direct behaviour or malice of the violator but very often it is the social climate that fosters neglect of children. For these reasons, recognition of the proclaimed children's rights is an important factor for their wider application and protection. The role of the defender of children's rights – the ombudsman for children – is unavoidable and always present. The experience of the existing protectors of children's rights, not only from Vojvodina but from the surrounding countries as well, indicates the necessity and justification for the introduction of such an institution in the territory of the whole Republic.

Serbia II

THE RIGHT OF A CHILD TO EDUCATION IN UNIVERSAL AND REGIONAL DOCUMENTS AND IN SERBIAN LEGISLATION

*Olga S Jovic**

Résumé

Les conventions internationales adoptées dans le courant de la deuxième moitié du 20e siècle, qu'elles soient d'application universelle ou régionale, sont des instruments puissants dans le domaine des droits de l'enfant. Dans le champ du droit international, la convention la plus importante en regard du statut social et légal de l'enfant est la Convention sur les droits de l'enfant de l'ONU, adoptée en 1989, que la Serbie a ratifiée par l'Acte de ratification (La Gazette officielle SFRJ – Convention internationale, no 15/1990). La Serbie s'engageait ainsi à reconnaître sans discrimination les droits de l'enfant et à garantir les droits prévus par la Convention pour chaque enfant sous sa juridiction. Le droit de l'enfant à l'éducation prévu dans la Convention inclut le droit à l'éducation primaire et le droit à la dignité dans la fréquentation scolaire. Le droit à l'éducation est un authentique droit personnel de l'enfant, sujet de droit. L'objet de ce droit est le développement intellectuel de l'enfant. Depuis la naissance jusqu'à l'âge adulte, l'éducation de l'enfant est soumise à l'influence de différents facteurs. Toutefois, l'école et la famille sont les facteurs déterminants. Ce sont les parents qui, les premiers, ont le droit mais aussi l'obligation de jeter les bases intellectuelles de la formation de leur enfant. En conformité avec ses obligations internationales, la Serbie a, dans la *Loi sur la famille* adoptée en 2005, explicitement et pour la première fois énoncé le droit de l'enfant à l'éducation. Les parents ont le droit et l'obligation d'éduquer leurs enfants. En ce qui a trait à l'éducation primaire, les parents ont l'obligation de permettre à leurs enfants d'accéder au système d'éducation. Quant à l'éducation secondaire et post-secondaire, les parents doivent assumer cette obligation dans la mesure de leurs moyens financiers et dans le respect des volontés et des préférences de l'enfant.

I INTRODUCTION

The development of science and technology is a positive accomplishment for our civilisation. Education is a pedagogical process and the result of acquiring knowledge, skills and habits through school and other factors (family, cultural

* LLM, Faculty of Law University of Priština, Headed in Kosovska Mitrovica, Serbia.

institutions, public information services), and personal efforts that contribute to the formation of one's personality and lead towards self-education. The basic role of self–education is to develop the physical, psychological, intellectual and moral aspects of every man, which are required by political society as a whole and the society they are particularly a part of.[1] In that sense, based on the functional criterion, a distinction is made between intellectual, cultural, technical and moral education. Rapid changes in every area of scientific and technological revolution have resulted in a relatively new term, 'permanent education', which denotes an overall view of the educational function, its present and future role. It comprises numerous educational principles and aims, from the initial view that a person is being educated throughout their whole life, to the requirement for a fully democratic educational system, which would be accessible for everyone. In every country, a system is formed with levels such as pre-school, primary, secondary, and higher education as well as with special intentions: general education, vocational or professional education, special education, and education of adults.

II THE RIGHT OF EDUCATION AS A BASIC HUMAN RIGHT IN THE SYSTEM OF UNIVERSAL AND REGIONAL DOCUMENTS ON HUMAN RIGHTS

Starting from the most general division of civil, political, economic, social and cultural rights, it is common to regard the right to education as one of the cultural rights. Culture as a multi-meaning term comprises all spiritual rights that a person creates and lives with, and is a part of a total social and individual life, a cluster of all important human accomplishments (material and spiritual), without which a human society cannot be imagined. The position of cultural law in international legal documents shows that it is an individual right, because an individual acquires and internalises basic cultural accomplishments, for that person to become a member of the social community and to communicate with other individuals when engaged in various social activities. Cultural rights are aimed at preservation, development and spreading of culture and science.[2] According to the provision of Art 15 of the International Covenant on Economic, Social and Cultural Rights, cultural rights comprise the right to participate in cultural life, the right to enjoy the results of scientific progress, the right of protection of moral and material interests of the authors of scientific and art works, and the freedom of scientific work and creativity.

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1 See B Mayall *Children's Childhoods, Observed and Experienced* (The Falmer Press, London, 1994) 114–128.

2 One of the meanings of 'culture' is that it denotes a certain social environment that each individual is born into, one which has certain rules that it needs to conform to: customs, social habits, norms, laws, systems of communication. Still, even though we as individuals are different in terms of culture, a common factor to all human beings on this planet is that we communicate and engage in moral relations. See F Fukujama *Naša posthumna budućost'* (Our Posthumous Future) (CID Podgorica, 2003) 19s.

The extent of this right on education is much more complex, because education is a factual precondition for the full exercise of civil, political, economic and social rights.[3] Education should aspire towards full development of an individual's personality and dignity, as well as reinforcing respect for human rights and basic freedom. Intellectual training or 'organised cultivation of the capacity to think' is not the only goal of education; the essential function of education is training for systematic use of intelligence when dealing with problems.[4] Furthermore, education should develop tolerance and enable an individual to have a useful role in a free society, to enhance understanding, tolerance and friendship among all nations and all racial, religious and ethnic groups.[5]

On the matter of human rights, the right to education aims at positioning people in similar, just social positions so that they can truly enjoy all human rights. It involves equal access to education, therefore no discrimination in this respect is allowed.[6] Primarily, the right to education means the right to gain education, which derives from the provisions of universal and regional documents that stipulate that education must be available for everyone. In this area, the Convention Against Discrimination in Education (1960) is of greatest importance. It bans discrimination based on race, skin complexion, gender, language, religion, political or other belief, national or social background, economic conditions or birth. A provision of Art 1 of this Convention stipulates the following:[7]

> '1. For the purpose of this Convention, the term "discrimination" denotes any distinction, exclusion, limitation or preference based on race, skin complexion, gender, religion, political or other belief, national or social background, economic status or birth, with the aim to deny or prejudice the right on equality regarding education, especially:
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> a) denying access to any person or group of people to any form or level of education;
> b) limiting any person or group of people to lower education;
> c) founding or holding separate educational systems or institutions for individuals or groups, excluding cases from Article 2;
> d) placing any individual or group in a position that is not compatible with human dignity.'

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3 See V Dimitrijevic, M Paunovic, V Đerić '*Ljudska prava*' (Human Rights), Belgrade Center for Human Rights, electronic version, available at: www.bgcentar.org.yu/index.php?p=248.

4 See M Komar-Janjić and M Obretković *Prava deteta prava čoveka* (Children's Rights Human Rights) (Belgrade, 1996) 80s.

5 See Art 13(1) of the International Covenant on Economic, Social and Cultural Rights, 1996, available at: www.ohchr.org/EN/Pages/WelcomePage.aspx.

6 See Art 26(1) of the Universal Declaration of Human Rights, and Art 13(1) ICESCR.

7 See UNESCO Convention Against Discrimination in Education, passed on 14 December 1960. By 31 December 2005, 91 states had joined the Convention, our country among them ('Official Gazette FNRJ – International Contracts', No 4/64). See the text of the Convention at: www.UNESCO.org.

For the purpose of this Convention, the term 'education' denotes all types and levels of education and implies access to education and the standard and quality of conditions in which education is taking place.[8] With the aim to prevent any form of discrimination, the contractor states are obliged to abolish any legal provision that implies discrimination in education, to ensure enrolment of students in all educational institutions without prejudice, and to ban any distinction in public authority acts towards citizens, except for those based on abilities or needs.[9] Contractor states are obliged to ensure that primary education is free of charge and compulsory, that secondary education is generally available, that higher education is equally available for everyone according to their abilities, and to ensure that everyone can pay for the acquiring of scholarships s prescribed by the law.[10] Furthermore, contractor states are obliged to guarantee the same educational standards and conditions that regulate the quality of education in all educational institutions of the same level. Formulations of the third and fourth Article of the Convention, taken together, show that contractor states have immediate obligations when implementing this international contract. Simultaneously, they offer enough space for various interpretations in national legislation.[11]

Considering the fact that the right of education comprises the right to gain education, all international contracts insist that primary education be compulsory, free of charge and available for everyone. With respect to the importance of primary education, it is the obligation of the state to provide such education regardless of its material and economic conditions (II 15 ICESCR). Secondary education must be generally available for everyone, and contractor states must gradually become free of charge.

In the past years, the world's perception of the right to education has been changing. Unlike the Universal Declaration of Human Rights, which declares that everyone has the right to primary education that should be free of charge, and that it is compulsory, the World Declaration on Education for All (1990)[12] prescribes that: 'Every individual – child, adolescent and adult – should be provided with an opportunity to gain basic knowledge'.[13] In support of the above-mentioned is the fact that there are changes in the field of education, and that there are more and more opportunities to learn and gain skills outside

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8 See Art 1, item 2 (a)(b)(c) of the Convention Against Discrimination in Education.

9 See Art 3 (a)(b)(c) of the Convention Against Discrimination in Education.

10 See Art 4 (a)(b) of the Convention Against Discrimination in Education. Art 4 (c) stipulates that the contractor states must encourage and upgrade the education of persons without primary education with respect to individual capacities.

11 See Y Daudet and P M Eisemann *Commentary on the Convention Against Discrimination in Education* (Paris, UNESCO, 2005) 24.

12 See World Declaration on Education for All, passed on the world Conference on Education for All in Jomtien (Thailand), on 9 March 1990. For the text of the Declaration see: www.UNESCO.org.

13 The Universal Declaration of Human Rights (1948) does not use terms like 'learning', whereas the World Declaration on Education for All does not use terms such as 'elementary, fundamental, free, compulsory education'. For more, see World Education Report, *The right to education-towards education for all throughout life* (Paris, UNESCO, 2000) 26.

school or institutions. In the modern era, learning is stretching throughout a lifetime, so access to education in the twenty-first century is varied. In this manner and form education continues from childhood into old age.[14]

On the European level, Protocol I with European Convention for the Protection of Human Rights and Fundamental Freedoms,[15] in its first sentence, prescribes that 'nobody can be denied the right to education'. Interpretation of this formulation of the Convention immediately draws attention to the fact that this article offers a negative provision with respect to education instead of a positive right to education. This implies that the state is not obliged to provide education to every individual, ie if the state provides education, then it should not be denied to anyone. Such an imprecise definition of the right to education can lead to relativity of the law in practice, from the danger of abuse of the right to education for political causes to justification of the absence of an obligation on the state to secure the right to education.

(a) Right of the Child to Education – from a world to a European concept

The right of the child to education is a phrase rich both in its broader and in its more constricted sense. In its broader sense, it implies the right of a child to access information from public media, whereas in its more constricted sense, it means the right of a child to primary education and the right to dignity while attending school.

This classification of children's rights to education is found in the UN Convention on Rights of the Child. Namely, contractor states acknowledge the important role of public media, and, with this in mind, are obliged to provide children with access to information and materials from various national and international sources, especially those targeted at the development of their social, spiritual and moral values, to which end it will entice distribution of information and materials that are of social and cultural interest for the child and in accordance with the spirit of the right to education.[16] Two articles of the Convention are devoted to the essence of the right to education. First, according to Art 28 of the Convention on the Rights of the Child, contractor

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[14] See J Delors *Learning: the treasure within*, Report to UNESCO of the International Commission on Education for the Twenty-first Century (Paris, 1996) 99–100.

[15] See Protocol I of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, passed on 20 March 1952. Text of the Convention was altered in Protocol 11 and comprises Protocols 1, 4, 6, 7, 12 and 13, which are still effective. The Convention was changed in accordance with the stipulations of the Protocol 3 (ETS, No 45) which became effective as of 21 December 1971, Protocol 8 (ETS, No 118) which became effective as of 1 January 1990, and text of Protocol 2 (ETS, No 44) which, in accordance with Art 5(3) of the same Protocol, became part of the Convention as of its effective date on 21 September 1970. All provisions that were altered or added to these Protocols were replaced by Protocol 11 (ETS, No 115) as of its effective date 1 November 1998.

[16] See Art 17(a) of the UN Convention on the Rights of the Child. From the very text of this Article we derive the aim of the children's right to access information from public media, which is enhancing the level of knowledge and skills of a child.

states, by acknowledging the right to education and with the aim of its gradual accomplishment,[17] are obliged to realise end goals in the field of education of the child. Goals stated in Art 29 of the Convention target: development of the child's personality, talents and mental and physical capacities to their end limits; development of respect for human rights and fundamental freedoms and principles stipulated in the UN Charter; development of the respect for the child's parents, child's cultural identity, language and national values of the country they live in, and civilisations different from their own; preparation of the child for responsible living in a free society.[18] In accordance with the above-mentioned, we conclude that the right to education is a personal right of every individual, whereas the object of the right to education is intellectual development.[19] With regards to primary (compulsory) education, the subject of the right to education is the child, because regular compulsory education coincides with childhood. The right to education created in this manner, above all, is the primary personal right of the child, who is also the subject of that right, whereas the object of the right is intellectual development,[20] the aim of education being to equip the child for independent participation in social life.[21]

The right of the child to dignity when attending school implies an obligation on the states to take all the necessary measures to secure that discipline in schools is in a manner that is appropriate for the dignity of the child. The aim of this provision is the prevention of humiliating and inhuman actions towards children in school.[22] To put it differently, corporal punishment of the child, which induces physical pain or emotional distress, is an absolutely unacceptable discipline measure. Children are subjects of the right, not objects; they are social actors and active participants of the educational system and, therefore, we cannot allow verbal humiliation or corporal punishment.[23] With this aim, the EC Assembly adopted a special Recommendation 1666 (2004): a Europe-wide ban on corporal punishment of children,[24] which invites member states to take actions that will contribute to a total ban of any form of corporal

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17 Art 28 of the UN Convention on the Rights of the Child, as well as other universal and regional documents, nominates the right to education in a manner which implies that primary education is compulsory and free for all, encourages various forms of secondary education to be available for every child, enables higher education to be available for everyone in accordance with capacities, takes action for securing regular attendance and lowering the level of dropping out of school.

18 See Art 29(1)(a), (b), (c), (d) of the UN Convention on the Rights of the Child.

19 See M Janjić-Komar '*Pravo deteta na život i zdravlje*' (The Right of the Child to Life and Health) (PhD thesis, Belgrade, 1978) 59–60.

20 Ibid.

21 See N Vučković-Šahović '*Prava deteta i međunarodno pravo*' (The Right of the Child and International Law), (Yugoslav Center for the Rights of the Child, Belgrade, 2000) 214.

22 See Art 28(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

23 The right of the child on dignity when attending school is specially addressed after European Court for Human Rights, in the case of *Campbell and Cosans v UK* No 00007511/76; 00007743/76 of 25 February 1982, reached a verdict which bans corporal punishment in schools, available at: http://www.echr.coe.int/ECHR/EN/hudoc.

24 See Recommendation 1666 (2004) Europe-wide ban on corporal punishment of children, of 23 June 2004, adopted on the 21st cession of the EC Assembly, available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta04/EREC1666.htm.

punishment of children in families, school and all other environments. The ban on corporal punishment of children in school (including private schools) and other educational institutions must be systematically and universally respected. Corporal punishment of children breaks the basic right to human dignity and physical integrity. Furthermore, taking the fact that children are people, and in accordance with the accepted standpoint that corporal punishment of people is banned in European society, it is all the more reason why social and legal approval of corporal punishment for children must stop.[25] Therefore, adopting strategies to increase awareness of both children and public about the damage of corporal punishment is of vital importance.

(b) Choice of education for children in accordance with religious and philosophical beliefs of parents

Article 2 in Protocol I of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that the state, when executing its duties in the field of education, respects the right of the parents to secure education and schooling that are in accordance with their religious and philosophical beliefs. The same regulation is found in Art 13 of the International Covenant on Economic, Social and Cultural Rights with the aim to protect children from indoctrination by the state and teachers. Exercise of the right of parents to educate their child in accordance with their religious and philosophical beliefs increases the possibility for the parents to choose the kind of school their child will attend. At the same time, this right has its broader meaning related to every function that the state takes on in the field of education and schooling. This standpoint is set out in the verdict of the European Court for Human Rights in the case of *Kjeldsen, Busk Madsen and Pederson v Denmark*.[26]

> 'In accordance with Danish Constitution, all children have the right on free education in state primary schools (folkskolen), although the parents are under no obligation to enroll them in those schools, but can enroll them in a private school or teach them at home … The Court states that in Denmark, private schools coexist with public system of education. The second sentence of Article 2 of the Protocol 1 (P1–2) relates to the execution of every single function – "every function" – that contractor states take in the field of education and school, including organization of and financing public education. The second sentence of Article 2 (P1–2) must be regarded as a whole with the first one, which guarantees everyone the right to education. It is in accordance with the right of the parents to have the respect for their religious and philosophical beliefs.'

Conflict of interests between the right of the parents to provide their children with education that is in accordance with their beliefs and the state that has a great role in the field of education is not possible to resolve in a unique way due

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[25] See points 5 and 6 of the Recommendation Europe-wide ban on corporal punishment of children.

[26] See *Kjeldsen, Busk Madsen and Pederson v Denmark* No 00005095/71;00005920/72 of December 1976, available at: http://www.echr.coe.int/ECHR/EN/hudoc.

to the objective circumstances (non-existence of a particular school in the area where the child lives) or subjective circumstances (for example, intellectual capacity of the child) that accompany each case. Apart from this, lexical interpretation of Art 2 (P1–2) of the Convention for the Protection of Human Rights and Fundamental Freedoms observes that it protects the religious and philosophical beliefs of the parents, not children, which, it appears, is not in accordance with the meaning of Art 28(1) of the Convention on the Rights of the Child.

In the parents-school-child relationship, as a rule, parents should have the advisory role when exercising their right of choice of education (right to enter a school of their choice). However, it is arguable to what extent the child really has a choice in matters of choosing the kind of school they wish to attend if parents do not support their choice. When a child enrols in a school, the child is under age and incapable of having rights and obligations, and therefore, naturally, the choice of school and enrolment is executed by the parents in accordance with the child's best interests. Parents of every child old enough for compulsory schooling must provide education in accordance with the child's age, capacities and preferences. Respecting the child's will is pre-conditioned by the child's age and level of maturity. Therefore the child's right of choice of education, can, in fact, be discussed only in the period of secondary schooling. In that case, possible disputes between the child and the parents with respect to the choice of secondary school should be resolved by a respectable body, based on school notification; this body would reach its decision with respect of the child's best interests and thus compensate for the necessary parents' consent when the child enrols at school.[27]

(c) The role of school and parents in the education of the child

The everyday life of a child occurs within the family and in school; two important social environments where socialisation of the child takes place. From the moment of birth until maturity, education takes place under the combined influences of various factors, but family and school are institutions that have formal and educational responsibilities before law and society. Parents have not only the right, but also the duty, to influence formation of intellectual and emotional bases in the life of their child. School, as a social institution with accepted social goals and standard manners, is an environment where the authority of adults is more prominent and less changeable than in the family. Socialisation of a child within the family takes place in a social context with human interactions in which negotiation is an acceptable and normal activity that structures knowledge, actions and experience. For the youngest children, these relationships are most important in their social world.[28] Although primary responsibility for the child's development is placed upon its family, however, in order to accomplish full development of the child,

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[27] See B Novak '*Škola in otrokove pravice*' (School and the Right of the Child) (Ljubljana, 2004) 43.

[28] See B Mayall, *Children's Childhoods, Observed and Experienced*, above n 1, 234–237.

it is necessary to have continuous and constructive dialogue between parents and educational authorities.[29] The Recommendation 1505 (2001) CE on parents' and teachers' responsibilities in children's education stresses particularly the importance of communication and interaction between parents and educational authorities on all educational levels (national, regional and local), and member states are recommended to provide legal, financial and organisational conditions to facilitate practical implementation.[30]

School as an institution is not only the place for encouraging the child's talents, but its role is reflected in the child's personal development as a member of the social community. Naturally, there is no doubt that the primary function of a school is educational; in it, experts from various scientific fields provide children with primary knowledge and skills. Furthermore, school has a compensatory and integration function, through which an individual is included in a pluralistic society in a spiritual-ethical sense.[31] According to the Recommendation on *Children's participation in family and social life*, member states are obliged do ensure that school plans on all levels promote the development of skills and knowledge that children need on their way towards participation in family and social life.[32]

Two basic agents between child and society (family and school) have irreplaceable roles in the process of the child's personality development. The educational function of the family cannot be reduced to the relationship and attitude of parents towards the child, ie use of certain educational measures and actions in the development of the child's personality, because we are dealing with the system of causal relationship and influence of all family members: parents influencing children and the other way round, influence of siblings and other family members.[33] It is an undisputed fact that parents set value standards, and these standards are further expanded, amended or corrected by other socially important institutions. In a nutshell, it is common that upbringing is mainly associated with the function of family, while education, in modern times, is mainly conducted in schools as institutions of the system. Both family and school are places where socialisation of the child is taking place. However, the school system of every state that influences the formation of the child's personality through its educational measures represents a model where activities of experts are aimed at the teaching and upbringing of children.

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[29] See Recommendation 1074 (1988) on family policy, of 3 May 1988, available at: www.coe.int.

[30] See Recommendation 1501 (2001) on parents and teacher's responsibilities in children's education, of 26 January, available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta01/EREC1501.htm.

[31] See F Ossenbühl *Das elterliche Erziegungsrecht im Sinne des Grungesetzes* (Duckner&Humbolt, Berlin, 1981) 105–114.

[32] See Recommendation (98) 8 on Children's participation in family and social life, Appendix R (98) 8: Measures for the promotion of the children's participation in family and social life, of 18 September, available at: www.coe.int.

[33] See B Stanojlović *Porodica i vaspitanje dece* (Family and Upbringing of Children) (Belgrade, 1992) 57–58.

(i) Causal link between education and upbringing

The term 'upbringing' is tightly linked to contents and forms of education, and that is why in literature it is commonly combined into one term. Tightly linked in the collocation 'upbringing and education', according to the functions, categories of tasks and content, upbringing can be social, moral, intellectual, technical and professional, aesthetic, physical and concerning health. *Social upbringing* has the aim of enabling the child to be a useful and active member of society. With that in mind, parents have the duty to teach their child about the importance and value of work, to encourage and develop the child's interest in creative work and to influence formation of work habits and sense of duty in their children. *Moral upbringing* means bringing up the child with respect to ideals that have universal value: love, honesty, respect for other people's personalities and equal and inherent rights of every person, dignity, tolerance, freedom, equality, solidarity, humanity, responsibility, discipline at work etc. First ideas about what is good and evil, moral and immoral, allowed and not allowed, the child acquires from its parents, and by accepting them, or refusing them, it gradually develops its own attitude towards social norms. *Physical, emotional and intellectual upbringing* aim at producing a child that is a healthy, creative and independent personality who can contribute to the development of its social community and promote values that are desirable in any society.[34] From psychological, pedagogical and philosophical points of view, upbringing is a positive category that relates to the complete spiritual life of every individual.[35] On the other hand, the definition of education as 'the process of spiritual shaping of a person, that achieves full potential of its existence, its humanity', implies that this term is narrower than the term upbringing, because it denotes a process that enables an individual to gain general and specific knowledge. The process of upbringing is the holistic shaping of a person's spirit and character, that is, its personality.[36]

Education and upbringing of a child are accompanying and necessary factors of growing up, the aim of which is to equip the child for independent choice and responsible decisions. The correct process of upbringing and education means the application of measures to encourage the child by creating a positive social and emotional climate, creating positive conditions for learning, by using prevention techniques in certain situations, because verbal and non-verbal encouragement have great rational and emotional importance in the correct and complete development of a child into a mature and responsible person.[37]

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[34] See M Draškić *Porodično pravo i prava deteta* (Family Right and the Right of the Child) (Belgrade, 2005) 283–284.

[35] See B Novak *Škola in otrokove pravice* (School on Child's Rights) above n 27, 26–27.

[36] Ibid.

[37] See N Lalić 'Podsticanje kao vaspitna mera u osnovnoj školi' (Encouragement as an Upbringing Measure in School) Vol 37, no 2 (Belgrade, 2005) 132–152.

III THE RIGHT OF THE CHILD TO EDUCATION IN THE SERBIAN LEGAL SYSTEM

In domestic legislation, the Act on Bases for the System of Education and Upbringing,[38] prescribes that the system of education and upbringing provide availability of education and upbringing that is appropriate for the level of development and age of the child, that is, the student. Education and upbringing are conducted as pre-school education and upbringing, as well as primary and secondary education and upbringing.[39] Article 3 of the Act on Bases for the System of Education and Upbringing states all the goals and tasks of education and upbringing, and the most important are: development of intellectual capacities and knowledge with children and students that are essential for understanding nature, society, themselves and the world they live in and all this in accordance with their development needs, capacities and interests; to qualify them for work, further education and independent learning, in accordance with the ideas of constant improvement and lifetime learning; to qualify them for independent and responsible making of decisions relating to their own development and future life etc. With respect to exercising the right to education and upbringing, all citizens are equal regardless of their gender, race, nationality, religion, age, mental and physical state, social and cultural background, financial assets, political orientation or other personal characteristics.[40]

The Family Act of the Republic of Serbia from the year 2005 for the first time explicitly recognises the right of the child to education.[41] Although the child is the central subject of the right to education, the child's parents have the right and duty to take care of their child's education.[42] The right to education is a very wide term, and due to its rich content, this right of the child demands a new role for the parents. Because of the fact that primary education is compulsory according to the Constitution and according to the law, it is the duty of parents to fulfil that obligation and provide their child with primary education. In the process of primary education and schooling of the child the role of the parents is to provide their child with access to systematic education. With further education of the child (secondary, higher or high education), parents fulfil this obligation according to their abilities (Art 71, para 1 of the Serbian Family Act). The law does not prescribe that there is a legal obligation

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[38] See Act on Bases for the System of Education and Upbringing, 'Official Gazette of RS' no 62/2003, 64/2003, and Act on Amendments to the Act on Bases for the System of Education and Upbringing, 'Official Gazette of RS' no 58/04 and 62/04.

[39] See Art 2(3) of the Act on Bases of the System of Education and Upbringing that prescribes that the manner of education and upbringing is prescribed in this Act and in specific Acts in the field of education and upbringing. In national legislation, legal sources in this area are: Constitution of the Republic of Serbia (Act 71): 'Everyone has the right on education, primary education is compulsory and free', Act on Primary School, 'Official Gazette of RS' no 22/01, Act on Secondary School, 'Official Gazette of RS' no 50/93, 67/93, 66/94, and Act on Amendments to the Act on Secondary School, 'Official Gazette of RS' no 23/02.

[40] See Art 4 of the Act on the Bases for the System of Education and Upbringing.

[41] See Art 63 of the Family Act of the Republic of Serbia, 'Official Gazette of RS' no 18/05.

[42] See Art 68 and Art 71 of the Serbian Family Act.

on the parents to secure secondary education for their children. This makes sense if we are talking about securing the means for higher or high education,[43] but is not justifiable if we are talking about secondary education in state schools.[44] So, the financial and material assets of the parents for secondary education of the child do not have a prevailing role in view of the fact that Art 71, para 3 of the Constitution of the Republic of Serbia prescribes that secondary education is free, which is further explained in the provision of Art 105 of the Act on Secondary School, which states that the means for secondary education and upbringing are secured from the budget of the Republic of Serbia.[45] In this manner the state encourages development of secondary education by making it available to all children, despite the fact that secondary education is not compulsory in our country. With respect to high education, on the one hand, it is the duty of the state to enable everyone to gain high education that is, on the other hand, determined by the individual capacities of the child and financial assets of the parents. The latter is also confirmed in Art 155, para 2 of the Serbian Family Act, which prescribes that an adult child who regularly attends school has the right to be supported by the parents in accordance with their abilities, and as late as 26 years of age.

A great leap forward in the child's right to education is the fact that the Serbian Family Act prescribes that a child who has reached 15 years of age and is capable of judging can decide which secondary school they wish to attend.[46] The Serbian Family Act, therefore, has two approaches towards a child's education. Education is the child's right, but at the same time, it is one of the components of parents' care. This prescribed right of the child is relative in its character because it depends on the child's capacities, wishes and preferences, and is further limited by the right of the parents to provide their children with education consistent with their religious and ethical principles. As opposed to secular education, religious education depends on the parents' and child's wishes. The fact that religious education is organised mostly for members of the dominant religion and that members of minor religions are thus in less favorable positions, raises the question whether religious education should be conducted in secular schools, primarily in view of the multi-confessional society.[47] However, the aim of this norm is not only to protect the religious and philosophical principles of the parents, but also to provide parents with a

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[43] In domestic legal theory we come across the interpretation that secondary education of the child depends on their parents' financial assets. In that respect see, eg, M Draškić *Porodično pravo i prava deteta*, above n 34, 271; G Kovaček-Stanić *Porodično pravo* (Novi Sad, 2005) 285.

[44] Art 3(1) of the Act on Public Services, 'Official Gazette of RS' no 42/91, 71/94 and 79/05, prescribes that, in order to secure exercise of the rights granted by the law and exercising other legally established interests in the areas of: education, science, culture, pupil's and student's standard, institutions are established, whereas Art 2 of the Act prescribes that financial assets of these institutions can be in all proprietary forms. In this way the existence of private secondary schools was legalised in Serbia.

[45] See Art 71 of the Constitution of the Republic of Serbia, 'Official Gazette of RS' no 98/06 and Art 105 of the Act on Secondary School: 'Ministry of education, municipality i.e. town where school's head-office is signs a contract with the school about securing means for its functioning based on its annual curriculum, in accordance with the law'.

[46] See Art 63(2) of the Serbian Family Act.

[47] See G Kovaček-Stanić *Porodično pravo*, above n 43, 286.

protective mechanism against the risk of the state and state schools imposing certain principles, beliefs and conduct.[48] Following this analogy, the most common disputes are about religious and civil education of the child in primary and secondary schools that are in the national curriculum as optional subjects.[49] Here too, parents play their role in controlling the choice of optional subjects their child would attend, and this choice should be in accordance with the child's capacities and preferences. In civil education, special stress is put on sex education of children, because recently the relationship between the state and individuals in matters of sex and reproduction rights of the young has been changing. As it is in the spirit of the Convention on the Rights of the Child to recognise the child's right to freedom of mind, conscience and religion, the child who is capable of forming his or her own attitudes has the right to freely express such attitudes on all matters that concern him or her. Therefore, there is no reason why these provisions should not apply to the relationships of school-parents-child in matters of sex education.[50] In other words, the interpretation of the provisions of domestic legislation brings us to the conviction that the right to education is an authentic right of the child, and that in its execution the decisive role is with the parents, because intellectual development of the child greatly depends on the parents' decision on what kind of education is in the child's best interest.

IV THE RIGHT TO EDUCATION OF THE CHILD WITH SPECIAL NEEDS

For a long time, and completely without grounds, it was considered that the state can provide education for a child with special needs through schools for children with special needs, that is, with a specially adapted curriculum, and by doing so, legitimately exclude the child from the regular system of education. Under that concept, the duty of the state was to create conditions in which children with special needs could obtain appropriate education. The duty of the state was primarily to create appropriate forms of school in accordance with the capacities of individual groups of children with special needs. Where the state does not provide special educational forms for a child with special needs (and excludes the child from the regular system of education), according to the rules of international law, this would be infringement of the right to education.[51] However, in modern developments in European and other countries, it is emphasised that a child with special needs should be educated in regular schools together with other children. This attitude has been met with great dissatisfaction by parents who did not want to accept the fact that they had to enrol their children with special needs into schools with an adapted

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[48] See M Draškić *Porodično pravo i pravo detera*, above n 34, 285.

[49] Decree of Serbian Government on organising and conducting religious education and an alternative subject in primary and secondary schools ('Official Gazette of RS' no 46/01) introduced religious education and civil education into our schools.

[50] See M Janjić-Komar and M Obretković, *Prava deteta prava čoveka*, above n 4, 125–126.

[51] See B Novak *Pravica otrok s posebnimi potrebami do izobraževanja v redni šoli, Zbornik znanstvenih razprav* (letnik LXIV, Ljubljana, 2004) 371.

curriculum that were often very far away from their residence, because regular schools did not have special pedagogic methods. This regularly implied placing the child into a boarding school and separating the child from the family.[52]

Modern social model of attitudes towards children with special needs implies annulling the disorder in the child's social functioning and the child's attitude towards the environment. Intellectual and social development of children who are physically and mentally challenged is, at the abstract level, comprised in the network of rights prescribed in universal international legal instruments: right to health, right to non-discrimination, right to social protection. A child with special needs enjoys full protection in view of the aforementioned rights,[53] and the child's status becomes specified within effective norms of national legislation.

(a) International and European approaches

International legal treatment of children with special needs was transformed when the Convention on the Rights of the Child was passed, which proclaimed that the member states are obliged to respect and secure the rights stipulated in this Convention for every child under their jurisdiction, without any form of discrimination, including the child's disability.[54] In a special way, rights of children with special needs are treated in Art 23 of the Convention on the Rights of the Child, which, in its broad formulations, we can say abstractly comprises the right of the child with special needs education.[55] The third paragraph of the aforementioned article of the Convention stipulates that:

> '… recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present Article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation

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52 Ibid.

53 Until the UN Convention on the Rights of the Child became effective, international law did not deal with this category of individuals separately. Even with respect to adults with physical and mental challenges, only the provision of Art 15 of the European Social Charter stipulates the right to occupational qualifications and rehabilitation of physically or mentally disabled persons, and Art 18 of the additional Protocol with American Convention on Human Rights in economic, social and cultural rights. See N Vučković-Šahović *Pravo deteta i međunarodno pravo*, above n 21, 207.

54 See Art 2(1) of the UN Convention on the Rights of the Child.

55 Article 23(1) and (2) of the UN Convention on the Rights of the Child state: '1. Contractor states acknowledge that mentally and physically disabled child should enjoy full, good quality life, in the conditions that guarantee dignity, improve self-confidence and facilitate the child's active participation in the community. 2. Contractor states acknowledge the right of the disabled child to special care and shall encourage and provide, according to available funds, the necessary help to the child, which help should be appropriate to the child's condition and the parents' and guardians' abilities.'

> opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.'

It is crucial that states are obliged to enable international co-operation in distributing and accessing information on methods of education and professional services, with the aim of improving experiences in this area.[56]

On the European level, EU Recommendation (92) 6 on a Coherent Policy for the People with Disabilities[57] emphasises basic aims by specifying that, apart from gaining academic skills, education of disabled young people should include social skills and preparation for independent life in co-operation with parents and teaching staff, as well as practical training for life and social integration.[58] In view of the importance of early intervention, it is in the child's best interest to start medical and educational activities in pre-scholar age, that is, to attend school and extra activities from an early age. The Recommendation emphasises the importance of contact between disabled children and those who are not disabled, because it is a powerful stimulus for integration of both categories of children. Therefore, education of the disabled child should be conducted in a regular environment, equally with other children, whenever possible, by providing help, support and care; to meet their specific needs, in any case, disabled children should be provided with special therapeutic, technical and educational help. If the individual needs of the child demand special education, regular education or a combination of these two, it essentially implies close co-operation between special and regular schools; contact of the growing disabled children with their peers who are not disabled; support for transfer to a regular school if there is a wish and realistic possibility.[59] As for education of disabled children in regular schools, requirements that have to be fulfilled are that the school must have: medicinal, therapeutic and psychological services; appropriate sized classrooms where the teacher can, if necessary, be helped by an adequately qualified expert; equipment adapted for the disabled children for better access and transport; and the existence of activities for various forms of disability.[60] Education of disabled children in a manner that is equal with other children, without the necessary systematic support, decreases their chances for equality, and, depending on the circumstances of each individual case, and especially on the specifics of the disability, disabled children can make better progress in special or in regular schools.[61] Consequently, education contributes to the fact that the

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56 See Art 23(4) of the UN Convention on the Rights of the Child.

57 See Recommendation No R (92) on a Coherent Policy for the People with Disabilities, enacted on 9 April 1992 on 47th cession of Ministry Council, available at: http://wcd.coe.int/.

58 See item 1.3 of the V part of the Recommendation on a Coherent Policy for the People with Disabilities.

59 See item 1.6 of the V part of the Recommendation on a Coherent Policy for the People with Disabilities.

60 See item 2.1 of the Recommendation on a Coherent Policy for the People with Disabilities.

61 See item 2.2 of the Recommendation on a Coherent Policy for the People with Disabilities. Provided policy includes all areas of social life and applies directly to: prevention and health education, identification of the disability and diagnosis, treatment and therapeutic help,

disabled child becomes an independent individual, capable of a normal social life, as far as possible, respecting the right to be different. Complete rehabilitation includes plenty of complementary measures that contribute to the physical and psychological independence of the disabled child.

Furthermore, on the universal level, the UN Convention on the Rights of Persons with Disabilities (2006) – recognising the importance of accessibility to the physical, social and cultural environment, to health and *education* and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms – provides that in realising the right to education,[62] states parties shall ensure that persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability.[63]

Schooling, ie education of the disabled child, must be adapted to the level of disability and individual needs, therefore each state, on the national level, prescribes programmes, conditions, the manner and procedure for enrolment and education of the disabled child as a student.

The fact that 10% of the world's population (according to the research of the World Health Organisation) has some form of disability, as well as education being one of the necessary factors for their integration, has had its impact on domestic legislative structure. Education enables wider involvement of disabled children into regular systems of education and hence into society, where every child should develop according to their own capacities. Mentally disabled children can be involved in certain segments of their environment and under certain conditions, and for all the children with special needs it is necessary to provide adequate programmes and experts who can work with them in regular schools.[64]

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education, employment, social integration, social, economic and legal protection, training individuals included in the process of rehabilitation and social integration of the disabled persons, information and research.

62 See UN Convention on the Rights of Persons with Disabilities, from 6 December 2006. Which enters into force 30 days after the 20th country ratifies the treaty, available at: www.un.org/disabilities/convention/conventionfull.shtml.

63 See Art 24(2)(a) of the UN Convention on the Rights of Persons with Disabilities.

64 The main topic of the twelfth session of the Sub-committee for the Right of the Child of the Serbian Parliament, held on 3 July 2006, was concerned with the importance of the education of children with special needs in Serbia. Research conducted in five regular and ten special schools in Belgrade produced the following results: of all the children from regular schools included in the research, 25% had some disorder in pronouncing sounds, 8% to 25% had difficulties with writing, 30% to 40% had motoric disorders, 26% to 30% had hearing impediments, and between 10% and 20% of the children had behavioural impediments, available at: www.parlament.sr.gov.yu/content/lat/aktivnosti/skupstinske_detalji.asp?Id=1106&t=A.

(b) Serbian law

In Serbia, a complete system of education is standardised by the Act on Bases of the System of Education and Upbringing, as a basic Act, in which the disabled children, of any kind and category, are treated equally with other children in the eyes of the law. In other words, disabled children are provided with the ability to attend school and be educated according to their capacities. This is provided in the provisions of this system law as well as in the provisions of the Act on Primary School and the Act on Secondary School. Upbringing and education are conducted in pre-school, primary school and secondary school in accordance with the level of development and age of the child, and equal opportunity for education of disabled children.[65] In our system of education disabled children and young children have the opportunity to be educated in pre-school (kindergartens),[66] regular primary and secondary schools, colleges and universities, as well as in special institutions where programmes and methods are adapted to groups with respect to their disability, that is, in schools with programmes for children with disabilities adapted for physical and psychological development and in special institutions.

Education in primary schools for disabled persons implies education and upbringing that recognises their special needs.[67] Primary schools have a school curriculum, and can also have a curriculum adapted for students and adults with development impediments (Art 30, para 2 of the Act on the Bases of the System of Education and Upbringing). According to the Act on Primary School, the disabled child enrols in the school based on the resolution that states the type and level of disability (children with physical and hearing impediments – physically disabled, blind and poor sighted, deaf and hard of hearing children; mentally challenged children – slightly, moderately, more seriously and seriously challenged children; children with multiple disabilities – with two or more disabilities, autistic children). Primary education of the disabled children lasts up to 9 years and is conducted in accordance with the school curriculum in primary schools or with a special curriculum.

According to Art 11, para 1, item 3 of the Act on Secondary School, civil rights of general interest in secondary education and upbringing also include secondary education, education and training for work of regular disabled students. The school curriculum for disabled students is made for every form and level of disability. The school for disabled students accepts its students

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[65] See Art 2, para 2, items 4 and 5 of the Act on the Bases of the System of Education and Upbringing of the Republic of Serbia.

[66] At pre-school age, the disabled child (based on the findings and opinions of the Committee for categorisation on form and level of their disability) can attend development groups in regular kindergartens or pre-school classes in special institutions.

[67] According to Art 3, para 1 of the Serbian Act on Preventing Discrimination Against People with Disability, 'Official Gazette of RS' no 33/06, the term 'people with disability' denotes individuals with inborn or acquired physical, sensory, intellectual or emotional impairment who, due to social and other obstacles, do not have the ability or have limited ability to be involved in social activities at the same level as others, regardless of the fact that they can or cannot perform those activities with the aid of technical devices or support services.

based on the resolution that states the type and level of disability, and the municipality in accordance with the law makes this resolution, which is then the base for determination of the student's professional orientation.[68] For the correct and full implementation of the legal provisions in this field, the Centre for education of persons who need special social support (disabled persons, persons with mental impediments, with acquired disability, physical disability) was formed, and it conducts professional work regarding planning and coordinating activities with respect to their education and professional training.[69] This, in effect, confirms the intention of the legislator to prevent discrimination in upbringing and education of disabled children at all levels.[70] Based on what has been stated so far, we can conclude that the position of disabled children in the educational system of Serbia is regulated by numerous Acts. These Acts are a great, but not sufficient, factor in the children's full integration into society, because they do not treat integrated education as a general principle. Systematic measures have still not been taken to ensure the adaptation of educational curricula and educational processes in regular institutions to the needs of disabled children.

(c) Inclusive education of the child with special needs

As the general system of education does not satisfy needs of the disabled children, most often, the children and their parents turn to special educational institutions. Therefore, in the past few years there is great promotion of so-called inclusive education, which will be the main component of the Program for the Reform in Education,[71] the basic aim of which is to include all children, as much as possible, in regular schools, regardless of their physical, social, emotional, linguistic and other abilities.[72] The inclusive model means expanding social boundaries through accepting all its members without

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[68] See Art 4, para 4 of the Act on the Bases of the System of Education and Upbringing.

[69] See Art 39 of the Act on Secondary Education.

[70] See Art 25 of the Act on the Bases of the System of Education and Upbringing.

[71] In that respect, on 13 February 2007, the Serbian Ministry of Education and Sport, based on the Cooperation agreement with the organisation Save the Children, and as part of the project 'Moderating Effects of Poverty on Children with Special Needs in Serbia', invited a second tender for submitting proposals that promote inclusive education in Serbia. General priority of the tender is offering support to projects that develop models of inclusive education of disabled children. Furthermore, the Ministry of Labour, Employment and Social Policy monitors and supports the reformatory process of the Serbian Government in forming a legal framework that will improve the status of disabled persons through adoption of the Strategy for Improvement of Life of the Disabled Persons.

[72] In June 2005 the Center for Development of Inclusive Education was formed in Belgrade as a non-government organisation, with the idea to create projects that will influence the exercise of full integration of disabled persons through respect for human rights and through their free education of choice. The traditional medical model views the heart of the problem in the very disability of the disabled person, but the new model implies that the essence of the problem is social environment. The social model promotes integration of the disabled persons, since including such a person into their social community leads towards erasing differences among people, available at: http://www.crid.org.yu. CRID is the abbreviation for Center for Development of Inclusive Society (centar za razvoj inkuzivnog drustva) and their website is about organizations, events and activities in that area.

barriers, while also preserving a person's identity. Implementation of inclusive education means fulfilment of numerous conditions: children's ability, school equipment, educated teachers, parents and experts, but also the reform of legislation concerning the education and upbringing of disabled children.[73]

New development guidelines for the system of education of children with special needs demand a change in the concept of the educational needs of the child and the transfer from integration to inclusive upbringing and education of children with special educational needs. We should state that the change is not only in terminology, but in content, too. As integration most often means placing a child with special education needs into a regular institution from which it was excluded and the tendency of society to adjust the child to some average result in order to facilitate inclusion in the regular system of education, full integration of an individual depends on their participation in social processes and institutions with average results. Likewise, without average results in education, there is no full integration in society. As opposed to integration, inclusive education means forming such a system of education and upbringing that removes the obstacles that prevent optimal development of the potential of all children, including those with special needs, by promoting the child's individual needs, co-operation with the child and the parents, and active inclusion of the education staff into the development of the inclusive process. When including the disabled children into regular institutions, it is necessary to know and respect basic principles of inclusive educational process:

(a) a positive attitude towards differences;

(b) the right of the child to be with peers;

(c) all children and parents must be treated with respect;

(d) creating educational conditions that enable taking into account individual needs of the children, that is, flexibility and adjustment to differences, or education according to a flexible curriculum;

(e) collective responsibility of all the experts;

(f) professional training of the experts in school; and

(g) taking into account optimal educational needs of each individual child.[74]

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[73] See B Medenica *Pred vratima elektronske inkluzije* (At the Door of Electronic Inclusion), available at: www.defektologija.net. At the moment, whilst at the start of this complex process, Europe has new ideas. The plan of the European Commission is to have electronic inclusion by 2010. The development of the information society, although marked as a positive movement, introduces digital separation for persons with special needs. In that respect, the concept 'design for all' and the concept 'assisting technologies' offer applicable solutions for accessibility in the digital world.

[74] See M Kavkler *Odgoj i obrazovanje djece sa posebnim potrebama* (Upbringing and Education of Children with Special Needs), available at: www.see-educoop.net/education_in/pdf/educ_children_with_spec_needs-slo-bsn-t07.pdf.

Inclusive upbringing and education of children with special educational needs demand conditions that various institutions and individuals must fulfil: all bodies on regional and local levels, professional advisers and, finally, society as a whole.

V CONCLUSION

The right to education is one of the basic and most important development rights of the child, but at the same time, it is the pre-condition for the development of every society. Between the child and society the two most important factors are family and school. Education is, from the moment of birth, under the influence of various factors. However, family and school are the institutions that have the greatest responsibility for the child's education. It is the right and duty of the parents to provide for their child's education. Serbian legislation implies the parents' responsibility for the intellectual upbringing of the child, too. Parents have the duty to secure primary education for their child, and with respect to the child's further education, they fulfil this obligation according to their abilities and in accordance with the child's capacities, inclinations and wishes. Despite the fact that the right to education is the right that primarily belongs to the child, the role of the parents in exercising this right is great. In that respect, we can conclude that, although the right to education is an authentic right of the child, in its exercise, the parents have the crucial role, because it depends on their decision as to what kind of education is in their child's best interest. Therefore it seems that we cannot decisively state that the right to education is solely the right of the child.

Sierra Leone

DEVELOPMENTS IN SIERRA LEONEAN FAMILY LAW IN 2007

Lotta Teale[*]

Résumé

Pendant la course aux élections d'août 2007, d'importantes améliorations ont été apportées en Sierra Leone à la condition juridique des femmes et des enfants. Le 7 juin 2007, la Parlement adopta le Projet de loi sur les droits de l'enfant qui était longuement attendu. Le 14 juin 2007 le Parlement a adopté, après seulement une journée de débats et avec un «certificat d'urgence» présidentiel, trois projets de lois s'intéressant à l'égalité entre hommes et femmes: la *Loi sur la violence familiale*, la *Loi sur l'enregistrement des mariages coutumiers et le divorce* et la *Loi sur la dévolution des immeubles*. Ces trois lois changent considérablement le droit de la famille de la Sierra Leone. En 2007, le pays se retrouvait au dernier rang tant de l'Index de développement humain (IDH) que de l'Index genre et développement (IGD) du Programme des Nations Unies pour le développement (PNUD). À condition qu'elles soient correctement mises en œuvre, ces législations devraient améliorer considérablement la situation des enfants et des femmes en Sierra Leone.

Ce texte présente la nouvelle législation en matière de violence familiale, de transmission successorale immobilière et de droits de l'enfant; il les compare aux anciennes législations afin d'en mieux saisir les conséquences. Le présent texte situe aussi ces lois par rapport aux autres instruments juridiques, incluant la Constitution et les pratiques coutumières. Cet exposé s'arrête par ailleurs au processus qui a mené à l'adoption des projets de lois et il met en lumière quelques-uns des défis que posera leur mise en œuvre.

I INTRODUCTION

In the run up to the Sierra Leonean Presidential and Parliamentary elections in August 2007, considerable advances were made to the legal position of the country's women and children. On 14 June 2007, the Sierra Leone Parliament passed three 'gender bills', the Domestic Violence Bill, the Registration of Customary Marriage and Divorce Bill and the Devolution of Estates Bill into law. On 7 June 2007, Parliament also passed the long awaited Child Rights Bill into law. Together, the new Acts could completely transform family law in

* Lotta Teale is a barrister with a door tenancy at 14 Gray's Inn Square Chambers, London. She worked with a coalition of women to bring the legislation through Parliament and is now working with the same coalition to implement the legislation.

Sierra Leone. In 2007, the country was placed, once again, at the bottom of both the UNDP Human Development Index and the Gender-related Development Index.[1] If properly implemented, the new Acts should help to radically improve the position of women and children in Sierra Leone.

A variety of factors contributed to the enactment of this legislation. It built on years of lobbying from International non-government organisations (NGOs) and pressure from donors. Indeed women's rights activists in Sierra Leone have been advocating for such laws since independence in 1961. The Government of Sierra Leone had signed and ratified the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1988, and adopted the Convention on the Rights of the Child (CRC) in 1989. Since then, neither had been domesticated as required by Sierra Leone law, and little progress had been made to implement their provisions. UNICEF had been championing the Child Rights Bill for many years, as a means of domesticating the CRC, and was the main actor in getting that Act through.

The three 'gender bills' were drafted back in 2004 with support from UNDP, but several different drafts had been written by various government bodies, and the dispute over which was to go forward had brought the process to a standstill. Their progress in 2007 was largely the result of strategic lobbying and material, technical and legal support by a small coalition of women from various NGOs.[2] The campaign took advantage of the outgoing President Kabbah's desire to leave a legacy: indeed, without his issuing a certificate of urgency requiring that Parliament undertake all three readings in just one day, the Bills would never have got through, as Parliament disbanded just 2 days after their passage. The campaign also benefited from a very close election campaign where 48% of the registered voters were female. A few hundred women were brought to Parliament, dressed in white, to exert pressure on MPs, and banners were put up across the headquarter towns for the attention of passing politicians canvassing votes. By the time of the parliamentary debate all sides were championing the legislation as it was threatened that women would not vote for any party that rejected the Bills. The election itself was won on a knife edge and, to the surprise of many in Sierra Leone and outside, the results saw a new government coming to power, in an unprecedented peaceful transition.

In the rush to pass the legislation, however, there have indeed been some clerical errors, some significant, and the new government will now be tasked with making amendments. The Registration of Customary Marriage and Divorce Act, for example, fails to integrate any of the amendments made by

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1 The Gender-related Development Index is a composite index measuring average achievement in basic dimensions of living standards covered in the human development index, adjusted to show inequalities between men and women. See http://hdrstats.undp.org/countries/data_sheets/cty_ds_SLE.html.

2 The Coalition on the Gender Bills comprised individuals representing the International Rescue Committee, Action Aid, Grassroots Empowerment, the Sierra Leone Court Monitoring Programme, Oxfam and the United Nations Integrated Office for Sierra Leone.

Parliament. This makes a significant difference to the contents of the Act, in many ways undermining its whole purpose (for example, one of the major provisions was introducing a requirement of consent and minimum age for marriage and, although adopted by Parliament, this is not contained in the version that went to the President for assent) and as such at this stage it is not worth going into its provisions until corrections are made.

This article therefore presents the new law on domestic violence, intestate succession and the rights of the child, and sets these against the old law, showing the implications of the new legislation. It also sets the new legislation within the framework of other laws, including the Constitution and customary practice. It will start with a brief background to the recent conflict in Sierra Leone and how women and children were affected.

II BACKGROUND: THE CONFLICT AND FAMILY LAW

The civil war in Sierra Leone, from 1991 to 2002, saw horrendous atrocities committed against civilians on a massive scale. According to the report of the Truth and Reconciliation Commission (TRC) for Sierra Leone, while all sections of society suffered abuse, women and children were singled out for some of the most brutal treatment recorded in any conflict. The TRC report found that women were killed, raped, forced into marriage and sexual slavery, tortured, amputated and mutilated, forcibly recruited into the various factions, forcibly impregnated and sterilised, trafficked and forced into cannibalism.[3] Girls between 10 and 14 were particularly targeted for all forms of sexual abuse. The conflict in Sierra Leone became notorious for the forcible recruitment of children into the various armed factions. Children were compelled to kill, both their own family and then others, and were killed, drugged, tortured and forced into slave labour. Children were both the victims and perpetrators, conditioned to accept violence as the norm and commit unspeakable atrocities against others.[4]

Women and children were targeted in this way during the war not least because of the way they were treated in times of peace before the conflict. The sexual exploitation of young girls, for example, was in many ways an extension of the normal practice of marrying young girls without their consent to much older men. Women and children were also very vulnerable economically, and as such open to exploitation, not least because customary law in many places prevents women from entering into contracts, inheriting or owning property. Indeed, the state of the customary family law is also cited as one of the root causes of the war. Because married women were not, in many places, entitled to own property when women were ejected from the marital home on their husband's death or when husbands expelled their wives after a relationship breakdown,

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[3] *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, 2004, Vol 2, Chapter 2, 'Findings', 100–106.

[4] Ibid, 96–100.

women and children frequently found themselves on the street and with no means of support, and no standing in law to require better treatment. This caused young people to feel alienated from their communities, inspiring them to join armed factions. Yet, until June 2007, these laws had not changed.

III THE CONSTITUTION AND THE DIFFERENT TYPES OF LAW IN SIERRA LEONE

Such discriminatory laws are permitted by the Constitution of Sierra Leone. According to the Constitution, discrimination is prohibited except in matters relating to 'adoption, marriage, divorce, burial, devolution of property, on death or other interests of personal law' and in situations where customary law applies.[5] As such, even though the new laws have been passed, discriminatory customary practices can continue: for now, both laws will apply in places where customary law applies, although the new Acts will take precedence.[6] There has recently been a review of the Constitution by a specially formed Constitutional Review Commission, which in April 2007 recommended the abolition of the relevant sections, such that discriminatory practices will no longer be permitted.[7] There must be a referendum on changes to the Constitution, and it is envisaged that this will take place during the local elections in mid-2008. It is hoped that after this the exemption will no longer apply. However, the recent referendum on the Constitution in Kenya, in which voters rejected reform on the basis of the provisions it was seeking to introduce on gender equality, is a warning to activists in Sierra Leone as to how debates running up to the referendum might develop.[8]

Three different types of law operate in Sierra Leone relating to family matters, namely common law, Muslim law and customary law. Common law dominates in Freetown and other urban areas, and is adjudicated before the formal court system. Muslim law is of limited scope but applies to marriage and inheritance, as set out in the Muslim Marriage Act 1960. Customary law applies throughout most of rural Sierra Leone, is unwritten, and varies from place to place and by tribe.[9] It is applied by respected members of the community and chiefs, and in local courts. However, common law also applies throughout Sierra Leone, and pursuant to the Local Courts Act 1963, appeal from local courts is to the Magistrates' Courts, in which common law applies.[10]

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5 See Constitution of Sierra Leone 1991, s 27(4)(d) and (e).

6 See the Local Courts Act 1963.

7 'Preliminary Report of the Constitutional Review Commission', Constitutional Review Commission, Freetown, March 2007, 19–20.

8 See United Nations Committee on Elimination of Discrimination against Women, 'Report of Chamber B, 799th & 800th Meetings', 27 July 2007, at www.un.org/News/Press/docs/2007/wom1644.doc.htm.

9 See J Smart *Customary Family Law in Sierra Leone* (Fourah Bay College Bookshop Ltd, Freetown, 1983).

10 Alterman, Binienda, Rodella and Varzi, 'The Law People See: The Status of Dispute Resolution in the Provinces of Sierra Leone in 2002', National Forum for Human Rights, Freetown, 2003, 9–11.

In practice, very few family law cases come before any form of court: the vast majority are mediated within the family or go before chiefs. The most frequent type of family case brought before local courts involves disputes over inheritance. The speed and expense in taking other types of cases are prohibitive, especially because women often only have access to cash through their husbands.[11] It is therefore important that the new legislation is embedded into the much-used informal dispute resolution systems, and that all those adjudicating or mediating disputes are aware of the new provisions. In the coming months and years extensive efforts will be made to educate such people about the new legislation, and encourage them to see that it is in the interests of community harmony to implement it.

IV THE DOMESTIC VIOLENCE ACT 2007

Until June 2007, domestic violence was prosecuted under the Offences Against the Person Act 1861, and there were no civil measures available to protect victims. In practice, domestic violence was and is considered, at best, a private family matter, to be resolved within the family and at worst, a normal and acceptable part of family life. In customary law, domestic violence is lawful if it is 'reasonable', which means that a husband can 'beat (his wife) but not to the extent of wounding her'.[12] There is a traditional saying that states 'she was not given you to beat her like a drum'.[13] As such there is already a culture of domestic violence being wrong in essence.

Some progress seemed to be made in 2001, when the government established special 'Family Support Units' (FSUs) within the Sierra Leone Police to handle family matters; a positive indication that family disputes were now being taken more seriously. However, the FSUs have suffered from little financial or, until now, legal backing. Domestic violence constitutes by far the most frequently reported type of incident.[14] Despite this, hardly any prosecutions are brought and those that are, are generally unsuccessful: in 2006, across the whole of Sierra Leone, only one conviction was obtained for an incident of domestic violence.[15] In practice, officers have been forced to mediate even the most serious of cases. Officers express dismay that all they can do is call up the husband, ask him to accept his wife back, and send the woman back to the same violent situation from whence she came, now often aggravated by the fact that the woman has got outsiders involved.[16] Blame for domestic violence is

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[11] Interview with Paralegals at Timap for Justice, Magburaka, Northern Province, Sierra Leone, May 2007. Timap for Justice is a non-profit organisation providing free justice services across Sierra Leone. See Lotta Teale, 'An evaluation of the way that Paralegals at the Timap Programme in Magburaka, Sierra Leone, deal with family cases', Timap for Justice, August 2007.

[12] J Smart *Sierra Leone Customary Family La* (Fourah Bay College Bookshop Ltd, Freetown, 1983) 108.

[13] Interview with Paralegals at Timap for Justice, May 2007.

[14] Unpublished statistics provided by the FSU, Police Headquarters, Freetown, February 2007.

[15] Ibid.

[16] Interview with FSU staff member, Police Headquarters, Freetown, February 2007.

often heaped solely on the survivor, who is generally shamed and stigmatised for reporting incidents and may be divorced by her husband or disowned by her family for doing so. Yet unless there are family members on whom she can rely, the only option for a woman leaving a violent home is usually to take to the streets, as there are no emergency care homes. Compounding this, there is a traditional saying that a woman's children will be blessed if she endures suffering in her marriage.[17] As such, in addition to the financial difficulties, there is enormous cultural pressure not to leave the family home.

The Domestic Violence Act 2007 makes it an offence to commit domestic violence, and introduces civil measures to try to prevent it and protect victims. Domestic violence is defined very broadly to incorporate physical or sexual abuse, economic abuse, emotional, verbal or psychological abuse, harassment and intimidation, and conduct that is harmful and endangers safety, health and well-being, or undermines a person's privacy, integrity or security, or detracts from a person's dignity.[18] The definition was kept wide because it was felt that otherwise judges might try to restrict its application, but the definition as passed is likely to cause considerable uncertainty.

During the parliamentary debates, a female MP expressed concern that refusal to have sexual intercourse with one's partner should constitute domestic violence, and there was general agreement about this point, and so, as a compromise, the definition was amended to incorporate acts or omissions.[19] It is hoped that it will never be used to prosecute on such a basis. Importantly, marital rape would clearly constitute domestic violence under the definition of sexual abuse.[20] This was not something discussed by Parliament in reading the bill, and yet is something which one would expect to be very controversial indeed in Sierra Leonean society. It will be interesting to see whether any successful prosecutions can be brought for this over the coming years.

Domestic violence can only take place in a domestic relationship, which is also defined broadly. A domestic relationship incorporates not only marriage, cohabitation, courting couples, etc but also protects other types of family members, co-tenants, home-helps, and people attending care institutions under the care of the offender.[21]

The court can deal with domestic violence in a number of ways. Wherever the incident is not aggravated, and if the complainant consents, the court can refer the case for settlement.[22] Alternatively it can prosecute. The Act also introduces protection orders to prohibit respondents from committing or threatening to

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17 Ibid.
18 The Domestic Violence Act 2007, s 2.
19 Unpublished notes taken during the Pre-Legislative Session on the three bills, Sierra Leone Parliament, Freetown, 11 June 2007.
20 The Domestic Violence Act 2007, s 1.
21 Ibid s 3.
22 Ibid s 20.

commit domestic violence.[23] The Act is framed widely so that respondents can also be prohibited from causing others to commit domestic violence, and protection orders can be sought against such other persons. This seeks to address a common practice in Sierra Leone of a husband inciting other family members to abuse his wife.[24]

Protection orders may be used, inter alia, to oust an abusive partner from the home, and to require them to continue paying for the upkeep of the home and maintenance for the partner and her child. With a weak policing system, and general community tolerance of domestic violence, together with assumptions about the proper distribution of roles and property within the family, and the private nature of family matters, the implementation of protection orders ousting a man from the home will be very difficult to enforce indeed. In a country where, furthermore, roads are very poor and communication systems weak, for the time being enforcement in rural areas is likely to be virtually impossible.

More positively, the Act introduces a requirement that victims be provided with medical care and medical certificates free of charge, and that police assist victims to a place of safety if necessary.[25] Although such provisions will be difficult to ensure at first, they should act to strengthen the argument to prioritise such services in budgetary allocation.

Despite the hurdles to implementation, the new Act represents a landmark for family relations in Sierra Leonean society, and will be an important step from which to embark on changing the prevalent culture of impunity towards domestic violence. One of its most important practical ramifications is likely to be in strengthening the position of victims by introducing the ability to threaten legal proceedings in the course of mediation. As one paralegal noted, it adds weight to argument when the perpetrator catches sight of a pair of handcuffs.[26]

V THE DEVOLUTION OF ESTATES ACT 2007

The Devolution of Estates Act is likely to be the most extensively litigated as it will substantially change the prevalent male domination of property ownership. In a society where most property is inherited, this Act could potentially have very far reaching effects. The new law deals with distribution of property when a person dies intestate, and occasions when unreasonable provisions in a will can be changed to provide for dependants.

Although wills can be drawn up, to which the United Kingdom Wills Act 1837 applies, most people in Sierra Leone die without leaving a will. Property is

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[23] Ibid s 10.
[24] Interview with Yasmin Jusu Sheriff, Human Rights Commissioner, Freetown, May 2007.
[25] The Domestic Violence Act 2007, s 7.
[26] Interview with paralegals at Timap for Justice, May 2007.

usually distributed according to the Administration of Estates Act 1960, Muslim law or customary law. Until the enactment of the new legislation, the Administration of Estates Act provided that, while 100% of a woman's estate went to her husband, only 30% of a man's estate would go to his wife. Section 9 of the Muslim Marriage Act provided that if any party to a Muslim marriage died his or her estate was to be distributed in accordance with Muslim law, but no rules were provided on distribution. Under Muslim law, women are not allowed to administer estates: as such male relatives usually distribute property between themselves. Customary law varies, but normal practice is for a man's male relatives to take all of his property, and if the wife seeks to retain an interest in it she must marry one of her husband's relatives, a practice known as 'widow inheritance'. In many places, because women are not entitled to keep property acquired during the marriage, widows have no right to keep property built up in the course of the marriage.[27] Men and women across all sections of society have been personally affected by these laws as children, not least as a result of the low life expectancy and the practice of women marrying much younger than men: as such there was considerable support for legislative reform.

The new Act provides that men and women inherit equally from each other. Broadly, the new Act shifts the flow of inheritance from being passed on to the deceased person's extended family, towards the wife (or wives) of the deceased and any children. The Act provides that the surviving spouse(s) will be entitled to personal chattels and the family home, and it becomes an offence to eject them. The remainder of the estate is divided between the various family members, by percentage of property. This will in practice be very difficult to calculate given that most property is in kind. It will be up to wives to distribute the property, as they will now be responsible for administering estates.[28] Where there are multiple wives they will all be entitled to inherit, although their inheritance will depend on how long they were married to the deceased and how much they each contributed to the marriage.[29] This provision is particularly popular among women, many of whom express concern that older women are often marginalised when a husband chooses a new young wife. There is considerable fear about the precarious position in which women find themselves as they get older, and this Act moves to provide greater security at this vulnerable time. The Act also defines 'spouse' broadly so that property devolves between unmarried couples as if they were married, providing they have lived together for at least 5 years and neither are married to another person.[30]

As with the other Acts, it remains to be seen how its provisions will be implemented. According to the Act, all disputes must be settled before the High Court, which is likely to be highly restrictive, especially in rural areas. The court

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27 J Smart *Sierra Leone Customary Family Law* (Fourah Bay College Bookshop Ltd, Freetown, 1983) 108.

28 The Devolution of Estates Act 2007, s 3(2).

29 Ibid s 6(2).

30 Ibid s 2.

system is notoriously slow and expensive: it was recently documented that to enforce a contract in Sierra Leone it takes on average 515 days, with 58 procedures and the cost of bringing an action is on average 227.3 times the amount of the debt.[31] As such, the focus of implementation strategies will be on education and resolving issues as far as possible before recourse to court.

VI THE CHILD RIGHTS ACT 2007

The position of children in Sierra Leone is also notoriously weak. Almost half of all children aged 5–14 are engaged in some form of child labour, with regional disparities (in urban areas 27% are employed as opposed to 57% in rural areas).[32] About 11% of children are orphans and 20% do not live with their biological parents.[33] Sexual abuse of children remains a serious concern, with a rape crisis centre in Freetown recording that from January 2006 to July 2007, 57% of cases reported involved abuse of girls aged 11–15, 19% involved girls aged 6–10, and 6% involved girls aged 0–5.[34]

Unlike the new Acts discussed above, the Child Rights Act follows much more closely the specific provisions of the international obligations adopted by Sierra Leone, particularly the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, and seeks specifically to implement them. It is a far-reaching Act, dealing with areas as varied as employment, criminal responsibility and parental and state responsibilities. It establishes various new bodies tasked with protecting children including new 'family' courts specifically for dealing with matters relating to children. It also introduces the principle of the best interests of the child as the primary consideration to be applied throughout.[35]

The Act sets out a series of rights to which a child is entitled.[36] These include, inter alia, a right to life, health, education and shelter, the right to a name and nationality, to grow up with parents, and to be protected from involvement in armed conflicts. Somewhat disappointingly, while children are to be protected from cruel, inhuman or degrading treatment or punishment, corporal punishment is forbidden only if it is 'unreasonable', or if the child is incapable of understanding the purpose of the punishment.[37]

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31 *Government of Sierra Leone Justice Sector Reform Strategy 2008–2010*, Freetown, November 2007.

32 Multiple Indicator Cluster Surveys (MICS), UNICEF, 2005.

33 Ibid.

34 See Rainbo Programme Updates for January 2007, May 2007 and August 2007, Produced by the International Rescue Committee, Freetown.

35 The Child Rights Act 2007, s 3.

36 Ibid Part III.

37 Ibid s 33.

The Child Rights Act complements the new gender legislation by introducing a minimum age of 18 for marriage and a requirement that both parties consent.[38] Forcing someone to marry is made a criminal offence.[39] This is likely to be controversial in practice in a country where girls are generally considered marriageable from puberty, and the majority in rural areas are currently already married by the age of 18. Families are often keen to marry off their daughters young so as to avoid any shame that may be brought on them through early pregnancies.

Notably the Act does not prohibit the practice of female genital mutilation (FGM). It is estimated that 90% women in Sierra Leone have undergone FGM.[40] While there was strong external pressure to incorporate such a clause, much of the parliamentary debates on the Child Rights Act focused on this issue, and there was strong opposition to such a section. Seeing the controversy surrounding the clauses in the Child Rights Bill, draftspersons working on the gender bills omitted references to FGM, in a pragmatic effort to push the legislation through at this opportune time. While disappointing to many international onlookers, this omission represents only a minor setback for most national activists, given the significant progress in many other areas.

The Child Rights Act represents a much needed step towards making fathers responsible for their children. Previously there were (long outdated) restrictions on the maximum amount that parents could be ordered to pay in maintenance cases, causing those trying to settle disputes to do their best to conceal the state of the law from fathers.[41] Now maintenance will be awarded appropriately according to the circumstances of the case. Moreover, maintenance cases will no longer have to be taken to the High Court, a requirement that previously made enforcement of maintenance agreements next to impossible, but will instead take place in the new 'family courts'.[42]

The Act also makes extensive provisions on child protection, including the introduction of care and supervision orders, and provisions regulating public care institutions and foster care. Given the immense expense of bringing care proceedings in any country, there is scope for pessimism at the prospect of operating formal proceedings in the country with the lowest standard of living in the world, where the Ministry responsible is notoriously the weakest government ministry. In 2006, the Ministry of Social Welfare, Gender and Children's Affairs was allocated a total of just over $500,000 USD, the smallest budget of any ministry, despite the breadth of its mandate, which encompasses

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38 Ibid s 34.

39 Ibid s 35.

40 'We'll Kill you if you Cry: Sexual Violence in the Sierra Leone Conflict', Human Rights Watch, January 2003, Vol 15 No 1(A), 24.

41 Interview with family case workers at the Ministry of Social Welfare, Gender and Children's Affairs, New England, Freetown, February 2007.

42 The Child Rights Act 2007, s 91.

all matters relating to children, women and the protection of the vulnerable.[43] The Act seeks to address this by reinstating and formalising the role of communities in taking responsibility for matters of child welfare, including adjudication, assessment and monitoring of placements, under the overall responsibility of the Ministry.

VII CONCLUSION

The enactment of the new laws is a laudable and promising effort towards improving the position of women and children in Sierra Leone, and bringing about greater equality within the family. Together they make significant headway into making the rights and provisions contained in CEDAW and the CRC enforceable in court. At the same time the new legislation is also likely to provoke considerable disharmony in relationships as hierarchies are threatened, arousing resentment and potentially worsening levels of violence. Already there are reports that certain groups are taking exception to particular provisions.[44] The way in which the new laws are conveyed and enforced will be key.

Weakness in the formal legal system will remain a problem for years to come, and those working on implementation argue that the focus must necessarily be less on enforcement through formal institutions, and more on education and community level dispute resolution mechanisms.[45] Implementation has been mainstreamed into a 3-year nationwide Justice Sector Reform Strategy designed by the Justice Sector Development Programme on behalf of the Government of Sierra Leone.[46] It has also been incorporated into the framework of the United Nations Peacebuilding Commission, which started work in Sierra Leone in 2007.[47] A nationwide action plan is being developed, incorporating the various relevant government bodies, NGOs and the donor community, supporting and bolstering the Ministry's efforts. NGOs and the international development agencies have been critical in moving these laws forward so far, and it is vital that the new government engages properly and fully with them, taking advantage of the support they can offer. It is also essential that the various bodies work together rather than competing for resources and duplicating projects, with resultant gaps and limited evaluation of impact.

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[43] Ministry of Finance statistics, May 2007. See *Government of Sierra Leone Justice Sector Reform Strategy 2008–2010*, Freetown, November 2007, 89.

[44] In September 2007 there were media reports in Freetown of certain groups of Muslim men objecting to the new legislation. Some Christian women are also uncomfortable with the provisions on cohabitation, as raised in a workshop with the Council of Churches for Sierra Leone, Freetown, May 2007.

[45] Discussions with Jamesina King and Yasmin Jusu Sheriff, Human Rights Commissioners, and Amie Kandeh of the International Rescue Committee, interviewed for the purposes of providing input into the Justice Sector Reform Strategy, Freetown, November 2007.

[46] The Justice Sector Development Programme is a 5-year project run by the British Council and funded by the Department for International Development.

[47] *Sierra Leone Peacebuilding Cooperation Framework*, Consultation Draft, Peace Building Commission, 13 November 2007.

With the legislation only recently passed and the new government just into power, there is presently considerable momentum. While this lasts, pressure will also be exerted to complete the framework of laws relating to women and the family: a draft sexual violence bill and another regulating divorce and matrimonial property have yet to be enacted. But, although important to grasp while there, momentum will fade. Only through sustained and truly committed efforts, particularly on the part of the Government, can a change in the law filter down, and only then will it have any meaningful impact on the lives of women and children across the country.

Full texts of the new legislation can be found at www.sierra-leone.org/laws.html.

Slovenia I

THE REFORM OF SLOVENIAN FAMILY LAW: PROPERTY RELATIONS BETWEEN SPOUSES

*Viktorija Žnidaršič Skubic**

Résumé

La réforme du droit familial slovène se réalise par étape depuis quelques années et l'actuelle *Loi sur le mariage et sur les relations familiales* de 1976 sera incessamment remplacée. Le nouveau projet de loi est actuellement en gestation et il devrait aboutir à la création du *Code de la famille*. Le présent article expose le nouveau droit patrimonial conjugal et plus particulièrement le droit des régimes matrimoniaux. Le nouveau Code apportera, en effet, certains changements fondamentaux à ce chapitre. Si la réforme est adoptée, les couples de la République de Slovénie pourront désormais faire un contrat de mariage et choisir leur régime matrimonial, ce qui jusqu'à ce jour leur est interdit puisque les époux sont soumis au seul régime légal obligatoire de la communauté de biens.

I INTRODUCTION

The following dilemmas always arise when an existing, valid legal system is being altered: how to reach the set goal and how to improve the existing condition with which we are (obviously) unhappy. There are always several possible methods and ways: some advocate a gradual approach (the so-called evolutionary approach) while others call for revolutionary procedures. Some want a solution that would attune the law to the existing social situation and others think the law should dictate positive guidelines for society's development. Every time we have a chance to take part in a legislation project we are faced with a significant challenge of how to balance the various justified options and at the same time take into account, or at least tolerate, different interests of various stakeholders. In my opinion, this process is not only a work of science, but also a work of art.

Reforming the family legislation in Slovenia has been taking place over recent years in, we could say, small and gradual steps.[1] Partial solutions and

* Assistant Professor, Faculty of Law, University of Ljubljana, Slovenia.

1 See Zupančič Karel and Novak Barbara *Marriage and Family Relations Act* (Zbirka predpisov) (Ljubljana: Official Gazette of the Republic of Slovenia, 7th edn, 2004) 11–105.

amendments to the Marriage and Family Relations Act[2] will, it seems, soon be superseded by a new law.[3] The bill, entitled the Family Code,[4] is currently with the government and is expected to be sent to Parliament soon.[5]

Foretelling the passing of such an Act, as well as its final contents (and title), is of course a risky proposition but I nevertheless believe it makes sense to reveal to the expert public the basic problems *de lege lata* and their solutions *de lege ferenda* in the Republic of Slovenia. Namely, some revolutionary novelties can be found in the proposal of the Family Code regarding property relations between spouses.

The source of problems in the current Slovenian family law legislation in the area of property relations between spouses lies in the fact that the core of the legislation originates from the time when Slovenia was part of the so-called socialist world. The socialist social order, which was (formally) abolished by the passing of a new Slovenian Constitution,[6] left its mark on nearly all areas of an individual's life and activities. Family law was, of course, also adjusted to the regime and 'served' it. The problems of general civil law and its sphere of property relations were mainly manifested in the transformations and adjustments of several basic, traditional property law institutes and principles to the content and values of the socialist order. Private property was no longer a fundamental value that should be given the highest legal protection, while its social consequence, the so-called 'social property', gained in importance and was protected above all. Today, 'social property' is no longer present in Slovenia, and the Slovenian Constitution uses the traditional (capitalist) notions of property rights and ways to ensure their protection. However, we can often see in practice that the former social order has not yet been completely eliminated and is present through various manifestations and institutes. It is also expressed through the current legislation in the area of the property regime between spouses. We can see that state paternalism also reached into relations among people that used to be a matter of their (more or less) free disposition (typically civil law matters), but at the same time we must also acknowledge (as I will point out later on) it was not always without a reasonable cause.

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2 Marriage and Family Relations Act, OJ SRS nos 15/1976, 30/1986-ZNP (20/1988 – corr.), 1/1989, 14/1989, OJ RS nos 13/1994-ZN, 82/1994-ZN-B, 29/1995-ZPDF, 26/1999-ZPP, 60/1999 Constitutional Court ruling: U-I-273/98, 70/2000-ZZNPOB, 64/2001, 110/2002-ZIRD, 42/2003; Constitutional Court ruling: U-I-312/00–40, 16/2004.

3 Zupančič Karel and Novak Barbara 'Žnidaršič Viktorija, Končina Peternel Mateja' *Reform of the family law: proposal for new regulations with a commentary* (Zbirka predpisov) (Ljubljana: Official Gazette of the Republic of Slovenia, 2005).

4 See: www.mddsz.gov.si/si/zakonodaja_in_dokumenti/predpisi_v_pripravi/ (accessed 5 November 2007).

5 Situation in November 2007.

6 The Constitution of the Republic of Slovenia, OJ RS nos 33I/1991-I, 42/1997, 66/2000, 24/2003, 69/2004, 69/2004, 69/2004, 68/2006.

The issue of property relations between spouses was, obviously,[7] not too pressing, at least in our country's early transitional phase. The reasons for that, in my opinion, mainly lie in the fact that family law was not a focus of the new authorities at that time, as other areas of law had priority: it was necessary to ensure a normal functioning of the state, achieve its international recognition, set up the framework for legal and economic stability, etc. Another reason lies also in the fact that civil law, generally speaking, did not encounter such large changes as some other branches of law. We could also enumerate many other reasons for the present situation but they will be elaborated in this chapter later on. The fact is that the state eventually showed some interest in family law, and in changing or adapting it to the present time, and in relations among family law subjects. Nevertheless, we have to conclude that its interest is not strong enough, as the bill has been in government hands since 2004.

II PROPERTY RELATIONS BETWEEN SPOUSES UNDER THE PRESENT SLOVENIAN FAMILY LAW

(a) Marital property regime *de lege lata*

The basic features of the Slovenian marital property regime can be defined briefly as follows: it is a statutory (legal) property regime (*as opposed to contractual)* and it is of an obligatory (compulsory) nature. The spouses cannot conclude prenuptial agreements in order to change their marital property regime and adapt it to their wishes and needs. It is basically a regime of community property. From the time of entering into marriage and throughout its duration all the assets gained through the work of the spouses represent their community property. That means that they own the property in equal (undivided) shares and they have to manage and dispose of the property together and in agreement. To avoid the difficulties of joint administration, the spouses can agree that only one of them will have executive powers for both of them. In that case one of the spouses can also dispose of the property without the explicit agreement of the other. The property, held by a spouse at the time of the marriage, as well as all subsequent gratuitously acquired property (gifts, inheritance), is the spouse's separate property. Each spouse manages and disposes of his or her separate property independently.

The dissolution of the marital property regime of community property can be caused by various reasons. The division of joint assets among spouses is obligatory in the case of a divorce, annulment of the marriage or death of one of the spouses. The spouses can also agree on dividing the joint assets during the marriage. If they cannot reach an agreement, they (or each one of them) can demand that the court decides upon the question of division in a non-contentious procedure. The basic principle in all of the above-mentioned cases of division of joint assets is the principle of equal shares of both spouses.

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[7] The Constitution of the Republic of Slovenia was passed in 1991; in 2007 we still use the Marriage and Family Relations Act from 1976.

Only in cases when one of the spouses thinks he or she has contributed to the joint assets in a greater share than the other can he or she claim the right to a bigger portion of the assets from the court. He or she has to prove a larger contribution to the joint assets.[8]

As Slovenian family law (and also many other legal branches of Slovenian law)[9] treats the partnership of a man and a woman, who live in a life community for a longer period of time and face no legal impediments to concluding a marriage, regarding relationships among themselves, as equal to marriage,[10] this kind of (heterosexual) partnership also has the same legal consequences in the field of property relations. That means that partners in this kind of legally recognised partnership are under the obligations of the same property regime as spouses.

(b) Problems of the present marital property regime (main reasons for reform)

The underlying problem of the present marital property regime is that it is of an obligatory nature. This means that the legislation prohibits concluding prenuptial agreements, based on which the spouses could freely manage their property issues or agree on a different property regime from that accepted by law. This kind of legislation is nowadays practically unheard of, especially in the EU member states or other countries with a legal system comparable to Slovenia's. The legislation that is based on the old socialist social and legal order has become contentious with the passing of the new Slovenian Constitution.

While the Constitution does not specifically deal with property relations between spouses, it does contain a property provision that ensures the right to private property and inheritance (Art 33). Also important is the provision (Art 67) which states that the law defines the manner of acquiring and enjoying property in such a way as to ensure its economic, social and ecological function, and also defines the method and conditions of inheritance.

The question that arises is whether the obligatory regulation of the marital property regime in the present Act can still be reasonably defended in relation to the present constitutional order.

I believe that the answer to this question is negative. As the new constitutional order in Slovenia returned to the old – we could even say classical – notion of

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8 In no case is it enough to claim the bigger portion just on the assumption that the other spouse was unemployed or he or she did not receive salary (as we mentioned above).

9 See Žnidaršič Viktorija 'Zunajzakonska skupnost – nekateri (aktualni) problemi, Podjetje in delo', 2007, letnik 33, no 1, 192–222.

10 It gives them the same rights and duties as spouses, but only in relation to themselves. This kind of partnership is not registered. It does not represent a status of a person. This is contrary to the case of homosexual registered partnerships, as provided for in a new Act. See the Registration of a Same-Sex Civil Partnership Act, OJ RS no 65/2005.

private property in the legal system, especially by abolishing the so-called 'social property', we can also anticipate the return of the basic civil law principles in the area of the law of property. The marital property regime is one of such areas and should be in line with the following two basic principles: the autonomy of will of the contracting parties and the optional nature of legal norms. These two principles can only be abolished under special conditions, set down specifically by law and arising from substantiated reasons. Such reasons are, in my view, not present in the marital property regime.

I also believe that an adequate interpretation of the constitutional provision on the social function of the property right cannot present a solid basis to argue for the obligatory nature of the property regime which is now in force. The limits of the current legislation that practically do not allow any prenuptial agreements are much too strict and as such probably constitutionally contentious.

Interference in the autonomy of an individual spouse is not justified by a right that would have priority in such a case or protection of an interest of the other spouse who would need it. Based on the constitutional right to private property, the spouses should be guaranteed the freedom to independently opt for a different solution if the one offered by law seems to be unsuitable for them. By passing suitable, individual obligatory regulations, instead of a complete property regime, the legislator should guarantee the protection of third-party interests, especially children as well as creditors, and the security of legal transactions.

It should be said, however, that the present obligatory property regime also has some advantages, especially in the sense of property equality between husbands and wives. One of its potential benefits that will be eliminated by the freedom to conclude prenuptial agreements is its relative straight-forwardness and simplicity, especially if compared to solutions in other countries' law which is much more complex.[11] This, however, cannot serve as an argument to keep the obligatory property regime. The new Act should contain a property regime for those spouses who decide not to conclude a prenuptial agreement.

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[11] There are only 12 articles on the topic of marital property regime in the present Slovenian Marriage and Family Relations Act. The comparison, for example, with the French Code Civil with almost 200 articles on the topic, speaks for itself. See Code Civil at: www.legifrance.gouv.fr/ (accessed 6 November 2007).

III PROPERTY RELATIONS BETWEEN SPOUSES IN PROPOSAL OF NEW FAMILY CODE (*DE LEGE FERENDA*)

(a) Contractual marital property regime

One of the essential novelties in the bill on property relations between spouses is the provision that allows the spouses to select and determine the contents of their own property regime. This means that the spouses, should they want to, have the possibility of avoiding the legal marital property regime by concluding a prenuptial agreement and can, in principle, freely determine its contents. Basically they themselves determine the contents of their property regime, but, of course, have to consider certain necessary caveats. We call this their contractual property regime. If the spouses decide to forgo this option, their property regime is evaluated according to the legislative provisions of the legal property regime.

The novelty in the bill, logically linked with the above-mentioned, is an explicit demand to completely reveal data on the property status of each spouse. If one of the spouses fails to reveal the data, the other has the right to challenge the prenuptial agreement. False or concealed data on property of an individual spouse can lead to a conclusion of a prenuptial agreement under the terms that the other spouse would not have agreed to if fully acquainted with the actual property situation of his or her partner.

Prenuptial agreements give the spouses the opportunity, in addition to their marital property regime, also to determine some other questions regarding their property relations, during their marriage or in the case of a divorce. They can, for example, agree on the right (and duty) of maintenance of one of the spouses in case of divorce. On the other hand, they cannot agree on mutual disposition of their assets in the case of death of one spouse (contractual dispositions *mortis causa*). The Slovenian Inheritance Law, contrary to some other European jurisdictions (for example Austrian, German, Swiss), opposes the concluding of a contract of inheritance.[12] That is why the inheritance clauses in the prenuptial agreement would be null and void.[13]

A prenuptial agreement can be concluded before the marriage, but also during the marriage. In the first case we talk about a prenuptial agreement and in the second about a nuptial agreement. A prenuptial agreement becomes effective at a time after the marriage that the spouses determine by themselves. If they do not determine the time, it becomes effective on the day of the marriage. In the case of a nuptial agreement the spouses can, among other things, also agree on

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[12] It is a contract in which one of the contracting parties leaves the entire or part of his estate to the other contracting party. See Zupančič Karel *Dedovanje* (Official Gazette RS, Ljubljana, 2005) 97–98. Žnidaršič Skubic Viktorija 'Dedna pogodba, Zbornik znanstvenih razprav', Letnik LXV, *Pravna fakulteta v Ljubljani* (Ljubljana, 2005) 380–382.

[13] I argue for the opposite solution. See Žnidaršič Skubic Viktorija 'Dedna pogodba, Zbornik znanstvenih razprav', Letnik LXV, *Pravna fakulteta v Ljubljani* (Ljubljana, 2005) 380–382.

a solution for their previous property regime. If they do not explicitly state their decision on the issue, the solution is provided by law: the legal marital property regime applies for the winding-up of the previous property relations between spouses.

Prenuptial agreements can be changed and/or amended, in accordance with the will of the spouses during the marriage. In such a case the rules that apply to concluding the prenuptial agreement apply mutatis mutandis.

Since a long-lasting heterosexual partnership[14] has the same legal consequences as marriage in Slovenian Family Law regarding relations between the partners, the new bill for arranging the issue of prenuptial agreements has to also take into account such partnerships. The special provision states that the rules on prenuptial agreements apply also to the agreements on a property regime between heterosexual partners.[15] The rights of homosexual partners have since July 2006 been set down in the Registration of a Same-Sex Civil Partnership Act.[16] The Act guarantees practically the same property regime to homosexual partners in valid registered partnerships as the present family law legislation does to spouses.[17] The Act, though passed recently, does not include the option for homosexual partners to conclude a contract, similar to a (pre)marital agreement, in which they could freely determine their property regime during the registered partnership or on dissolution of this kind of partnership. If the proposed new regulation of marital property is accepted by passing a new Family Code, I think that the Registration of a Same-Sex Civil Partnership Act should be suitably amended. There is no reasonable cause for this kind of discrimination between homosexual partnerships and heterosexual (unregistered) partners or spouses.[18]

A prenuptial agreement should be contracted in the form of a notarial record. The same explicit demand for formality should apply to possible amendments and changes to a premarital agreement. There are many reasons for demanding this kind of strict formality. Because of the special, emotional nature of the relationship between spouses, the contracting partners have to be, more than

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[14] This kind of partnership is defined thus in Art 12 of the Marriage and Family Relations Act: 'A long-lasting life community between a man and woman who did not marry has the same legal consequences for them as marriage if no reasons for invalidity of the marriage exist' (translation of the author).

[15] The Family Code bill states in Art 82/5 that the provisions on prenuptial agreements are analogously used for the property regime arrangements among (heterosexual) partners. The only exceptions are the provisions on registering prenuptial agreements. See: www.mddsz.gov.si/ (accessed 5 November 2007).

[16] The Registration of a Same-Sex Civil Partnership Act, OJ RS no 65/2005.

[17] See Arts 9–18 of the Registration of a Same-Sex Civil Partnership Act.

[18] The Act (and especially the provision on succession) is currently being dealt with by the Constitutional Court of Slovenia. The claimants argue that the Act is unconstitutional because of discrimination on the ground of sexual orientation. At the time of writing this article (November 2007) the ruling has not yet been passed. See Žnidaršič Viktorija, 'Die Erbfolge der gleichgeschlechtlichen Partner in der Republik Slowenien' *Zeitschrift für das gesamte Familienrecht*, 15 September 2007, 18, jg 54, 1511–1513.

usually, protected from their own thoughtlessness.[19] We should also consider the interests of third persons, especially creditors, and the interest of certainty of legal transactions.[20] If the provision on formality is not respected, the prenuptial agreement is null and void. If the prenuptial agreement is not valid, regardless of the reason,[21] the legal marital property regime applies. The same applies to those agreements which are not clear and undisputable in their content and a better result cannot be achieved by different methods of interpretation.

Given the novelty of concluding prenuptial agreements, the notary public gained a new and important role in the process of their conclusion. The notary has to inform the spouses or future spouses about the content of the legal marital property regime and acquaint them with their legal property rights and duties. Before the notary writes down the agreement, he has to offer impartial advice to the spouses. The notary must make sure that both spouses fully understand the meaning and the legal consequences of the contents of their prenuptial agreement. As a part of his general duty, the notary is also obliged to make sure that the concluded agreement is not contrary to the Constitution, legislation and moral principles.[22]

The new Family Code bill also provides for the public record of prenuptial agreements. It establishes a special register – register of prenuptial agreements – as a public register containing data on the concluded agreements. The register will most probably be managed by the Notary Chamber of Slovenia and will allow stakeholders to be aware of basic data on couples and the existence of pre-nuptial agreements.[23] The spouses have the right to refuse registering their agreement if they do not want to make their contractual marital property regime public. There is no obligation to register the agreement, but, if a record of a prenuptial agreement in the register does not exist, we can assume that the couple in question has chosen the legal marital property regime. This means that property relations between the spouses are governed by the rules of community property and that the third person in good faith cannot be prejudiced by their (internal, unregistered) agreement and consequently by their contractual marital property regime.

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[19] See Žnidaršič Viktorija *Premoženjska razmerja med zakoncema* (1 natis, Ljubljana, Bonex, 2002) 466–467.

[20] Ibid 464–469.

[21] These cases should be, regarding the strict demands on concluding the (pre)marital agreements, very rare in practice.

[22] This is a special provision of the Family Code proposal, but also a general provision from the Code of Obligations (OJ RS no 83/2001, 32/2004, 28/2006 Odl.US: U-I-300/04–25, 29/2007 Odl.US: U-I-267/06–41, 40/2007) and Notary Act (OJ RS no 13/1994, 48/1994, 82/1994, 41/1995 Odl.US: U-I-344/94–19, 1/1999 Odl.US: U-I-125/95, 83/2001-OZ, 73/2004, 98/2005, 17/2006-ZIZ-C, 115/2006, 33/2007-ZSReg-B).

[23] The data that should be recorded is as follows: name and surname of spouses or future spouses who signed the agreement, date of the agreement, name of the notary public who made the agreement in the form of a notary public record.

(b) Legal marital property regime

The bill includes a slightly amended and upgraded legal property regime between the spouses and corrects some doctrinal vagueness. However, the basic contents of the legal marital property regime remained unchanged apart from the fact that it is no longer of an obligatory nature. It consists of a regime of community property for the joint assets of spouses (gained in a payable way during a marriage), and a regime of separate property for all other kind of assets, owned by each spouse (inheritance, gifts, the assets they owned before the marriage). The regimes were selected on the basis of evaluating their contents as well as on the basis of legal history or the continuity of the legal regulation.

The question is why the proposition in the new Act retains the regime of a community property for the joint assets of spouses and not, as for example in the Croatian legislation, a model of co-ownership of community assets.[24] If nothing else, this would facilitate the everyday management of the assets. The working group for drafting the bill agreed that a marriage is based on a close emotional link between the spouses and is not governed solely by economic interests but mainly by the interests of acquiring and acting on the behalf of common interests. This is wholly compatible with the definition of the old, so-called 'community of joined hands'.[25] The community property regime in this way takes into account the personal nature of a lifelong union and uses its framework to evaluate the very close connection of the spouses' property interests in an optimal fashion. We also think that such a regime deals with the ideal of property equality between a man and woman to the greatest extent possible.

(c) Special issues

(i) Joint property, special property

The marital property regime of community property of spouses is much more clearly stated in the bill than in the present Act. The bill defines the joint assets as the collection of all property rights which were acquired through labour or onerously during a marriage and the living community.[26] Joint assets of the spouses also include the property rights which are acquired on the basis and with the aid of joint assets or the assets that come from the joint assets (real

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[24] See Art 249 of Croatian Family Act (Obiteljski zakon), Narodne novine, N 116/2003, 17/04, 136/04, 107/07. See also Alinčić Mira, Bakarić Abramović Ana, Belajec Velimir, Hrabar Dubravka, Hrvatin Branko, Jakovac – Lozić, Korać Aleksandra *Obiteljski zakon, Narodne novine* (Zagreb, 2004) 292–294.

[25] Gesamthandgesellschaft. See Žnidaršič Viktorija *Premoženjska razmerja med zakoncema* (1 natis, Ljubljana, Bonex, 2002) 366–368.

[26] Both conditions must be met. The community property regime does not apply to property acquired after the spouses cease living together. Jurisprudence and legal theory have already supported this approach. See Zupančič Karel, Novak Barbara, Žnidaršič Viktorija and Končina Peternel Mateja *Reforma družinskega prava: predlog novih predpisov s komentarjem* (Zbirka predpisov) (Ljubljana: OJ RS, 2005) 164.

subrogation). These latter categories that have resulted in the largest number of issues and dilemmas in practice are listed in the bill as examples. The bill also defines special property in greater detail: it sets down its complete definition, lists its individual contentious categories as examples and introduces a special category of special property which is always treated as the special property of a spouse, that is, the property that belongs personally to one of the spouses, he or she being the one who uses it or needs it. This kind of property does not have to be of large value.

(ii) Managing and disposing of joint assets

The Family Code proposal in principle retains the requirement that the spouses dispose of and manage joint assets together and in agreement. The novelty it introduces is the legal assumption that one spouse has the consent of the other in cases when he or she disposes of a wage or a property right over movables of small value as well as when he or she executes the regular administration of joint assets. On the other hand, spouses have to consent expressly in cases of greater intervention in the joint assets of spouses such as alienation of an immovable or assets of large value.

(iii) The division of marital property

The issue of dividing the joint assets of the spouses remains basically unchanged. In principle, the 50:50 rule is applied, meaning the rule of equal portions, except in cases where one of the spouses can prove a bigger contribution than the other. However, the proposal introduces an additional demand that a court, when deciding on a claim by a spouse to be awarded more than a 50% share, must first ascertain that a substantial difference in the amount of contributions by both spouses exists. If no such difference can be proved, the court rejects the lawsuit.

Such a regulation is aimed at preventing long-lasting and complex litigation, where there is an obvious lack of a difference in the contribution by both spouses. Apart from the difficulties in establishing an exact evaluation of actual contributions by each of the spouses through their long years of joint life, the question also arises as to what extent the courts, based on certainty, can give a judgment in which they declare that the difference in the contributions only amounted to several per cent.[27]

(iv) Investments of the spouse in the separate property of the other spouse

The Family Code proposal explicitly regulates the issue of investment by one of the spouses in property that is the separate property of the other spouse. The

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[27] For more details see Žnidaršič Viktorija *Premoženjska razmerja med zakoncema* (1 natis Ljubljana, Bonex, 2002) 489–496.

Slovenian Law of Property Code[28] establishes as the basic principle the *superficies solo cedit* principle. The spouse who invested in the other spouse's separate property in the form of immovable property has a right to claim a special mortgage by the order of a court[29] if an agreement cannot be reached.

IV CONCLUSION

It is undoubtedly necessary to reform the valid marital property regime which as *jus cogens* presents a legal oddity in a developed and democratic Slovenia and Europe. In this way we will eliminate one of the relics of the old social and legal order that has not yet been updated. Many reasons exist for such a state of affairs. It is understandable that the issue of the marital property regime did not make it among the top state priorities in the gigantic project of establishing its new legal foundations and reforming its legislation. It is also true that the existing property regime is not bad in essence and is not felt as unjust by the majority of people or it would have been much more criticised in the past decade. It is also important to note that differences in the amount of assets and wealth of individuals have only arisen recently, meaning that the number of potential parties to a prenuptial agreement has also only been increasing recently. There are also many other reasons for the present situation. Some of them are not of a scientific but more of a political nature and that is why they will not be amended on this occasion.

The Family Code proposal introduces new solutions mainly in the name of larger autonomy for spouses (and heterosexual partners). It is largely done by initiating the possibility of a contractual property regime. On the other hand the proposal (mainly) retains the verified and proven solutions *de lege lata* as the legal marital property regime. In a special field of law, such as family law, maybe this kind of a gradualism in reform is the optimum solution. Time will tell, as usual, if we are right.

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[28] Law of Property Code, OJ RS no 87/2002, 18/2007 Constitutional Court ruling: U-I-70/04–18.

[29] This is in line with Art 143 of the Law of Property Code. See Miha Juhart, Andrej Berden, Tomaž Keresteš, Vesna Rijavec, Matjaž Tratnik, Ana Vlahek and Renato Vrenčur *Stvarnopravni zakonik s komentarjem* (GV Založba, Ljubljana, 2004) str 643–646.

Slovenia II

THE POSITION OF CHILDREN AFTER VISITATION REFORM: BETTER OR STILL LACKING?

Dr Suzana Kraljić[*]

Résumé

L'auteur présente les récents développements concernant la détermination et l'exécution du droit aux relations personnelles en droit slovène après l'adoption de la *Loi sur le mariage et les relations familiales* de 2004. Le droit aux relations personnelles est un droit strictement personnel, incessible et intransmissible. L'enfant et le parent ont un droit fondamental aux relations personnelles et ce droit ne peut être limité par les autorités publiques que si sa mise en oeuvre va à l'encontre de l'intérêt de l'enfant. L'auteur souligne que la nouvelle loi permet aux deux parents, en cas de divorce ou de séparation, de bénéficier de la garde partagée et du droit d'éducation conjoint. Avec la nouvelle loi, les enfants sont désormais les premiers titulaires du droit aux relations personnelles, alors que les parents en sont les titulaires secondaires. L'autre grand changement dans la loi concerne le droit de contact des tiers (grands-parents, frères et sœurs, beaux-frères, belles-sœurs, anciens parents d'accueil, nouveaux époux ou conjoints …). L'auteur met en lumière que les sanctions en cas de non-respect de ce droit, peuvent affecter tant le parent gardien que le parent ayant un droit d'accès.

I INTRODUCTION

The regulation and execution of personal contact demands a lot of listening, understanding, and a readiness to let go and push the interests of parents into the background. Often, parents follow their own interests and forget that in personal contacts, the guiding principle is the best interests of the child only. Regulation and execution of personal contact gain increasing dimensions influenced by the larger mobility of people, which in turn influences the larger number of mixed marriages. The development of marriage law moves in the direction of making the conditions for divorce easier, which also shows in the increasing number of divorces. These facts (and others) are bringing about 'the bloody price of modern society' – there are more and more children, who do

* Faculty of Law, University of Maribor, Mladinska, Slovenia.

not live with both parents, and more and more proceedings referring to personal contact. And the children are the persons who are paying 'the bloody price of modern society'.

Children should be the central subject of family law – but is this always true, or are they frequently put to one side? The children's rights convention,[1] as well as other international conventions in the field of child law or the protection of children, guarantee in all matters and proceedings, in which there are children involved, the protection of their rights and interests by the principle of the protection of the child's best interests. This principle does not mean one set standard, since the meaning of the 'child's best interest' is separately determined in every special case.

The Slovenian Marriage and Family Relations Act (MFRA)[2] was adopted in 1976 and came into force on 1 January 1977. MFRA adopted some modern regulations for that time (eg extending personal rights and duties and property consequences of marriage to cohabitation, equality of children born in marriage and outside wedlock), but with time it submitted to the developing trends in the field of family law, and child law, especially. In 2001 and 2004, the novel MFRA-B and MFRA-C were adopted and brought big change in the field of legal regulation of personal contact in Slovenia.

II FIRST NOVELTY – JOINT CUSTODY

On 1 May 2004, the novel MFRA-C came into force, and in Art 105 it determines that parents, if they do not or will not live together, have to agree on the protection and upbringing of their children, in accordance with the children's benefits. In spite of the fact that it is now expressly stated, we can see such an approach even earlier in legal practice. The basis for that was provided by Art 64, enabling an agreement on joint custody between the spouses in cases of agreed divorce. In 1996 already, in the territory of the Court of Maribor, three proposals by the centre for social work regarding joint custody were dealt with.[3] In spite of the fact that the court confirmed only one of these joint custody proposals, we can see this positively, since at the court as well as at the centre for social work, already 8 years before the legal regulation of joint custody, they were thinking in this direction. Of course, we must not forget the readiness of the parents already at that time to accept this possibility, since obviously they put the best interests of the child first.

Under the present regulation, parents are both enabled on divorce (agreed or based on a law suit), as well as on the ending of cohabitation, to have a

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1 United Nations Convention on the Rights of the Children (CORC) – Ur l RS – MP, no 9/92.

2 Marriage and Family Relations Act (MFRA) – Ur l SRS, no 15/76; 30/86; 1/89; 14/89; Ur l RS, no 13/94; 82/94; 29/95; 26/99; 70/00; 64/01; 110/02; 42/03; 16/04.

3 For more detail see A Zadravec, *Sodelovanje sodišč in centrov za socialno delo; Skupina avtorjev, Novejše tendence razvoja otroškega prava v evropskih državah – prilagajanje otroškega prava v Republiki Sloveniji* (Maribor, 1998) 109.

continuing right to custody and upbringing of the child in spite of the fact of their separated lives. Joint custody is possible only if the parents agree on custody and upbringing. Here, the centre for social work may support them. If the parents have accordingly agreed, if their agreement was positively assessed by the centre for social work, and if the court also decides that the agreement is in favour of the child's best interests, the court can decide that the children will be in the custody and upbringing of both parents – i e that the parents will have joint custody. But, if the court establishes that the agreement is not in the best interests of the child, it will reject the proposal of the parents.

In order for the parents to have joint custody, they also have to agree on the regulation of personal contact with the parent at whose place the child does not live. When the parents discuss the regulation of personal contact, this shall also encompass the regulation of:

(a) the formation of regular personal contact;

(b) the time of major holidays;

(c) the spending of vacations;

(d) the time during the school holidays, days without school and in time of illness;

(e) contact with relatives;

(f) school care for the child and decision-making regarding education;

(g) religious education of the child; and

(h) the child's health.[4]

As mentioned, personal contact represents one of the central questions at the time of divorce. Due to the ending of the relationship on the parental level, a new organisation of the relationship towards the children is necessary, especially regarding personal contact. Many parents have great problems regarding the regulation, as well as regarding the carrying out of personal contact, since it demands the necessity of communication and coordination with the other (former) spouse. Also both parents' way of living differs after divorce. The parent, at whose place the child lives, faces, in every day life, the events and the problems of the child. The organisation of the child's and the parent's own life demands more effort than the organisation of the life of the parent where the child does not live. Thus, the parent, at whose place the child lives, has to think of every day matters connected to the child (e g what the child shall wear to school; what to eat for breakfast, lunch and dinner; etc), while the

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[4] M J Haynes, R Bastine, G Link and A Mecke 'A Scheidung ohne Verlierer, Ein neues Verfahren, sich einvernehmlich zu trennen' *Mediation in Praxis* (Kösel-Verlag GmbH & Co, München, 1993) 109.

other parent, with whom the child does not live, does not need to worry about these things or has to face them in a much less frequent way. The formation of regular personal contact is a very important matter, needing special attention, since personal contact enables the child to keep in touch with the parent with whom the child does not live. On the other hand, the regulation of personal contact demands a high readiness on the part of the parents to communicate, so that they can reach mutual compromises, accepting the basic principle that everything they do, they shall do in the best interests of the child. The parents shall agree on the frequency, the length, the place and way of personal contact. They may agree on weekly (each Friday and Saturday) or monthly contact (every first weekend of the month). Especially since it is about personal contact (hours), it is very important that the time is determined exactly (e g from 15.00 till 18.00). The determination of the place of personal contact is important in cases where the parent is allowed personal contact but only in presence of a third person. In such cases personal contact can be in public places (e g a park), where the execution of personal contact may be totally supervised by a third, usually neutral, person (e g an employee of the centre for social work, an attorney), but also by a person whom the child trusts (e g foster parent, curator, godfather, grandparent). It is also important that the parents agree on who shall bring the child to personal contact with the parent, with whom the child does not live, and back.

Since the execution of the so-called immediate (direct, face-to-face) contact is not always possible or its execution is time limited, it is necessary for the parents to agree also on indirect contact. Thus, the parent, where the child does not live, may be enabled to communicate in different forms (e g e-mail, short message service, telephone). This indirect contact is especially important, since it enables the continuation of the child's contact with the parent, with whom the child does not live, in spite of either territorial distance[5] or absence of immediate contact for a longer period of time.[6] But, in addition to contact on the primary (immediate contact) or secondary (indirect contact) level or as a supplement of both, the parents shall agree on a third level of contact encompassing the guarantee of informing the parent and vice versa about what is especially important in matters that essentially influence the life of the child (e g medical procedures for the child or the parent, school grades, birth of a new child of an absent parent). The third level of contact may be executed independently (e g when the execution of primary and secondary contact would contradict the benefits of the child) or as a supplement to the first two. The optimal personal contact will therefore encompass the execution on all three levels (primary, secondary and third), whereas the best interests of the child always have to be in the foreground, and not the interests of the parents. The

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5 Indirect personal contacts are especially important in cases of nationally mixed marriages (the spouses being citizens of different states), when after divorce either the parent, at whose place the child lives, or the parent, where the child does not live, moves away from the country of the child's residence. Thus, there is a territorial distance disabling regular and immediate contacts or there is contact for longer time periods, respectively. And so, indirect contact is frequently a 'saving grace' in order to maintain connections between the child and the parent.

6 S Kraljić 'Konvencija o pravici otrok do osebnih stikov' *Pravna praksa*, št 33/2003, IV.

parents shall agree on personal contact so that their agreement is in accordance with the practicalities, as well as the needs, of all involved.[7]

The parents also have to be aware that personal contact will not always run in the best way according to the schedule as planned, since they also have to respect the child's needs, which show up more and more with the age of the child (e g younger children have fewer needs of their own, the older a child becomes, the greater the needs become (e g visiting friends, birthdays, sports activities, independent shopping). Therefore, certain situations have to be foreseen and, in case they occur, personal contact has to be seen in a flexible way.[8]

Special attention shall be dedicated to the regulation of personal contact during holidays (either personal or state holidays), as well as vacations, since this is the time when families spend time together.

If the parents are not capable of reaching an agreement, and there is no possibility of joint custody, custody and upbringing of the child is given to one of them. In an extreme case it can be given to an institution or to foster parents and then personal contact may be regulated within these possibilities as well.

III SECOND NOVELTY – CHILD AS MAIN HOLDER OF THE RIGHT TO PERSONAL CONTACT

Personal contact is carried out when the child does not live together with a parent. The child may live separated from one or both parents. Separated living can be based on the parents' own decision (e g divorce), based on a state body (a court – in the case of business capacity deprivation; centre for social work – in the case of child deprivation) or even based on the child's wish (e g the child calls the centre for social work and asks to be put into an institution).

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7 See also ruling of the Supreme Court of Justice of the RS, no VS06788 from 26 September 2002.

8 The child (who lives at place A) should live at his or her father's place B on Friday, Saturday and Sunday. On Saturday, the child is invited to the birthday of the child's best friend. The child (12 years old) wishes to go to the celebration. If the father would strictly stick to the agreed dates, he would meet problems, since the child would not understand his wish to spend the weekend with his child, but would see an 'enemy' in the father, who does not want the child to have 'a good time with friends'. The child would refuse the father. On the other hand, the father, who respects the child's wish to go to the friend's birthday party, suffers a loss, especially if there are rare personal contacts (once a month). This would mean that he would meet the child the next month, if they would strictly stick to the agreed plan. A similar situation may occur with a parent, at whose place the child lives, when he or she has to go for a business trip. If we strictly stick to the schedule, the father could refuse contact. The child, again, would feel rejected by the father (the child would not judge the mother, since she has to go for a business trip, but would judge the father, who did not want to have the child). Therefore, the mediator has to warn the parents, when negotiating personal contacts, of these possibilities. He has to explain to the parents that they shall plan also a regulation in case of the emergence of extraordinary circumstances (e g birthdays, weddings, sickness).

Until the enactment of the novel MFRA–C, the right to personal contact was defined as a right of the parent, since it was determined that the parent, who does not live with the child, has the right to personal contact. This provision enabled the parents to claim that personal contact was their right only. The child and the child's rights were put to one side. The novel MFRA–C has placed the child as primary holder of the right to personal contact, and the parents as secondary ones.

> 'The child has the right to contact with both parents, both parents have the right to personal contact with the child, and contact mainly guarantees the child's best interests.' (Art 106, s 1)

From this quote, we can conclude that the legislator followed the Convention on Contact Concerning Children (CCCC),[9] also defining the children and parents as holders of the right to personal contact (Art 4, s 1), in spite of the fact that the Convention had not yet been ratified by Slovenia. But, in spite of the fact that the parents also are holders of the right to personal contact, the child's best interests are the base for the regulation of personal contact (compare Art 106, s 1, sentence 2 MFRA and Art 4, s 2 CCCC). The principle of the protection of the child's best interests has to be followed by the court and the centre for social work. In accordance with the above-mentioned principle, the court has to respect the child's opinion, too, if the child is capable of expressing it personally or via a person of trust chosen by the child, and if capable of understanding the meaning and consequences of what is expressed (Art 106, s 7 MFRA).

There is no dispute about the need to respect the child's opinion on personal contact. However, we have to be careful that there is no manipulation of the child. The parent, at whose place the child lives, meets situations that are not met by the other parent or are faced by him or her in a less intensive way. What does this mean from the viewpoint of the child or, respectively, how can a child interpret 'the presence or absence of the parent, respectively, in all these every day matters'? Presence, as well as absence, may be interpreted positively or negatively by the child. The positive view on the presence of the parent in every day matters shows in the estimation and respect of the child for this parent, who takes care of the child, who is there for the child's needs and who is at the child's side when needed. Negative aspects may show in the present parent's stress, since he or she has to deal with things now (after divorce), which were regulated by both before (but this is not necessarily the case, since maybe this parent took care of everything on his or her own during matrimony anyway). Then, the parent's stress may show in the wish for stronger support by the child in every day matters, for greater control, regulation of every day life or on the

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[9] The Convention was signed on 15 May 2003 in Strasbourg and is open for the member states of the Council of Europe and non-member countries, which co-operated in its preparation. In order to make the Convention work, three ratifications are needed, of which at least two have to be done by member states of the Council of Europe. It is not possible to have reservations to the Convention, which is composed of the preamble, followed by 27 articles separated into six chapters.

other hand – with an indifference towards the child – less care for the child. The positive aspect of absence mainly shows up in cases either when the child was physically, psychologically or sexually abused by the 'absent parent' or when the child was (usually the silent) witness of physical, psychological or sexual violence of the other parent (usually by the father on the mother). The absence of the 'violent parent' brings peace to the life of the child. The negative aspect of absence is found in cases where the child was or still is strongly bound to the parent, at whose place the child does not live. The child misses the absent parent and blames the parent, at whose place the child lives, for the absence of the other parent, which leads to stress for this parent, again. And frequently the parents mix up their role as a parent regarding the child with the role of the partner. If there is a rejection of personal contact, in every case we need to establish where the rejection comes from, and this is the task of the centre for social work and the court. The rejection of contact may be the consequence of valid reasons (eg fear of violence), manipulation of the child by the parent at whose place the child lives, or also the child's misunderstanding and confusion about the new circumstances. If it is established that the child refuses personal contact for valid reasons and that the personal contact is not in the child's best interests, it can be limited or forbidden.

IV THIRD NOVELTY – PERSONAL CONTACTS WITH OTHERS

MFRA–C adopted one more essential novelty – it regulated personal contact with other persons. The child has the right to personal contact with persons to whom the child is related by family or personally, if this is in the child's best interests (Art 106a, s 1 MFRA). The child's family or personal relationships includes the grandparents, brothers and sisters, stepbrothers and sisters, former foster parents or present spouses or cohabitants of one or the other parent. In spite of the explicit naming of these persons, Art 106a, s 1 MFRA leaves the door open, since it also allows personal contact with a person not named in this article. The fact that it is not a conclusive circle of persons derives from the formulation in the law:

> 'The child has the right to personal contact with other persons … It is considered that these persons *mainly* are parents, brothers and sisters, stepbrothers and sisters, former foster parents, former and present spouses or cohabitants, respectively, of one or the other parent of the child.'

The openness of the circle derives from the word *mainly*, showing that the law enumerates persons who usually have the tightest connection to the child, but that the legislator was conscious of the dynamics of life and, by this formulation of the law, it ensured that in each case the connection or the affection of the child had to be concretely established. Personal contact with other persons will be enabled, of course, if it is in the child's best interests.

In spite of the fact that the novelty of the MFRA–C has legally determined personal contact of the child with persons to whom the child is personally related or related by family, we have to stress that it is not an equalisation of other persons with the parents regarding personal contact with the child. The right to personal contact of the parents with the child is the legal expression of parenthood. That is, the parents have the right to personal contact with the child, disregarding whether they ever lived together with the child and whether there are emotional connections between them and the child, since they are connected by the family relationship. Here is the essential difference from personal contact with other people. The condition for having personal contact is that the child is personally related to them or related by family, respectively. For parents, the family relation (either by kin or by adoption) is sufficient, whilst other persons have also to fulfil the condition of personal connection, shown mainly through the steady presence of the person, joint living, care by the person for the child and the child's affection and trust towards this person.[10]

Also, here we have to give an advantage to an agreement relating to personal contacts (on the range and the way of executing personal contacts). At the making of the agreement, the child's parents and the person with respect to whom the child has a right to personal contact have to be involved. If the child is old enough and is capable of understanding, the child surely has to be included. If the named persons are not able to reach an agreement on the question of contact by themselves, the centre for social work helps them to conclude an agreement. If the parents, the other person and the child agree on personal contact, the court, based on their proposal, may finalise the agreement in a non-litigious proceeding, except if the agreement fails to conform with the child's best interests. Then, the court rejects the proposal (Art 106a, s 2 MFRA).

If the parents, other persons and the child do not reach an agreement, the proposal for the determination of the range and the way of execution of personal contact with other persons can be sent to the court by: the child of the age of 15 years or more and being sound of judgment (this means that the child is capable of understanding the meaning and legal consequences of his or her actions); the persons with whom the child is connected by family or personally; and the centre for social work, which is obliged to take all necessary measures demanded by the protection of the child's rights and best interests, in accordance with Art 119 MFRA. But, since the child, according to Art 77 Civil Proceedings Act (CPA)[11] does not have capacity to actively participate in the proceedings, and if personal contact with other persons would be in the child's best interests, the centre for social work can send the proposal for the regulation of personal contact. It is about the independent right of the child, the content of which is that the child preserves the feeling of emotional connection and security and mutual affiliation and love towards the other

[10] M Končina–Peternel *Pomoč otrokom, ko starši odpovedo* (Znanstveno in publicistično središče, Ljubljana, 1998) 15.

[11] Published in Ur l RS, no 26/99; 96/2002, 2/2004.

person. And if the child is not old enough (under 15 years) to do it him or herself, the centre for social work can do it. The proposal has to have evidence attached from the competent centre for social work that the parents and other persons did not succeed in reaching an agreement on personal contact between the child and the other persons (Art 106a, s 4 MFRA). The evidence on the failure to reach an agreement represents a first condition for the decision by the court. The second condition is that the court, before making its own decision, asks for the expertise of the centre for social work on the child's best interests, which is evaluated in each case separately.[12]

The child's interests are questionable also in the case where there is no agreement and the other person is sent the proposal for the regulation of personal contacts. That is, when the child sends the proposal, it is clear that the child wishes to have personal contact. When the proposal is sent by the other person, we may face two situations, ie the child wishes to have contact or the child rejects contact. If the child wishes to have contact, there are no problems. If the child opposes personal contact with the sender of the proposal, the court also has to respect the child's opinion, if the child expressed this opinion by him or herself or via a person of trust, whom the child chose, and if the child is capable of understanding the meaning and consequences of it (Art 106a, s 5 MFRA).

Surely it is best if there is an agreement between all involved, since in such situations frequently there is no involving of the court. But, if there is an agreement and they turn to the court of justice, this court decides on contact in non-litigious proceedings (Art 106a, s 3 MFRA). If there is no agreement, we have the question, whether personal contact, upon which the court decides in the case when the parties cannot reach an agreement, is really in the child's best interest. Uncertainty, misunderstandings and tensions in the relations between the parents and other persons negatively influence the child and cannot be a basis for personal contact or be for the child's benefit.

The MFRA does not mention the parents as persons who can send to the court a proposal for the regulation of personal contacts with other persons. If the relations between the parents and other persons are regulated, then there is no need for judicial rulings as contact is running spontaneously. But, when the relations are not regulated, it is not the parent who wishes the regulation of contact, but the other person. If the other person does not want personal contact in spite of the efforts of the parents and the child, that person cannot be forced into it. And for these reasons the legislator did not mention the parents as legitimate persons for the sending of the proposal to the court, so the parents appear only following an agreement, where all participants suggest that the court grants an order in non-litigious proceedings.

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[12] Verdict by the Supreme Court of the RS, no VS 13584 from 4 April 2001.

V FOURTH NOVELTY – SANCTIONS CONNECTED WITH PERSONAL CONTACT

The right to personal contact is a strictly personal right and cannot be passed forward nor be inherited. Each child and each parent has a fundamental right to personal contact. The right to personal contact can be limited by the state or its bodies, only if it is established that the execution of personal contact is not in the best interests of the child. The sanctions connected with personal contact can operate in two directions, since they can affect the parent, at whose place the child lives, as well as the parent having the right to personal contact.

(a) Sanctions against the parent who has the right to personal contact

The parent, at whose place the child lives, as well as the child, can resist the execution of personal contact. The essential guideline here is the child's best interests. If the execution of personal contact means a psychological burden for the child or the child's physical or mental health would be endangered, the court might limit personal contact or deprive persons from these rights, it can decide that contact shall be executed under the supervision of a third person or that it shall be executed without a personal meeting, but in another way, depending on the way in which the child's best interests will best be guaranteed (Art 106a, s 5 MFRA).

The MFRA demands from the parent executing personal contact that he or she has to avoid everything making the upbringing of the child more difficult (Art 106, s 2, sentence 3 MFRA), since manipulation of the child can also occur on his or her part. But, the MFRA does not foresee any direct sanctions against this. However, the long-term influence on the child can lead to personal contact being assessed as a psychological burden for the child, and consequently might lead to a limitation or deprivation of the right to personal contact or to an execution of personal contact under supervision or an execution of merely secondary or tertiary personal contact.

The MFRA–C from 2004 also brought a novel feature regarding the body competent to deprive or limit the parental right. The competence was transferred from the centre for social work to the court.[13] The centre for social work preserved its counselling role, but lost the right to decide.

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[13] See also ruling by the Constitutional Court of the RS no U-I-312/00/40 (published in Ur l RS, no 42/03), which overruled Art 106, s 1 MFRA, that determined that in all cases of divorce or annulment of marriage, on the deprivation or limitation of the rights of the parents to contact, the competent body was the centre for social work.

(b) Sanctions against the parent or the other person at whose place the child lives

The parent, at whose place the child lives, or any other person, at whose place the child lives, has to avoid everything that makes contact more difficult or impossible. He or she has to try to maintain the child's proper attitude towards contact with the other parent or the parents, respectively (Art 106, s 2, sentences 1 and 2 MFRA). It is a two-way street, i e the duty is directed towards the omission of everything that would prevent or make contact difficult, and towards the preparation of the child for contact. In the first case the responsibility is totally on the side of the parent, at whose place the child lives, while in the second case the whole burden is also on that parent, with the difference that he or she also has to prepare the child for personal contact that might be refused by the child. If the child refuses personal contact, in every case it is necessary to establish what the basis of the refusal is. If it is a refusal for valid reasons, personal contact, as mentioned above, may be limited or taken away. The refusal of personal contact may be caused due to an action of the parent, at whose place the child lives. The parents frequently transfer their feelings, disappointments and unhappiness that they have towards the other parent to the child. They try to take revenge in the way that they manipulate the child and generate 'an artificial hatred' towards the other parent.

Before the new MFRA–C from 2004, MFRA did not contain any sanctions in cases of preventing personal contact. Another novelty was adopted in this field, the present Art 106, s 6 MFRA. This determines that when the parent, at whose place the child lives, prevents personal contact between the child and the other parent and contact cannot be executed even with the professional support by the centre for social work, the court, based on the call by one of the parents, can decide whether to take custody and upbringing of the child away from the parent, at whose place the child lives, and give the child to the other parent, if it forms the opinion that this parent will enable contact and if the child's best interests can be protected in this way. A transfer of the child between the parents may occur only on the request of the parent who proposes that the court takes the child away from the other parent and entrusts it to him or her. The transfer will be carried out only if the court establishes that the other parent is ready to enable contact to occur and if this is in the child's best interests (Art 106, s 6 MFRA).

The sanction for preventing or making personal contact difficult, before the novel MFRA–C, was already contained in the Act on Execution and Insurance (AEI),[14] but only through the novel provisions of AEI passed in 2002 widening the former Art 238 by Arts 238a to 238g (this is the twentieth Chapter entitled 'Execution in matters regarding the custody and upbringing of children and regarding personal contact with children'). If the parent, at whose place the child lives, acts against the decision of the court regarding contact, by preventing or making contact difficult, the decision is executed. Measures

[14] Published in Ur l RS, no 51/98; 72/98; 11/99; 89/99; 11/01; 75/02; 87/02; 70/03; 16/04; 132/2004.

regarding the execution of personal contact are also two-sided, ie there are measures when the parent, at whose place the child lives, prevents or does not carry out personal contact. In the same way there are also measures when personal contact with the child is forbidden. The execution of the decision on personal contact is done in two ways. Primarily, there is an attempt to carry out the intention by indirect force, by the imposition of penalties. If this does not work, the execution is done by direct force. In case of direct force the child is taken away from the person, at whose place the child lives, and is handed to the parent who has a right to personal contact.[15] Thus, first there is the need to fulfil the intention by penalties. If this does not work, immediate force is used. This happens very rarely and only where:

- there has been failure of indirect force; and
- it is in the child's best interests.

The question, it appears, is whether indirect, as well as immediate, execution is in the child's best interests. If the parent, at whose place the child lives, is sentenced to a penalty, this can also influence the financial benefits for the child, especially in cases where the child also refuses personal contact. The situation can even occur where the child's trust in the parent, at whose place the child lives, is destroyed, since he or she is forced to prepare the child for personal contact. The parent influences the child in order to avoid a penalty, which the child regards as a breach of trust, since the child is forced to do something that the child does not want to do. Also, in respect of execution by immediate handing over of the child, we cannot speak of the child's best interests, since this may have long-lasting and damaging consequences on the child.

When it is established that the execution of personal contact is not in the child's best interests, the decision to prohibit personal contact can be made (even a temporary suspension). If such a sentence is not respected, it can be backed up by penalties, by which we wish to influence the parent to leave the child alone.

VI FIFTH NOVELTY – COMPETENCE OF DECISION-MAKING IN PERSONAL CONTACT

As stated above, the parent or the other person (eg foster parent), to whom the child is trusted with custody and upbringing, has to avoid everything that may make contact with the child difficult or impossible. The child has to be prepared for personal contact, but not influenced to generate resistance against it. The parents transfer their desperation and pain to the child, who then takes

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[15] AEI determines that it is possible to take the child away from a person, at whose place the child lives at the time of execution, and to hand the child to the parent who has the right to personal contact, only in well-founded cases when this is necessary to guarantee the protection of the child's best interests (Art 238f, s 2 in connection with Art 238e, s 1 AEI).

over these feelings. This influence may be on purpose or not. Thus, there is a great burden on the parent, at whose place the child lives. On the one hand, he or she has to avoid all negative actions that might influence the child's attitude towards personal contact, and on the other, he or she has to be active in preparing the child for personal contact. And this is especially difficult when the child refuses contact and feels resistance. If this does not happen, under AEI, indirect or immediate execution can be carried out or, under MFRA, the child can be transferred.

But the parent who has the right to personal contact has the duty to omit everything that makes the custody and upbringing of the child difficult (Art 116, s 2 MFRA). If he or she does not, he or she can be deprived of personal contact.

The competence to make decisions is now totally with the court, while the centre for social work retains its role as consultant. Before the new MFRA–B and MFRA–C, the centre for social work was the one to make decisions on personal contact. Step by step, its competence in the field of personal contact lowered, so that today it does not decide any more, but gives expertise or support to the parents to help them agree on personal contact (Art 106, s 4 MFRA). Today, the court decides on the regulation of personal contact. The court of justice can decide on the basis of the parents' proposal, but only if it is in the child's best interests. However, if the parents, in spite of the support by the centre for social work, do not reach an agreement on personal contact, the court decides alone. There is a precondition for the proceedings and decision-making by the court, since, to their proposal to the court, the parents have to attach the centre for social work's confirmation that they tried to reach an agreement and did not succeed (Art 106, s 4 MFRA). If this precondition laid down by the law is not fulfilled, the court will reject the proposal. The court decides on the child's contact in non-litigious proceedings, except if it decides together with disputes over custody and upbringing of the child.

VII PERSONAL CONTACT IN CASE OF DEPRIVATION OF THE PARENTAL RIGHT

Most conflicts were and are about the execution of personal contact in cases where the parents are deprived of their parental right. The deprivation of the parental right is an independent measure, where the parents are deprived of the parental right in non-litigious proceedings, because they did not properly carry out their parental right in relation to the child. The parents might also be deprived of their parental right because of the deprivation of business capacity that automatically leads to the deprivation of the parental right as well. If the parents are deprived of the parental right, the child has to be taken care of. The child may be given to foster parents, or guardians, adopted or placed into an institution. The deprivation of the parental right means the exclusion of the parents from being the primary persons who have to take care of the child –

thus, the parent no longer has the right to care for the child, the child's rights and benefits, the child's property and cannot even represent the child.

If there is a temporary deprivation, ie if there is the possibility that, after the reasons for the deprivation have ended, the child might be returned, the question occurs as to whether personal contact should be continued, in order to prevent alienation of the child from the parents. Here, also, it is not possible to give a general reply that is valid for all cases. Each case has to be dealt with separately, since there is a range of reasons that may lead to a deprivation, and they are very different and cannot be put into one basket. If there is a deprivation of business capacity and by this, consequently, a deprivation of the parental right due to illness that can be cured, personal contact surely has to be maintained. But, if the deprivation of the parental right occurred due to multiple sexual abuse of the child, at least in the beginning, personal contact has to be prohibited or limited (eg only third level of personal contacts are carried out). Thus, it is essential to respect the circumstances of every deprivation, how the deprivation influenced the child and the possibility of re-establishing a parental right after the ending of the reasons for the deprivation, since this means that the child will return to the child's original surrounding and therefore personal contact has the role of preventing alienation.

VIII PERSONAL CONTACT WITH A CHILD AT FOSTER PARENTS' – POSITION OF THE FOSTER PARENT

The MFRA and the Act on the Execution of Fostering Activity (AEFA)[16] are unified regarding the rights to personal contact of the parents, at whose place the child does not live. Both Acts determine that the parents have a right to personal contact with the child, if the child does not live at their home. However, there are differences between the two Acts. The MFRA determines that the parents have a right to personal contact if the child lives at the place of another person – it is a general provision – while the AEFA concretely refers to the child at foster parents. Further, the MFRA determines that the other person, at whose place the child lives, has to avoid everything that makes difficult or prevents the child's contact with the parents, and has to try to develop a proper relationship between the child and the parents (Art 106, s 2). But, under the AEFA the foster parent is obliged to enable and support contact between the foster child and the parents, except in cases where the parents are limited or prohibited from having contact, based on the decision of the competent authority (Art 26). The duty of the other person, among whom the MFRA also counts foster parents, covers the duties of the foster parent under the AEFA. But, under the MFRA, the child has the right to personal contact also with a former foster parent, while the AEFA does not foresee this possibility. The reason for this is that the AEFA regulates relations only during foster care and not after it has ended, while personal contact under the MFRA

[16] Published in Ur l RS, no 110/02.

can also relate to a former foster parent. Thus, the foster child will live at the foster parent's place during the time of foster care based on the foster care contract and there will be no need to regulate personal contact. If the foster child is personally affiliated with the foster parent, this can be a basis for the regulation of personal contact after the ending of foster care. Personal contact between the child and the foster parent can be regulated on the basis of an agreement between the parents, the foster parent and the child, if the child is capable of understanding the meaning of the agreement. Then, the court, based on the proposal of the above-mentioned persons, can grant an order in non-litigious proceedings. If the child is 15 years old and capable of understanding the meaning and legal consequences of his or her actions, the child can send the proposal to the court for the regulation of personal contact with the former foster parent by him or herself. The proposal may also be sent by the former foster parent and the centre for social work, while the main guidelines always are the child's best interests.

IX CONCLUSION

The Slovenian regulations on personal contact have been altered over the past 5 years. The most important novelty is the positioning of the child as the primary carrier of the right to personal contact. Through this, the regulations were adapted towards international conventions and directives on the development of child law. Also, other alterations (transfer of competence to the courts of justice, the child's right to personal contact with third persons, and others) were just a final reaction to present trends and needs emerging from practice. However, this does not mean that the work has been done. Indeed, this is just a start. Parents must still take the biggest step. They are the main subjects in the regulation of personal contact and only when they are aware of the responsibility given to them can the law carry out its role properly. Whilst the parents are not capable of this, wounds will appear in the regulation of personal contact – negative consequences will be suffered by their children over a long period, possibly even in the future when their children have their own families.

South Africa

A NEW DEFINITION OF MARRIAGE: GAY AND LESBIAN COUPLES MAY MARRY

*June Sinclair**

Résumé

Cet article examine les motifs, les implications et certains problèmes posés par l'adoption du *Civil Union Act* de 2006, entré en vigueur à la fin de l'année 2006 et modifiant la définition de mariage dans le droit sud-africain. Cette législation fut imposée par la Cour suprême qui avait jugé un peu plus tôt que la définition du mariage contenue dans le Marriage Act, ainsi que les règles en matière de célébration du mariage, étaient inconstitutionnelles en raison de l'exclusion des couples de même sexe. L'interdiction pour ceux-là de se marier constitue une discrimination prohibée fondée sur l'orientation sexuelle et elle viole le droit fondamental à l'égalité et à la dignité. La nouvelle et controversée législation met en place l'institution de l'«union civile». Celle-ci peut être soit un mariage, soit un partenariat civil, au choix des conjoints. Le mariage conventionnel prévu par le Marriage Act demeure cependant intouché. Le présent article analyse et critique cette étrange situation. L'auteure explique les raisons de cette réforme, tout en regrettant un oubli majeur puisque les conjoints de fait non enregistrés qui sont impliqués dans une relation à long terme ne sont toujours pas protégés. Dans une société affligée par le Sida, la pauvreté et un système minimaliste de sécurité sociale, cet oubli reflète un désintérêt cynique à l'égard des femmes vulnérables et des enfants qui ne peuvent faire face aux besoins de base de la vie. Au surplus, ces récents développements ont complexifié encore plus le droit de la famille sud-africain qui n'en avait vraiment pas besoin. L'auteur réitère son souhait d'une simplification en la matière.

I INTRODUCTION

By far the most striking development in South African family law in recent years was the passing of the Civil Union Act 17 of 2006, which came into operation on 30 November 2006, allowing same-sex couples to marry. This legislation, while still in Bill form, was briefly discussed in the 2007 Survey. The Act's provisions and some of its implications will be more fully canvassed here.

* Special Adviser to the Rectorate and Honorary Professor of Law, University of Pretoria, South Africa; Honorary Professor of Law, University of Sydney, Australia.

II SAME-SEX MARRIAGE AND THE COURTS[1]

Since the advent of the Constitution and the Bill of Rights in 1994,[2] South African courts have been confronted with challenges to various pieces of legislation on the grounds that these Acts discriminated unfairly against same-sex couples, whom the law did not permit to marry, but who nevertheless lived in relationships that mimicked marriage in all other respects. The response of the judges has been to cure the specific constitutional deficiency (that is, the violation of the rights to equality and dignity) by reading into legislation that conferred benefits on 'spouse/s', words like 'or partner/s in a permanent same-sex life partnership'. For various specific and litigated purposes, therefore, the case-law rectified the discrimination against same-sex partners in areas such as medical-aid schemes for spouses under the Police Services Act (*Langemaat v Minister of Safety and Security*[3]*);* immigration permits for spouses of SA citizens (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[4]); a surviving spouse's pension as part of the remuneration of judges (*Satchwell v President of the Republic of South Africa*[5]); adoption and joint guardianship by husband and wife (*du Toit v Minister of Welfare and Population Development*[6]); the dependant's action and the recovery of funeral expenses (*Du Plessis v Road Accident Fund*[7]); registration of a same-sex partner as a parent after AIDs and implant of an embryo into the birth mother (*J and Another v Director General of Home Affairs*[8]); and the right of intestate succession of a surviving spouse (*Gory v Kolver NO*[9]).

While the work-product of the courts has been positive, piecemeal and ad hoc development of the law in such a crucial and contentious area has created enormous complexity and is no substitute for coherent, holistic reform by way of suitable legislation. Advising same-sex couples on their rights over the years became an exercise in tracking what legislation or rule of common law had been successfully attacked and what had not. The increasing calls for legislative action had however been heeded, in the sense that the South African Law Reform Commission had embarked on a broad investigation into domestic partnerships and cohabitation, whether of heterosexual or same-sex couples. It

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1 I am indebted to Yvonne Jooste for her research assistance for this contribution, which is based on a paper she assisted in preparing for the ISFL Council Colloquium held in Girona in April 2007. That paper drew also on the work of colleagues at the University of Pretoria, who generously made available to me articles they had submitted for publication. I thank Professors L N van Schalkwyk and M C Shoeman-Malan, and Ann Louw.

2 The year of operation of the Interim Constitution, replaced by the Constitution of the Republic of South Africa of 1996.

3 1998 (3) SA 312 (T).

4 2000 (1) SA 1 (CC).

5 2002 (6) SA 1 (CC).

6 2003 (2) SA 198 (CC).

7 2004 (1) SA 359 (SCA).

8 2003 (5) SA 621 (CC).

9 2007 (3) BCLR 249 (CC).

reported in March 2006, recommending legislation.[10] Before its recommendations could be considered by Parliament, however, the inevitable court challenge to the common-law definition of marriage came before the courts. In *Minister of Home Affairs v Fourie*,[11] two women who had been living together for 10 years wished to marry. They complained to the court that they were denied the right to do so by the common-law definition of marriage and also by a section in the Marriage Act dealing with the formula for the ceremony of marriage.[12] The common-law definition declares that marriage is a union for life of one man and one woman to the exclusion while it lasts of all others. It is taken from the English case, *Hyde v Hyde and Woodmansee*.[13] Section 30(1) of the Marriage Act contains the marriage formula to be put to intending spouses: 'Do you AB take CD to be your lawful wedded wife/husband?' Both the definition and the formula were the subject of constitutional scrutiny in *Fourie's* case.

The Constitutional Court gave a lengthy judgment, dealing with the denial to gays and lesbians of the right to marry. It held that the common-law definition and the offending section in the Marriage Act were unconstitutional and it gave the legislature 12 months (until 1 December 2006) to rectify the invalidity.

The basis of the finding is the violation of the entrenched constitutional rights of equality and dignity**.** The court was confronted with vocal moral and religious objection to same-sex marriage. On this issue it concluded that it is one thing for the court to take into account the important role that religion plays in our society, but another to use religious doctrine as a source for interpreting the Constitution. The religious sentiments of some, it determined, cannot guide the courts on the constitutional rights of others. This is an important judicial finding. However, it seems that, at the end of the day, religious sentiment, moral outrage and the views of traditional African leaders must have carried sufficient political weight to influence the nature of the remedy provided by the court, for which it has attracted criticism. Its remedy did not provide immediate relief to the parties before it.

An insightful and critical analysis of the decision is offered by Narnia Bohler-Muller.[14] The author points out that the majority judgment, given by Sachs J, was disappointingly tentative, while that of the minority, given by O'Regan J, was bolder and more activist. The difference between the two went only to the appropriate remedy. That favoured by the minority was for the court to declare the legislation invalid and to read in words to cure the defect so that the parties could immediately marry. The majority, however, felt that this remedy went too far and cautioned that the deficiency should be rectified by the legislature, not the courts. Hence, the majority declared the legislation

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10 Project 118 *Report on Domestic Partnerships*.
11 2006 (1) SA 524 (CC).
12 Act 25 of 1961, s 30(1).
13 (1866) LR 1 P&D 130.
14 'Judicial Deference and the Deferral of Justice in regard to Same-sex Marriages and in Public Consultation' (2007) 40 *De Jure* 90.

unconstitutional, but suspended the declaration of invalidity and gave the legislature one year to change the law, failing which a reading-in would occur. The disagreement as to remedy centred on the transformative role of judges within the South African constitutional dispensation and the appropriate application of the doctrine of separation of powers. Within this context, deference by the courts to the legislature carries with it the danger that South African society remains sufficiently conservative to countenance rules that violate (even first generation) fundamental rights enshrined in the Constitution. True commitment to those rights, it is argued by several writers and advanced by the minority judgment, requires judges to set new boundaries for judicial activism. This view does not deny the need for a balance between judicial deference and judicial activism; it calls for a uniquely South African approach to the development of the common law and the substantive protection of rights such as equality and dignity. As Bohler-Muller points out, '[i]t appears from the majority judgment in *Fourie* that Sachs J was convinced that the moral and religious sensitivities of the case called for a more tentative approach that would allow for public debate about the sacred and the secular and thereby satisfy the concerns of groups such as religious and traditional leaders'.[15] The question she poses is whether these sentiments should prevail over the rights of the parties to be granted the relief they sought, given that they are members of a minority group that has been faced with prejudice, disadvantage and discrimination. Should they be required to wait for the outcome of a legislative process that may or may not yield the remedy to which the court unanimously opined they were clearly entitled? Should not majoritarianism be sacrificed in favour of the particular rights of individuals before the court? Drawing on the work of several academic writers, Bohler-Muller mounts a cogent argument that would require the courts to acknowledge the political power invested in them and to assume responsibility for protecting the rights of marginalised litigants, on ethical grounds. To compel these litigants to abide by the whims of the moral majority in the belief that public participation in the legislative process would bring either consensus or at least an acceptance that the process would yield an outcome, repugnant to some, but one that must be accepted, amounted for this author to an abdication, a shirking of ethical responsibility by the majority in *Fourie*. She deprecates the failure of the court to do justice to the particularity of the case.

The legislative process that ensued was fraught with contestation. Religious and traditional leaders and others spoke out strongly against the recognition of same-sex marriage. There remain threats by them to challenge the Act that is the subject of this piece, not on the ground that there was no sufficient public process, but that the 'will of the people' was not taken seriously enough. No consensus and no acceptance were reached. It was the discipline of ruling-party politics that mandated votes in favour of the legislation, on the ground that the rights enshrined in the Constitution had to trump moral and religious considerations.

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[15] Ibid 98.

As will be seen below, the legislation that was ultimately passed as a result of the judgment in *Fourie* reveals a similar, cautious and tentative approach and a diffidence that is vulnerable to criticism similar to that proffered in respect of the Constitutional Court's majority judgment in *Fourie*. The political exigencies that caused the court to defer to the legislature caused the legislature to defer, in some measure, to the moral majority in formulating its remedy. Before an analysis of the Act is undertaken, a brief comment on the remedial action recommended by the SA Law Reform Commission deserves some attention.

III THE RECOMMENDATIONS OF THE SOUTH AFRICAN LAW REFORM COMMISSION (SALRC)

After a comprehensive study into same-sex marriage and also the issue of domestic partnerships generally, that is, including persons (homosexual or heterosexual) who live together in a marriage–like relationship but who do not marry, the SALRC came up with two sets of recommendations. As a first choice, it recommended simple amendments to the Marriage Act of 1961, creating a new definition of marriage and a new marriage formula that would override and replace the offending common-law definition and would make the Act applicable to all couples wishing to marry, regardless of sexual preference. The Commission noted that this solution would give proper effect to s 9 (the equality or anti-discrimination clause) of the Constitution. The second choice, put forward to accommodate religious objection to the first option, was to enact an Orthodox Marriage Act in addition to the amendment to the Marriage Act. The Orthodox Act would apply only to opposite-sex couples, while the amended Marriage Act would apply to all couples. The Commission considered that the Constitution,[16] which expressly permits legislation recognising marriages concluded under any tradition or system of religious, personal or family law, supports this approach.

The legislative proposals to give effect to the second set of options also included the enactment of a Domestic Partnership Act to provide for the recognition and regulation of registered partnerships, for couples who did not wish to marry. The Commission further recommended a part of such Act to provide for the regulation of the consequences of the termination of unregistered partnerships, by way of a judicial discretion to regulate the rights of the parties. It proposed that, in the absence of agreement, partners who have not registered their relationship could approach a court once the relationship has terminated for an order (a maintenance order for example) to regulate the financial consequences of the relationship.

The proposals were comprehensive and well researched; they took into account comparative developments and local sentiments. The legislature, however, finally spurred into action by the *Fourie* decision, and anxious to meet the

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[16] In s 15(3)(a)(i).

deadline set in that case, abandoned the full range of reforms recommended by the Commission and focused exclusively on same-sex marriage.

During the various stages of consideration of the Civil Union Bill,[17] introduced in September 2006, the provisions in it regulating registered partnerships for couples not wishing to marry were dropped. Cohabitation therefore remains unregulated in South African law.[18] The Minister, during the second reading debate on the Bill,[19] stated that the process of law reform remains an issue for further engagement and that the recognition of religious marriages, revision of the Marriage Act and the regulation of domestic partnerships would be taken up in the future. During the Upper House Debate on the Civil Union Bill[20] the Minister remarked that the Bill was drafted in response to the *Fourie* case. It is regrettable that, after comprehensive and lengthy investigation by the Commission, the legislature was able to respond only to the injunction by the Constitutional Court to rectify the law relating to same-sex marriage. We therefore await further piecemeal reform to deal with registered and unregistered partnerships and with Muslim marriages.

IV THE CIVIL UNION ACT[21]

The Act defines a civil union as a voluntary union of two persons who are both 18 years and older which is solemnised either by way of marriage or a civil partnership.[22] The objectives of the Act are to regulate the solemnisation and registration of civil unions, by way either of marriage or civil partnership, and to provide for the legal consequences of the solemnisation and registration of civil unions.[23]

The Act allows both same- and opposite-sex partners to solemnise and register a civil union either by way of a marriage or by way of a civil partnership. Heterosexual couples may thus now elect to enter a marriage in terms of the new legislation, or in terms of the Marriage Act. (It should be added, where appropriate, intending heterosexual spouses may select the Recognition of Customary Marriages Act[24] as their preferred vehicle for entering into a valid marriage.)

The Civil Union Act further provides[25] that a civil marriage officer is not compelled to solemnise a civil union between persons of the same sex if the officer objects on the grounds of conscience, religion or belief to solemnising

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17 B26B-2006.

18 For an excellent update on cohabitation, see Heaton 'An Overview of the Current legal Position Regarding Heterosexual Life Partnerships' (2005) 68 THRHR 662.

19 On 14 November 2006.

20 On 28 November 2006.

21 Act 17 of 2006, which came into operation on 30 November 2006.

22 In s 1.

23 In s 2(a) and (b).

24 Act 120 of 1998.

25 In s 6.

such a union. (Press reports published since the enactment of the legislation reveal that several couples wishing to invoke their new rights encounter difficulties in finding a marriage officer to celebrate their civil union.)

A new marriage formula is provided,[26] which differs from the marriage formula in the Marriage Act to the extent that it uses in the question to be put to each of the intending spouses the phrase 'spouse or civil partner' rather than the words in the Marriage Act 'husband or wife'. A marriage officer must also inquire from the parties whether their civil union should be known as a marriage or as a civil partnership. Both, it must be stressed, are 'civil unions' in terms of this new legislation.

What is of great importance is that the legal consequences of a civil union are the same as the consequences of a marriage celebrated in terms of the Marriage Act.[27] The Act further states that any reference in any law (with the exception of the Marriage Act and the Customary Marriages Act), including the common law, to 'marriage' includes a civil union and any reference to 'husband' or 'wife' includes a civil union partner.[28] This provision appears to confirm that marriages under the Marriage Act and the Recognition of Customary Marriages Act may only be heterosexual. It should not be overlooked that marriages under the latter Act can be polygynous.

It is thus clear that what South Africa has opted for, the civil union (which can be a marriage or a civil partnership, by choice of the parties), is a marriage-like institution with exactly the same legal consequences as a marriage solemnised under the Marriage Act, and it can be chosen by same- and opposite-sex couples. Since same-sex couples may not marry in terms of the Marriage Act it, unamended, remains the 'orthodox' legislative instrument. So, the Law Commission's first option, to extend the common-law definition of marriage in the Marriage Act to same-sex couples and to expand the formula for the solemnisation, was clearly not followed by the legislature. Neither was the second option, which was to amend the Marriage Act and to enact another 'orthodox' act exclusively for opposite-sex couples: The Civil Union Act applies to both same- and opposite-sex couples, while the Marriage Act, the 'orthodox' Act, remains applicable only to heterosexual couples. The latter Act's unconstitutionality, however, seems to have been unequivocally overcome (see further below).

It is worth considering at this point why the legislature chose to create two institutions available both to opposite- and same-sex couples. This question is not easy to answer. One possibility may be that, had the Civil Union Act created only a civil partnership, available only to same-sex couples, the 'separate but equal' argument, invoked often during the apartheid era to justify separate treatment, and which would not pass constitutional muster now, would surely have been raised as an obstacle. By choosing not simply to amend

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[26] In s 11.
[27] In s 13(1).
[28] In s 13(2).

the Marriage Act to include same-sex couples, the legislature was forced to create an institution for them that would not be different, other, and hence, arguably, demeaning. It could not therefore simply provide for a civil partnership. The Constitutional Court and academic writers had warned that a separate but equal institution which was not a 'marriage' would not do. It would not rectify the denial to gay and lesbian couples of the right to identity as 'married' persons within the social mainstream. The separate institution, even if in all respects similar to marriage, would symbolise that homosexuals were not capable of marrying and forming families as heterosexuals can do; that they are in some way not merely different, but inferior. Hence we have the creation of the opportunity for gay and lesbian couples to 'marry', with consequences identical to those applicable to heterosexual spouses, but under a different Act. This will, it is submitted, pass constitutional muster: there is no unfair discrimination here.

Moreover, by not disqualifying opposite-sex couples from using this new Act, the legislature has, it seems, insured itself against a claim that a separate Act for gays and lesbians is not good enough. Nevertheless, it is not easy to see why opposite-sex couples would want to resort to this Act to enter into a marriage. And what would be the point of their entering into a civil partnership?

Put another way, why was provision made for a civil partnership for anyone once the concession had been made to allow same-sex marriage? The answer may be that some gay and lesbian couples and some heterosexual couples may want the protection of the law relating to marriage, but not want to be assimilated into the Judeo-Christian conception of marriage, with the gender stereotyping that it entails. We know that there is a rich, comparative, feminist literature condemning the power relations within conventional marriage. Should same-sex and opposite-sex couples wish to bring themselves entirely within the purview of all the supportive, adjustive and protective measures of family law, without having to be 'married', the civil partnership option is there. So, instead of enacting the recommended provisions for domestic partnerships to accommodate couples who cohabit but do not wish to marry, the Act instead provides all cohabitants with the opportunity to enter into a civil partnership. In other words, this is a form of registration, coupled with solemnisation, of domestic partnerships, for those who want the protection applicable to married persons, without the descriptor 'marriage'. Does the play on labels really answer the assimilation/essentialism issue, or is this pure sophistry? It is clear that there is nothing to suggest that the power relations between spouses and the gender stereotyping associated with marriage will not present themselves with equal force within civil partnerships. The equivalence accorded to civil partnerships by the legislature will do little to signify to society that this is a different intimate relationship.

Opposite-sex couples may now enter into a marriage under the Marriage Act[29] or under the Recognition of Customary Marriages Act (if applicable)[30] or under the new Civil Union Act, or they may choose a civil partnership in terms of the Civil Union Act. All of these options will carry all the consequences of a conventional marriage. Is this not an embarrassment of riches? It would be interesting to know if there is any other jurisdiction that has found it necessary to provide so many options to its citizens. The result is a degree of complexity that defies explanation. What might be the justification for all these choices? The answer that will undoubtedly (but unconvincingly) be offered is that we are a diverse nation and that the law must cater especially for its various groups: it does so for polygyny within African custom, for Jewish divorce, for same-sex marriage, for civil partnerships and must, before long, do so for Muslim marriage.

Apart from the complaint that the current situation is supererogatory and too complex, the fact that South Africa is a secular state also militates against this fragmentary approach. While it is conceded that the rights of religious or ethnic groups are an important part of the fabric of society and must not be infringed, it is doubted whether a secular state is under an obligation to legislate to protect not merely the legal rights, but also the interests of different religious and cultural groups. Certainly, the view of Sachs J in the *Fourie* case[31] was that a distinction must be drawn between rights and interests, and that the courts are not required to interpret the Constitution in order to protect the interests of religious groups. That some of the group-based differences in our discrete pieces of legislation are defensible (such as those regulating African custom), it is submitted that a lot of simplification could occur without exciting more offence (inter alia to religious groups) than has already been occasioned.

Finally, failure by any cohabiting couple to take the step of formalising their relationship via a ceremony to create marriage or a civil partnership leaves them, no matter how long they may have lived in a marriage-like, permanent relationship, without legal protection and vulnerable.

In sum, then, South Africa has made a giant leap in granting full rights to marry to gay and lesbian couples. Some will argue that it is a leap backwards. I do not agree. Historically renowned as a conservative jurisdiction that countenanced racial and gender discrimination, it is now a country with one of the most liberal and advanced constitutional dispensations in the world. Its Bill of Rights demands that private lawyers test the internal rules of private law against the demands of constitutionally entrenched rights and that all lawyers, and the courts, approach private law with a much broader, social, political and economic awareness than the era of black-letter law ever envisaged. South Africa has, however, insisted on the retention of monogamy for marriages and civil partnerships under its new Civil Union legislation. And, although it widens the choices for the regulation of intimate relationships, it may be

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[29] Act 25 of 1961.
[30] Act 120 of 1998.
[31] See above n 11, at 560E-F.

accused of essentialism, for it compels all persons living in marriage-like circumstances to undertake a formal legal process of solemnising their union in order to bring themselves within the purview of family-law protection. They must accept all the consequences of conventional Judeo-Christian marriage. In insisting on this process, South Africa continues to assert that sustained cohabitation remains unprotected, despite its mimicking, in all important respects save formal celebration, conventional marriage. Here, the country lags behind many jurisdictions that do not and emphatically will not permit gay and lesbian marriage, but which have long accommodated the notion of cohabitation and the need to protect cohabitants. The result is incongruity, enormous complexity and a contradiction of the commitment to fairness. The argument that couples who do not take a formal step to solemnise their relationship deserve what happens to them is clearly not acceptable, especially in a developing country facing an HIV crisis, with parlous welfare and enormous poverty and inequality. It is to be hoped that the Minister will, as promised, introduce the long-awaited legislation to protect those who live in unregistered domestic partnerships: cohabitants.

V SOME PARTICULAR PROBLEMS ARISING FROM THE CIVIL UNION ACT

(a) Cohabiting couples who do not marry

In the wake of the enactment of the Civil Union Act, the rights of gay and lesbian couples who do not seize the opportunity to solemnise their relationship in terms of the new legislation are not clear. Special and complex problems of interpretation present themselves.[32] At the beginning of this piece[33] cases that were decided prior to the enactment of the new legislation were referred to, to demonstrate how the courts rectified the violation of the rights of same-sex couples by reading appropriate words into discrete pieces of legislation that came under attack because they were confined to 'spouses'. The rationale for the reading-in of additional words after 'spouses' like 'or partners in a same-sex life-partnership' was obviously that the protection provided to married couples in the offending pieces of legislation was not available to same-sex couples because they were not allowed to marry. Thus, their same-sex permanent life partnerships were recognised as equivalent to marriage via this intervention of the courts. But now they can marry. The rationale for all of those judgments fell away on 30 November 2006, when the Civil Union Act came into operation. Now what would be the case if a same-sex couple who did not take advantage of their new right to marry wished to rely on one of those judgments[34] to claim the benefits to which the courts had previously held unmarried same-sex couples in permanent life partnerships to be entitled? Do

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[32] Interpretation is not aided by the fact that there are typing errors in the Act. Also, the Act should not refer to religious denominations or organisations being granted the power to solemnise civil unions – see s 5. Only individuals can perform the required ceremony.

[33] In section II above.

[34] See nn 3–9 above.

the judicial declarations of invalidity and the judicial amendments to the Acts in question stand and remain capable of invocation now that the rationale for them has disappeared? If the answer is positive, same-sex cohabitants will continue to enjoy protection accorded to them under a different dispensation and which is not afforded to heterosexual cohabitants despite the fact that all cohabitants now have the election to marry. Put another way, now that same-sex couples can marry, if they do not do so, they would continue to be able to claim ongoing protection under these statutes while heterosexual couples in the same position do not enjoy this protection. If the answer is negative, the effect of the Civil Union Act must be taken impliedly to have repealed/invalidated the judgments and the judicial amendments to the legislation in question. It entails that same-sex couples lost the protection flowing from the courts' pronouncements from the moment that they became entitled to marry. They must resort to the Civil Union Act in order to bring themselves within the purview of the protection of laws applicable to spouses. It entails the retrospective removal of (vested?) rights that all same-sex couples were accorded by virtue of each of the judgments declaring constitutional invalidity and reading-in remedial words.

The correct answer is not obvious. Both can produce regrettable outcomes. The point is illustrated well and received attention in another context in the case of *Gory v Kolver*.[35] There, the Constitutional Court held that a section in the Intestate Succession Act[36] conferring rights of intestate succession upon a spouse but omitting to confer the same rights upon same-sex life partners was unconstitutional. The Court declared the legislation invalid and read-in words so that a same-sex surviving partner would inherit on intestacy. But it had also to confront the fact that the sisters of the deceased claimed to be his intestate heirs. They had acquired their rights on the death of the deceased, in terms of an Act that had not been declared invalid at that point. They argued that their vested rights could not be taken away by the court's finding, which they argued, should apply only to the estates of persons who die after the judicial pronouncement. Van Heerden J held that a judicial pronouncement of violation of the Constitution by an Act renders that Act invalid as from the moment the Constitution came into effect (27 April 1994) because of the supremacy of the Constitution. This is so unless the court, in the interests of justice and equity, limits the retrospective effect of such a declaration of invalidity. The reading-in by the court in this case created rights for a surviving same-sex partner as from the date of the coming into force of the Constitution, not as from the date of the judicial pronouncement. The Court's finding (regrettably) took away the rights of the sisters as intestate heirs, and (happily) conferred them on the surviving same-sex life partner. A hard case indeed. Applying this case to the question posed above would yield a positive answer: same-sex couples who do not invoke their right to marry remain protected in terms of the legislation that formed the basis of the judgments designed to

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[35] 2007 (3) BCLR 249 (CC).
[36] Act 81 of 1987.

protect those who could not marry. Heterosexual couples who cohabit but do not marry do not enjoy that protection. They never did. Unless the legislature intervenes, it seems they never will.

(b) Marriageable age

The Marriage Act[37] allows males of 18 years and over and females of 15 years (who are minors until 18 and require the consent of their parents to marry) and over to marry. If they are below these 'marriageable ages', they may still marry, but only with the consent of the Minister or, in certain circumstances, a judge. By contrast, the Civil Union Act expressly states that a civil union is the voluntary union of two persons 'who are both 18 years of age or older'.[38] It does not make any provision for persons below this age to marry. So, opposite-sex couples can marry below the ages of 18, in terms of the Marriage Act, but same-sex couples cannot. Was the differentiation intended? It may have been, on the 'moral' basis that gay and lesbian persons under the age of 18 years are too young to be taking a decision to marry. But this is pure conjecture. A mistaken inconsistency is the more likely answer. Either way, the differentiation may amount to unfair discrimination, and a constitutional challenge may be lurking here.

(c) Parental consent to marry

Apart from the silence of the Civil Union Act on marriageable age, there is the issue of parental consent, which the Marriage Act stipulates must be obtained by minors wishing to marry. At the time of the coming into operation of the Civil Union Act, on 30 November 2006, the age of majority in South Africa was 21 years.[39] Since the coming into operation of certain sections of the Children's Act[40] on 1 July 2007, however, the age of majority has been altered to 18 years. Should persons of 18, but who were still minors and who used the Civil Union Act prior to the coming into operation of the new age of majority, have acquired the consent of their parents for the civil union, just as they had to for a marriage under the Marriage Act? The impression created by the Civil Union Act, which is silent on parental consent, is that at 18 such a union could have been entered into without further ado. These matters needed clearer thinking by the draftspersons.

(d) Determination of matrimonial property regime

The private international law rule for determining the matrimonial property regime in South African law is the law of the husband's domicile at the time of

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37 Act 25 of 1961, in s 26.

38 In s 1 of Act 17 of 2006.

39 In terms of s 1 of the Age of Majority Act 57 of 1972, which was repealed by the Children's Act 38 of 2005. The relevant section in the Children's Act is s 17 and it did not come into operation until 1 July 2007.

40 Act 38 of 2005.

the marriage. A difficulty probably not foreseen by the drafters of the Civil Union Act is that civil unions are couched in gender neutral terms. Assume that the same-sex partners to a civil union have different domiciles. In the case of two males who conclude a civil union, the problem will be selecting the husband in order to determine the applicable property regime; in the case of two females, which of the women will be regarded as the 'husband' for this purpose?[41]

VI CONCLUSION

The South African law of husband and wife was complex before the advent of the new constitutional dispensation because it regulated intimate relationships according to race and gender and date of marriage. In the aftermath of adopting a Bill of Rights that outlaws unfair discrimination the country has achieved a considerable measure of fairness and justice through decisions of the courts and through legislation. But the intricacy of the web that has been woven in the process leaves men and women, and their legal representatives, groping for answers to complex problems that do not beset other jurisdictions nearly to the same extent. It is true that South African society is highly diverse and that there are widely varying expectations of the law by different groups. But this fact does not justify the continuing complexity that confronts us now. A plea for simplification by way of a general family code was made by me in a paper delivered in Oslo in 2002. It is repeated here.[42]

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[41] Le Roux 'What a Farrago' 2007 (April) *Without Prejudice* 71 raises this and other thorny issues.

[42] 'Embracing New Family Forms, Entrenching Outmoded Stereotypes: Building the Rainbow Nation' in P LØdrup and E Modvar *Family Life and Human Rights* (Gyldendal Norsk Forlag, 2004) 801 at 833–837.

Spain

THE POSTMODERN FAMILY AND THE AGENDA FOR RADICAL LEGAL CHANGE

*Miquel Martín-Casals and Jordi Ribot**

Résumé

Depuis quatre ans, le législateur espagnol a mis en branle un calendrier de réformes radicales en droit de la famille. Elles incluent notamment le mariage entre personnes de même sexe, l'amélioration du statut légal des personnes transgenres et une réforme du divorce dont l'objectif est de répondre aux manquements de la réglementation précédente. Alors que certains de ces changements du droit reflètent l'évolution des valeurs familiales, ils n'ont pas manqué de susciter une opposition acharnée de certains groupes sociaux. Au surplus, étant donné que le processus de «postmodernisation» de la famille espagnole n'est pas encore achevé, la vigilance s'impose à l'égard de l'application de certaines de ces nouvelles règles dans la pratique juridique quotidienne. Ce survol entend expliquer les réalités sociales et les politiques législatives qui sous-tendent ces changements et il veut vérifier comment ces changements s'harmoniseront au paysage juridique actuel.

I A SOCIETY THAT HAS CHANGED A GREAT DEAL … OR PERHAPS NOT SO MUCH AFTER ALL?

Only a few decades ago, at the end of the 1970s, Spanish families had a large number of children, the average fertility rate was high and so was the number of marriages.[1] Very few women had jobs outside their home and although an increasing number followed university studies their presence within the liberal professions or as university professors and managerial staff was very rare indeed. Even from the legal point of view, married women did not have full legal capacity. Until 1975,[2] the husband – whom she was obliged to follow to wherever he decided to establish his residence (Art 58 of the Spanish Civil Code

* Observatory of European and Comparative Private Law University of Girona (Spain).

1 The average number of children per woman in 1975 was 2.803 – one of the highest among European countries – whereas the global fertility rate per 1,000 females was 79.19. The gross marriage rate was then 7.60: Instituto Nacional de Estadística (INE). INE Base Main Demographic Indicators available at: www.ine.es/en/inebmenu/mnu_analisis_en.htm (accessed 7 February 2008).

2 In 1975 an Act was passed to abolish most of the existing restrictions to married women's legal capacity (Act 14/1975, of 2 May, amending the Civil Code and the Commercial Code regarding the legal condition of married women and their spousal duties (BOE n 107, 5 May 1975)).

(CC)) – was her legal representative and had to authorise her to appear in court, purchase property or alienate it (Arts 60 and 61 CC). He was the sole administrator of common matrimonial property (Art 59 CC) and the sole holder of parental authority over their minor children (Art 154 CC). Divorce did not exist and the only remedy spouses could avail themselves of was legal separation, which had to be based on fault of one of the spouses, with the consequence that spouses who were at fault lost their rights vis-à-vis their children and had to wave goodbye to any prospect of obtaining maintenance (Art 73 CC). Ecclesiastical courts, although they did not pre-empt the jurisdiction of secular courts, had the power to decree legal separation and nullity of marriage, as well as to decide on the legal measures regarding custody of minor children and the economic consequences of marriage breakdown. Children born out of the wedlock had a lower legal status than children born within marriage and single mothers had no rights.

The social and economic development after the death of General Franco in 1975 and the passing of the Spanish Constitution 1978 (CE) opened the gate to the swift modernisation of customs. Changes had already started to take place at the end of the 1950s with the opening of the Spanish economy to international markets and which continued in the 1960s and early 1970s under the peaceful invasion of foreign tourists and the massive emigration of Spaniards as an unskilled, cheap labour force to more advanced European countries. The Constitution considered, however, that it was still necessary to proclaim solemnly that spouses were equal in marriage (Art 32.2 CE) and that all children were equal before the law regardless of their filiation (Art 39.2 CE). Moreover, it enshrined the right 'to investigate paternity' and for mothers to receive protection 'regardless of their marital status' (Art 39.3 CE). The debate on divorce started shortly after the Constitution was passed, and strong opposition from the Catholic Church and other conservative and powerful social forces led to a rather timid regulation, which was heavily criticised by its opponents, who branded it as unconstitutional and against the Agreements that the Spanish State had signed with the Holy See in 1979.

The last 30 years have witnessed an unprecedented transformation in Spanish society at large and, in particular, in the Spanish family and its values. Reform of matrimonial law, with the introduction of divorce, took place in 1981 and, among many others, subsequent reforms followed in order to decriminalise abortion (1983), modernise the regulation of guardianship (1983) and adoption (1987) and to establish the first regulation on assisted reproduction (1988). During these years Spain started experiencing the effects of the so-called 'second demographic transition' which, as is well known, is characterised by the growth of single member homes and an ageing population, resulting from an increase in life expectancy, a declining birth rate and the impact of escalating divorce rates on families.

Also, starting from the 1980s, Spanish women have enrolled in the labour market and higher education en masse. Ever since, women's activity in the labour market has steadily grown to a rate equal the average rate existing in the

most developed countries, increasing in less than a decade from 39.50% (1998) to 49.37% (2007).[3] This data may explain the considerable increase in the average age of couples on the event of their first marriage which, by the end of the 1990s was already 29 for women and 30 for men.[4] During the 1980s and 1990s a dramatic decrease in the number of children a woman had given birth to also took place, dropping to a historical minimum of 1.15 in 1998.[5] The marriage rate has also fallen to a constant average of five per thousand inhabitants per year over the last few years. Alongside this, and in spite of the low proportion of unmarried couples, the percentage of children born to unmarried mothers has been increasing constantly until it reached 26.57% of all births in 2005.[6]

The 'Postmodernisation of Spanish family' – as the process of the evolution in family values and culture as a result of this changing economic environment has also been called[7] – has been a fertile breeding ground for legislative reforms whose main characteristic is breaking with inherited legal tradition. In this regard, the last years have been thrilling years of frantic change. After a dull conservative period full of doubt and hesitation, the Socialist party's coming into power has set an agenda for radical change into motion. Among other items,[8] it has included same-sex marriage, the improvement of the legal position of transgendered persons and a divorce reform aimed at putting an end to the shortcomings of a regulation passed under the pressure of social forces hostile to it.

This survey aims at offering the reader a wider perspective and at applying this to the reforms that have taken place over the last few years: a bundle of reforms which can only be understood in light of the changes in family culture that have taken place in Spain over these last decades.[9] In spite of tradition, Spanish family culture has evolved in a direction that favours the privatisation of family

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3 Data available from the website of the Instituto de la Mujer at: www.mtas.es/mujer/mujeres/cifras/empleo/situacion_laboral.htm (accessed 7 February 2008).

4 In 2005 the corresponding figures are 31.52 for men and 29.35 for women, whereas in 1975 they were 26.83 and 24.89: INE Base Main Demographic Indicators (see above n 1).

5 INE Base Main Demographic Indicators (see above n 1).

6 INE Base Main Demographic Indicators (see above n 1).

7 Gerardo Meil Landwerlin *La postmodernización de la familia española* (Acento editorial, Madrid, 1999).

8 An important part of the agenda for radical legal change, which will not be dealt with here, has also been the legislative initiatives against gender violence (Organic Act 1/2004, of 28 December (BOE n 313, 29 December 2004)) or in favour of equal opportunities for women (Organic Act 3/2007, of 22 March (BOE n 71, 23 March 2007)), as well as the new regulation favouring research on embryonic cells (Act 14/2007, of 3 July, on Biomedical Research (BOE n 159, 4 July 2007)).

9 On the process of reforms of Spanish matrimonial law, but taking a different standpoint of analysis, see previously Gabriel García Cantero 'Family Law Reform in Differing Directions' in A Bainham (ed) *The International Survey of Family Law 2006 Edition* (Jordan Publishing, 2006). In English, see also Ferrer 'Same-sex Marriage, Express Divorce and Related Developments in Spanish Marriage Law' [2006] International Family Law 139–143, Encarna Roca *Homosexual Families: Adoption and Foster Care* (Wellchi Working Paper Series No 6/2007, Children's Well-being International Documentation Centre, Barcelona, 2007) available at: www.ciimu.org/webs/wellchi/publications.htm.

relationships and, as regards their organisation, fosters a very high degree of de-institutionalisation. The prevailing social perception with regard to topics such as homosexuality, sexual relationships outside marriage, or the reasons that justify a couple's desire to divorce are extremely distant from values and attitudes prevailing in Spain not so long ago.

However, the firm and unmistakable determination to set an agenda for radical change into motion has given rise to an equally radical social and political opposing reaction. Additionally, more often than not, legal reforms are the expression of ideal models that do not fit perfectly into a much more complex and ambivalent social reality. In the Spanish case, in particular, the controversy generated by certain legal reforms and experience of daily legal practice show that the process of post-modernisation of family life in Spain is still limited and patchy and that these characteristics may act upon the actual impact of some of the radical legal changes brought about in the last few years.

II SOCIAL CHANGE AND THE RADICAL AGENDA: AN ASSESSMENT

(a) Family and new family forms

(i) Same-sex marriage

Homosexuality was outlawed in Spain until 1988. Homosexual relationships between adults constituted a crime of public scandal (Art 431 Penal Code). Public opinion is still today strongly polarised around this topic and responds to the parameters of age, marital status, religion, if any, and ideology of the respondents. A great majority, however, are in favour of equal rights for homosexuals. From the 1990s onwards, Spain is among the Western European countries with higher percentages of tolerance and acceptance towards homosexuality[10] and the data of the 2001 census reflects that 9 out of 1,000 unmarried couples openly came out as homosexuals.[11]

In view of this data it is no surprise that the claims of gay and lesbian groups became part of the political agenda in the 1990s and were laid down in new legal rules. First, these claims took shape in regional statutes on unmarried couples[12] and finally as the pivotal motto for radical legal change within the *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de*

[10] Eurobarometre 39.0 *Les européens et la famille. Résultats d'un enquête d'opinion* (European Commission, Bruxelles, 1993) 92–96. In this respect, Spanish society does not fit into the Southern European pattern followed by countries such as Italy, Greece or Portugal, where a majority of respondents think that homosexuality is still taboo (Eurobarometre 263, Summary, *Discrimination in the European Union. Special* (European Commission, Bruxelles, 2007) 12).

[11] See *Cifras INE* 6/2004 (Cambios en la composición de los hogares) (available at: www.ine.es/revistas/cifraine/0604.pdf). The 2001 census numbered 10,474 homosexual couples out of 563,785 cohabiting couples (1.85%). Some Autonomous Communities appear to have a higher proportion of homosexual couples than the national average: Balearic Islands (2.39%) and Canary Islands (1.92%).

[12] See below n 59 and 60 and the corresponding text.

derecho a contraer matrimonio,[13] ie the Act amending marriage, as regulated in the Spanish Civil Code, by introducing same-sex marriage.[14]

Opening marriage to same-sex couples was an electoral promise of the Socialist party for the elections of 14 March 2004. Beating all predictions, the Socialist party won the elections and the new government, under the leadership of Mr José Luis Rodríguez Zapatero, has put its mind to giving shape to this and other initiatives[15] which were considered emblematic on this new political stage.

The draft Bill for same-sex marriage was approved by the government on the 1 October 2004 and introduced into Parliament in January 2005. In its Statement of Purpose the Act contends that 'life in common as a couple of persons of the same sex has obtained increasing social recognition and acceptance, overcoming thereby deep-rooted prejudice and stigma'. In fact, when the Act was passed, opinion polls showed that the opinion of a great majority of the public was in favour of opening marriage to same-sex couples.[16] The parliamentary proceedings of the Bill were conducted rather swiftly in spite of the active opposition of the conservative Popular Party and the Christian Democrat sectors of the Catalan and Basque nationalist parties. In the Senate, a conservative majority succeeded in imposing its veto and forced the Bill to be sent back to Parliament for approval according to the procedure provided by Art 90.2 CE. The result of the voting in the Parliament was: votes cast: 338; in favour: 187; against: 147; and abstentions: 4.

From the point of view of legislative drafting technique, the Act confines itself to adding a paragraph to Art 44 CC, an article which provides that: 'Man and woman have the right to marry according to the provisions of this Code'. The new paragraph establishes now that 'marriage will have the same requirements and effects when marrying parties are of the same or of different sex'. Additionally, the Act amends other provisions of the Civil Code so as to replace all references to 'husband' and 'wife' by the generic expressions of 'spouses' or, in the case of references to 'father' and 'mother', by the generic and neutral term of '*progenitor'* (parent). It also lays down that from the day of its entry into force,[17] 'all statutory and regulatory provisions referring to marriage will be considered applicable regardless of the gender of their members' (First Additional Provision).

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13 BOE n 157, 2 July 2005.

14 On the sociopolitical context of the Act, see Kerman Calvo Borobia 'Necesidades políticas y protesta colectiva en la regulación de los matrimonios homosexuales en España' *Revista Jurídica UAM,* 2006, 139–158. See also Raquel Platero 'Love and the State: Gay Marriage in Spain' (2007) 15 *Feminist Legal Studies* 329–340.

15 See above n 8.

16 According to a public opinion survey released in June 2004 by the *Centro de Investigaciones Sociológicas* – a centre accountable to the Spanish government – 67.7% of the respondents were favourable to the introduction of same-sex marriage whereas only 23.7% of the respondents rejected it. The survey is available at: www.cis.es/cis/opencms/-Archivos/Marginales/2560_2579/e256800.html (Question 14) (accessed 7 February 2008).

17 3 July 2005.

Many social sections rejected the Act and an important part of legal scholarship has been very critical of it.[18] The main opposition party lodged an appeal to the Constitutional Court seeking the declaration of unconstitutionality of the Act.[19] Some judges in charge of the Registry of Marriages and Births have raised questions of unconstitutionality of the Act, which the Constitutional Court has rejected without going into the substance of the case, since it has considered that judges who are in charge of a Register lack the required jurisdiction to file such claims.[20] In one case, a judge in charge of the Registry of Marriages and Births has even alleged conscientious objection in order to be relieved from the duty of authorising same-sex marriages.[21]

Legal scholarship agrees in criticising the government for acting hastily and without having weighed up the opportunity of the measure and the degree of social rejection to it, especially when the plurality of approaches to this matter, which result from a comparative law analysis, offer different alternatives.[22] A section of legal scholarship considers that, although neither a reform of the Constitution nor a reinforced parliamentary majority was required to pass this Act, instead of reforming an essential aspect of marriage the government should have considered the possibility of recognising same-sex couples as legal partnerships with equal rights to marriage in all aspects except in the name of the legal institution.[23] This possibility was also proposed by the main opposition party, in spite of the fact that during the 8 years that it had been in power it had rejected all initiatives aiming at the same result.

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[18] See among others García Cantero (above n 9), José Luis Requero Ibáñez 'Reformas del Código Civil al servicio de una empresa idelógica' *Actualidad Jurídica Aranzadi* (2005), n 655, Enrique Ramos Chaparro 'Comentario crítico a la Ley 13/2005 sobre "matrimonio homosexual"' *Aranzadi Civil* 1/2006, and Guillermo Cerdeiro Bravo de Mansilla 'Es constitucional hoy el matrimonio "homosexual" (entre personas de idéntico sexo)?' *Revista de derecho Privado* (2005) 37–56. But see Etelvina Valladares Rascón 'El derecho a contraer matrimonio y la Constitución' *Aranzadi Civil* 9/2005 and Cristina de Amunátegui Rodríguez 'Argumentos a favor de la posible constitucionalidad del matrimonio entre personas del mismo sexo' *Revista General Legislación y Jurisprudencia* 3/2005, 351–368.

[19] Unconstitutionality appeal n 6864–2005. The appeal relied upon Art 32 CE, which according to the appellants' view lays down the right of man and woman to get married, thereby recognising (heterosexual) marriage as an institution protected by the Constitution. The appellants consider that the Act also disregards the protection that the Constitution demands for minor children (Art 39.2 CE) as long as it allows joint adoption by same-sex married couples. On the issue, with differing views, see for instance Julio V Gavidia Sánchez 'Uniones homosexuales y concepto constitucional de matrimonio' *Revista Española de Derecho Constitucional* 61/2001, 49–50;, Fernando Rey Martínez 'Homosexualidad y Constitución' *Revista Española de Derecho Constitucional* 73/2005, 111–156; and Luis María Díez-Picazo 'En torno al matrimonio entre personas del mismo sexo' InDret 2/2007 available at: www.indret.com.

[20] See admissibility decisions 505/2005 and 508/2005, of 13 December, 54/2006 and 59/2006, of 15 February, and of 16 January 2008.

[21] Such a possibility was rejected by the Full Chamber of the General Council of the Judicial Power on 22 November 2006.

[22] See the account provided by Cristina de Amunátegui Rodríguez 'Argumentos a favor de la posible constitucionalidad del matrimonio entre personas del mismo sexo' *Revista General Legislación y Jurisprudencia* 3/2005, 351 ff.

[23] See the *Dictamen* 2628/2004 of the State Council (16 December 2004) on the draft bill of Act 13/2005. See also Maria Paz García Rubio 'La modificación del Código civil en materia de

Two-and-a-half years after the Act came into force data shows that a considerable number of same-sex couples have decided to marry.[24] Between July and December 2005 alone, 1,269 same-sex marriages took place. According to most recent data, another 4,313 same-sex marriages were celebrated in 2006.[25] Following this trend, the number of same-sex marriages could be currently around 8,000, a figure that would be over 70% of the more than 10,000 same-sex couples calculated by the 2001 census.[26] As regards the fate of the Act in the near future, everything seems to depend on the decision pending in the Constitutional Court, since the main opposition party has already declared that it does not intend to abrogate it if it wins the March 2008 elections and the Constitutional Court rejects its claim for unconstitutionality.

Finally, as regards the celebration of same-sex marriages when one of the partners is a foreigner, legal scholarship has also criticised the legislature sharply for refraining from furnishing guidelines.[27] The problem arose only a few days after the Act was passed, when the Justice of Peace in charge of the Registry of Marriages and Births of Canet de Mar (Barcelona) issued a ruling requiring a foreign partner to provide a report from his Consulate stating that he was not married and declaring that Hindu law allowed the marriage he wanted to enter into. Accordingly, the celebration of marriage was suspended. Finally, however, the ruling was revoked.[28] The General Direction of Registers issued an important Internal Circular Order[29] on 29 July 2005 which considered that same-sex marriage between a Spanish citizen and a foreign one celebrated in Spain is valid even when the personal law of the foreign partner does not recognise this sort of marriage. According to the Circular, the grounds for this outcome are that heterosexuality of marriage is not a *subjective* requirement of the marrying parties – which must be fulfilled according to what their personal law provides, pursuant to Art 9.1 CC – but an *objective* requirement of marriage as an institution. Since the Act has not established any rules for mixed marriages, it has given rise to a legal gap which must be filled

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derecho a contraer matrimonio' *La Ley*, n 6359, 15 November 2005, 3–4 and Maria Paz Pous de la Flor 'La institución familiar en las parejas del mismo sexo' *La Ley*, n 6276, 17 June 2005, 6.

24 The Ministry of Justice issued the order JUS/568/2006, of 8 February (BOE n 53, 3. March 2006), subsequently amended partially by order JUS/644/2006, of 6 March (BOE n 58, 9 March 2006), to adapt the Registry of Marriages and Births to put into effect the new rules on same-sex marriages.

25 INE Demography and population. Vital statistics. Definitive results 2006 (Updated 7 February 2008), available at: www.ine.es.

26 See above n 11.

27 See Santiago Álvarez González 'Matrimonio entre personas del mismo sexo y doctrina de la DGRN: Una lectura más crítica' *La Ley*, n 6629, 15 January 2007, 1–4, and more references therein.

28 See Decision of the General Direction of Registers 26 October 2005 (Actualidad Civil 5/2006). According to a later Decision, issued on 7 April 2006 (La Ley 2006, 993), if the competent authorities had denied the certificate on matrimonial capacity required by Convention n 20 of the International Commission on Civil Status to a foreigner who wants to conclude a same-sex marriage in Spain, this fact does not prevent him from marrying, provided that the only ground for denying his application is the lack of the said certificate.

29 BOE n 188, 8 August 2005.

according to the principles resulting from Spanish material law and according to the yardstick that a maximum effect on the fundamental right to enter marriage must be given.[30] On the same grounds, the Circular also accepts that two foreigners may enter same-sex marriage validly in Spain as long as at least one of them has legal residence in the country (Art 57 CC) and points out the requirements that must be met for Spanish consular authorities to authorise same-sex marriages abroad (Art 51.3 CC). The practical result of this permissive approach is quite clear in light of the data on same-sex marriages celebrated in Spain: the rate of same-sex marriages where at least one of the spouses is a foreigner almost doubles the rate of opposite-sex marriages where one of the spouses is a foreigner (i e 32% against 15.72%).[31]

(ii) Adoption by same-sex couples

Adoption by same-sex couples is a disputed matter and public opinion is even more divided on this subject than on the access of same-sex couples to marriage.[32] Before Act 13/2005 was passed, however, several regional partnerships Acts had already accepted that same-sex partnerships could adopt jointly. This was the case, for instance, of the Basque *Ley 2/2003, de 7 mayo, reguladora de las parejas de hecho*[33] and of the *Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables* for Navarra. In fact, and to the astonishment of much of Spanish society, the Court of First Instance Number 3 of Pamplona issued, on 22 January 2004, a judicial decree which gave joint physical custody to the female partner of the biological mother of two twin girls who became pregnant as the result of assisted reproduction.[34] In the wake of the debate created by the judicial decision, several Autonomous Communities decided to include joint adoption by same-sex couples into their legislation.[35]

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[30] Most of the scholars commenting upon the Circular Order of the General Direction of Registers show their doubts about its internal consistency. Among many others, see Rodrigo Bercovitz 'Laguna legal y matrimonio de los homosexuales' *Aranzadi Civil* 18/2006, 1–3, Juan María Díaz Fraile 'Exégesis de la doctrina de la Dirección General de los Registros y del Notariado sobre la reforma del código civil en la materia del matrimonio introducida por la nueva Ley 13/2005, de 1 de julio' *La Ley* 2006, n 6449 and 6450, and Álvarez González (n 27 above) 3–5. But see the positive opinion delivered by Alfonso-Luis Calvo Caravaca and Javier Carrascosa González 'Matrimonio entre personas del mismo sexo y derecho internacional privado español' *La Ley* 2006, n 6391, 3.

[31] Out of 4,131 same-sex marriages entered into in 2006 1,323 were marriages between a foreigner and a Spaniard or between foreigners.

[32] According to the conclusions of a survey funded by the Fundación BBVA (*Retrato social de los españoles,* July 2007) 44% of citizens say yes to adoption by same-sex couples whereas 42% of the citizens reject it (quoted in *El país,* 26 July 2007).

[33] BOPV n 100, 23 May 2003. The constitutionality of Art 8 of the Basque Act 2/2003 was challenged before the Constitutional Court by the Spanish government and its application suspended by the court (see ATC 427/2003, of 18 December). After passing the Act 13/2005, the government withdrew the appeal.

[34] Later on, other court decrees have reached similar results when applying the above mentioned Acts. See Court of First Instance n 2 of Gernika 21 February 2005 (AC 200565) and Court of appeal of Gipuzkoa 13 May 2005 (AC 2005390).

[35] Aragón in 2004 (Act 2/2004, of 3 May (BOA n 54, 2 May 2004)) and Catalonia in 2005 (Act 3/2005, of 8 April (DOGC n 4366, 19 April 2005)).

Although it follows by implication only, Act 13/2005, besides opening marriage to same-sex couples, also involves same-sex married couples being allowed to adopt jointly.[36] However, the Act has not repealed the Third Additional Provision of the Act 21/1987, which had extended joint adoption to 'the man and woman members of a couple united in a permanent manner by a relationship of affection analogous to that of spouses'. Therefore, joint adoption by unmarried couples is still confined to heterosexual couples.

For persons marrying partners who already had children from a previous relationship, or who lived unmarried with these partners, adoption was initially the sole possibility to establish a relationship of filiation with their spouse's or partner's children.[37] Indeed a new regulation on assisted reproduction, passed around the same time as the new regulation on same-sex marriage, contained no provision which permitted the establishment of a relationship of filiation between the member of a lesbian couple who gives her consent to the application of artificial insemination on her partner and the child born as a result of these reproductive techniques. Done on purpose or inadvertently it was puzzling that, by contrast to what happens with the consenting male member of an opposite-sex marriage or unmarried couple, the new Act did not allow the consenting lesbian same-sex spouse to be legally considered to be the ('second') mother of the child.[38] Under the pressure of lesbian groups and public opinion the legislature decided to amend the Act by adding:[39]

> 'When a woman [undergoing treatment] is married to another woman and not legally or *de facto* separated, the latter will be able to declare before the person in charge of the Register of Marriages and Births of the place of her domicile that she gives her consent, when the child is born to her spouse, to establishing filiation also in her favour.'

Thus, the new Spanish legislation enables both access to adoption and consent to filiation of the child born by means of artificial insemination. In both cases, it refers exclusively to married couples. In spite of the previous experience of the regional statutes on registered partnerships, the state legislature has maintained the different treatment between heterosexual and homosexual

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[36] See the ruling of the Court of First Instance n 23 of Madrid 18 July 2006 (La Ley 92314006), on the adoption by a woman of the children of her female spouse, applying Act 13/2005.

[37] See Decision of the General Direction of Registers 30 September 2004, which denied the application filed by the female partner of the biological mother to be registered as (second) mother to the former's son.

[38] Following Art 9 Act 14/2006, of 26 May (on which see below), the Decision of the General Direction of Registers 5 June 2006 (BOE n 28 August 2006) had no chance but to rule out any legal effect to such a consent.

[39] Art 7.3 Act 14/2006, of 26 May, as amended by Act 3/2007, of 15 March, regulating the rectification of the Register as regards the mention of gender of persons (BOE n 65, 16 March 2007). It has been pointed out that here it is a question of finding an ad hoc remedy for the situation created by the non-application to marriage between women of the presumption of matrimonial filiation that the Code establishes for children born after the celebration of marriage. However, the peculiarity here is that the female spouse is not entitled to oppose assisted reproduction/fertilisation for her spouse. See Bercovitz Rodríguez-Cano 'Transexualidad, matrimonio entre personas de un mismo sexo y nombre' *Aranzadi Civil* 3/2007.

registered partnerships. All evidence suggests that this is not an intended effect resting upon either the greater stability of marriage or on reasons of legal certainty. Had this been the case, what should have been done is an amendment to the regulation in force regarding heterosexual partnerships. Under this point of view the current situation can be subject to criticism.

(iii) Legal status of transgendered persons

Tolerance towards other lifestyles and towards forms of personal development and fulfilment which are different from traditional ideas – or even in stark contradiction to them – has also been put to the test in the case of transgendered persons. The de-stigmatisation of this social group has opened up the possibility of legal recognition. This has been attempted, basically, through the possibility of changing the gender that is legally recorded in order to make it match with the gender that the person actually feels and lives, first, something which has been done with limited effects, and with full legal efficacy, second.

During a first stage Spanish courts recognised the right to change the name and the gender reference in the Register. The Supreme Court considered that, although the indication of gender existing in the registration of births could be changed, marriages celebrated by transgendered persons in accordance with the new gender publicised in the Register were void.[40] However, transgendered organisations did not agree with this restrictive position and their demands, aimed at obtaining the recognition of the right to marry (once the relevant data included in the Register had been changed), brought about the change carried out by the Act 13/2005 with regard to same-sex marriage.

During a second stage, along the lines of the evolution of the doctrine of the European Court of Human Rights (ECtHR),[41] Spanish courts and public authorities modified their original position and, in a series of Decisions published at the beginning of 2001,[42] the General Direction for Registers accepted that, in spite of the coincidence of biological sexes, nothing prevented them from authorising and registering the marriage if the reference to gender of the corresponding spouse had been modified in the Register. Previously, some judges had already authorised marriage between a man and a transgendered person[43] and public prosecutors had already stopped bringing actions against this sort of marriage. Whereas sometimes courts required the transgendered person who wanted to marry to have undergone surgery in order

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[40] See SSTS 8 July 1988 and 9 March 1989 (RJ 1989993) and decisions of the General Direction for Registers 2 October 1991 and 21 January 1988.

[41] See ECtHR 11 July 2002 (Cases *I v UK* and *Christine Goodwin v UK*).

[42] See decisions issued on 8 January 2001 (RJ 2001568; 2001569) and 31 January 2001 (RJ 2001095). See also the declaration issued on 21 March 2001 (RCL 2001, 286).

[43] See preliminary ruling of the Court of First Instance n 3 Igualada 3 January 2001 (AC 200115) and Melilla 10 January 2000 (AC 1999607).

to adapt his or her morphological characteristics to the new gender identity,[44] most courts' decisions seemed to be against this requirement.[45]

The third and current stage in the evolution of the legal recognition of transgendered persons has been brought about by the intervention of the legislature. The *Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*[46] (Act regulating the rectification of the Register as regards the mention of gender of persons), aims at removing all obstacles that hinder the legal recognition of the real gender identity of transgendered persons. In particular, it clearly excludes the requirement to undergo surgery or invasive treatment and, according to the new Act, the change in the reference to gender in the Register will be carried out, with all legal effects, once the person to whom gender dysphoria has been diagnosed provides a medical report showing that 'there is a dissonance between the morphological sex or physiological gender initially recorded and the gender identity felt by the applicant or psychosocial sex, as well as the stability and persistence of this dissonance'. The report must also reflect that there are no 'personality disorders which may have influence, in a decisive manner, on the existence of the dissonance mentioned in the previous paragraph' (Art 4.1 a). With regard to medical treatment, in principle it must be proven that this person 'has undergone medical treatment at least during two years in order to adapt his or her physical characteristics to those of the sex that is being claimed for', something which will be done by means of a report of the registered medical practitioner who has directed the treatment or, failing the existence of this report, by a report of a specialised forensic surgeon. This treatment will not be required when 'health grounds or age prevent from taking this treatment and a medical report declares that this is the case' (Art 4.2). In any case, the Act states clearly that 'in order to obtain rectification in the Register it will not be required that medical treatment has included sexual reassignation' (Art 4.2 *in fine*).[47]

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[44] STS 6 September 2002 [RJ 200180] and also SAP Toledo 10 April 2002 [AC 2002,192] and Madrid 23 December 2004. See the exhaustive account provided by Javier Nanclares Valle 'Comentario a la STS de 6 de septiembre, de 2002: una recepción incompleta de la nueva doctrina del TEDH en materia de transexualidad' *Repertorio Aranzadi del Tribunal Constitucional* 12/2003, 49.

[45] In this sense see Court of First Instance n 1 Barcelona 17 December 2004 and Valladolid 13 December 2004, upheld by SAP and Barcelona 17 February 2004 (AC 2004, 893) and Valladolid 23 May 2005. See also SAP Cádiz 20 April 2005 (JUR 200543363) and Madrid 15 July 2004 (JUR 200443776). The Supreme Court dealt with a case brought to court before the entry into force of the Act 3/2007 and concluded that sexual reassignation should not be a requirement in the light of the circumstances of the case (see STS 17 September 2007 [RJ 2007968]).

[46] BOE n 65, 16 March 2007.

[47] As to the funding of medical treatments for transgendered persons, see Annex III of Royal Decree 63/1995, of 20 January, which confines the coverage to surgery aimed at curing intersexuality. Accordingly, courts are denying coverage of the treatment costs when they are claimed by transgendered persons against Social Security (see STS Social Chamber 27 March 2007 (RJ 2007189) and 29 May 2007 (RJ 2007348)).

(iv) Single-parent families

Spanish society no longer stigmatises single mothers. Single-parenthood is conceived as one of the possible ways of establishing a family and the Constitution bans all sorts of discriminatory treatment against mothers (Art 39.2 CE). In fact, in Spain, it is even possible to establish a single-parent family having recourse to assisted reproduction techniques due to the fact that, since the first regulation passed in Spain in 1988, assisted reproduction has always been available to single women.[48] Act 14/2006, of 26 May, which has repealed the 1988 Act, has ratified this approach providing specifically – in order to overcome practical obstacles allegedly put down to individual women seeking recourse to assisted reproduction techniques − that 'a woman can become user and recipient of the techniques regulated in this Act regardless of her marital status and her sexual orientation' (Art 6.2). The anonymity of the donor of reproductive material, which the Act continues to impose (cf Art 5 of Act 14/2006), means that the legislature accepts that there can be children who, according to this Act, will not have a legal father when they are born. This aspect was the subject of a heated debate in legal scholarship, but the Constitutional Court considered that on this point the Act was in accordance with the Constitution.[49]

Most single-parent families now existing in Spain are not created, however, through choice. They are the result of an ever-increasing number of teenage pregnancies, on the one hand, and of family breakdown where physical custody is attributed to one of the parents, generally to the mother, on the other. The scarcity of empirical research existing on this topic,[50] as well as existing data on single-parent households, show that only in a very low number of cases is the head of a single-parent family a man.[51] It must be added that many of these households depend economically on maintenance provided by the other parent, either to the children themselves or to the custodial parent in the form of a compensatory allowance.[52] In this context, lack of payment of maintenance gives rise to social and financial desertion and is one of the main reasons for the feminisation of poverty over the last decade.

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[48] Art 6.1 Act 35/1988, of 22 November, on assisted reproduction techniques (allowing both unmarried and married woman to be artificially inseminated, though for the latter her husband's consent is required unless they have separated (Art 6.3)).

[49] STC 116/1999, de 17 de junio. See M A del Pilar Cámara Águila, 'Sobre la constitucionalidad de la Ley de técnicas de reproducción asistida Comentario a la STC 116/1999, de 17 de junio', *Derecho Privado y Constitución* 13 (1999), 117–148, and more references therein.

[50] See Francisco Rivero Hernández, 'Efectos de la crisis matrimonial respecto a los hijos. Estudio judicial (Juzgados de Catalunya)', *RJC* 3/2003, 659–688.

[51] The 2001 census numbered 352,757 households consisting of a single-household with a divorced or separated mother with children under 16 (26.5% of all single-households) (*Cifras INE* 6/2004 (Cambios en la composición de los hogares), see n 11 above.

[52] Data from the 2001 census reveal that in 18.9% of single-households with a divorced or separated mother (ie around 52,000 households) there was not even one single person employed and, accordingly, that they were, financially, fully dependent on maintenance (*Cifras INE* 6/2004 (Cambios en la composición de los hogares), see n 11 above).

As a result of this type of single-parent family the legislature passed, at the end of 2007, an Act establishing a public fund which aims at advancing maintenance payments laid down in breakdown agreements approved by the courts or in judicial decrees in favour of minor or disabled children (the so-called *Fondo de Garantía del Pago de Alimentos*).[53] This fund is initially endowed with €10m and the beneficiaries are minor or disabled children only, living in households with an income lower than €9,204.2 (in the case of families with one child) or €10,854.9 (in the case of single-parent families with two children) (Art 4.1). The beneficiary is entitled to an advance payment of the monthly amount of maintenance established by the court (Art 8.2), although the Act sets a maximum amount of €100 for each beneficiary of the same family unit. Advanced payments can be received for a maximum period of 18 months, regardless of whether payments are received continuously or in a discontinuous manner (Art 9).

The state will legally subrogate, up to the total amount of the payments made to the beneficiary, as to the rights that he or she has against the debtor of maintenance; this amount is considered to be governed by public law and the state will be able to use a compulsory administrative procedure to collect it (cf Art 24.1).[54]

(v) Cohabitation

According to data from the 2001 census, Spain had at the time 563,785 cohabiting couples, with or without children, a figure that amounted to 5.05% of all Spanish households.[55] In some Autonomous Communities the percentage was even above 7%.[56] This data showed an increase of 155% when compared to the number of cohabiting couples entered in the 1991 census. Social attitudes towards cohabitants have also been increasingly favourable over the years.[57]

This situation explains why during the 1990s there was a strong judicial and legislative trend towards the recognition of rights and duties of cohabitants, in particular, after breakdown of life in common. In the wake of the Catalan Act 1998 on Stable Unions of Couples,[58] and closely following the model of regulation established by this Act, most Autonomous Communities have passed

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53 Developed by means of Royal Decree 1618/2007, of 7 December (BOE n 299, 14 December 2007). A resolution issued on 17 December 2007 (BOE n 306, 22 December 2007) approved the application that those seeking help from the fund are required to file.

54 On this issue, prior to the establishment of the fund, see Esther Arroyo i Amayuelas 'Los fondos de garantía del pago de pensiones de alimentos: "Públicos o privados". Análisis de las iniciativas españolas (estatales y autonómica catalana) a la luz de las propuestas de derecho público y privado comparado quebequés' *Revista de Derecho Privado* 3–4/2004, 209–234.

55 563,785 out of 11,162,937 households, from which 9,510,817 households consist in couples, married or unmarried: INE Base (Censos de Población y Viviendas 2001. Resultados definitivos), available at: www.ine.es/censo/es/consulta.jsp.

56 Balearic Islands (9%), Canary Islands (8.3%) and Catalonia (7.36%): *Cifras INE* 6/2004 (Cambios en la composición de los hogares), see n 11 above.

57 Meil (above n 7) 20.

58 Act 10/1998, of 15 July, *d'unions estables de parellla* (DOGC n 2687, 23 July 2998).

specific statutes establishing legal effects on personal and economic aspects, both during cohabitation and after its breakdown. According to the Catalan Act and other Acts, the effects resulting from the corresponding Act apply to cohabitants who have lived together for at least 2 years or who have a child in common.[59] Most of the other Acts, however, additionally require registration of the partnership in an administrative register. For those cases where these regional Acts are not applicable,[60] the case-law of the Spanish Supreme Court has shown, up until 2005, a clear trend towards an approximation of cohabitation to marriage and, by having recourse to a variety of legal devices, it has fostered the recognition of economic effects in favour of the most vulnerable cohabitant after breakdown.[61]

It must be acknowledged, however, that the driving force behind legislation on cohabitation has been the need to provide a legal framework for homosexual couples who, before the reform carried out by Act 13/2005, could not have access to marriage.[62] Several attempts to pass a state law dealing with this subject, which would have been applicable all over Spain, have failed. This explains both the proliferation of regional Acts trying to give a legislative solution to the problem and the subsequent reaction that led the Socialist party to include the issue in their agenda and subsequently gave rise to Act 13/2005. For these reasons, further attempts to introduce a state regulation of cohabitation[63] reached a deadlock when the wheels of legislation for opening up marriage to same-sex couples were put into motion. At the end of this term the government seems to have definitely abandoned the old idea of passing a state Act on bringing cohabitation close to marriage or even putting it on an equal footing.[64]

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[59] This is the pattern of the legislation in force in Catalonia, Aragón, Navarre and Asturias. See Miquel Martín-Casals 'Mixing-Up Models of Living Together. "Opting-In", "Opting-Out" and Self-Determination of Opposite-Sex Couples in the Catalan and Other Spanish Partnership Acts' in Miquel Martín-Casals/Jordi Ribot (eds) *The Role of Self-determination in the Modernisation of Family Law in Europe* (Documenta Universitaria, Girona, 2006) 287–307.

[60] On the legal effects laid down by the regional Acts, see María de los Ángeles Zurilla Cariñana 'Las uniones de hecho. Aspectos patrimoniales' *Aranzadi Civil* 22/2007.

[61] One of the last accounts of case-law on the issue is David López Jiménez *Prestaciones económicas como consecuencia de la ruptura de las parejas no casadas* (Aranzadi, Navarra, 2007). In this respect, the ruling of the Supreme Court of 31 December 2003 (La Ley Iuris 11525/2004) is perhaps the most striking one, for the Court left aside a separation agreement entered into by the cohabitants concerning the economic effects of the couple's breakdown, and on the basis of the doctrine of unjustified enrichment granted the claimant a portion of her former partner's assets to compensate her work for the family. On occasions, the Supreme Court has also applied the provisions on the economic effects of marital breakdown and divorce to unmarried cohabitants.

[62] See Miquel Martín-Casals 'Same-Sex Partnerships in the Legislation of the Spanish Autonomous Communities' in Katharina Boele-Woelki and Angelika Fuchs (eds) *Legal Recognition of Same-Sex Couples in Europe* (Intersentia, Antwerp, Oxford, New York, 2003) 54–67.

[63] BOCG, Congreso, Serie B, nos 26–1, 38–1 and 55–1, 23 April 2004.

[64] Granting the surviving cohabitant the Social Security allowances available to widows has been one of the issues that has been most disputed (and litigated on). In this respect, the Constitutional Court has relentlessly stated for years that this is a matter for the legislature, because the fact that the surviving cohabitant is not eligible for such allowances is not against

This restrictive approach seems to be in line with the current social situation in Spain. In spite of the growth in the number of cohabiting couples over the last decade, the figures of cohabitation outside marriage are much lower in Spain than in the other countries of the European Union.[65] Moreover, also by contrast to other countries, cohabitation in Spain is much less important. Marriage is not an institution under attack and rejection, not even among younger generations[66] and, by contrast to other countries, cohabitation is not perceived as an alternative to marriage, but as a first step to family life. In fact cohabitation is, for young generations, the normal gateway to life in common, although it must be admitted that currently young people tend to marry much later than in years gone by.[67]

In spite of the legislative and case-law developments that have taken place since the end of the 1990s, the social perception is still that marriage is the institutional framework providing more security and stability, both with regard to the couple's relationships and to having and bringing up children. According to this position it is not surprising that 'trial cohabitation' is the cohabitation modality prevailing in Spain, ie a sort of short-lived cohabitation concerning young couples in the main, which ends after a few years either by a breakdown of the relationship or, more positively, by marriage. Recent research based on data of the 2001 census reveals that young couples between 20 and 39 years consider that cohabitation is very different from marriage.[68] Moreover, several social indicators show that it has less stability and durability than marriage: the age average of cohabitants is much lower than in that of couples marrying for the first time, there is a significantly different fecundity rate – ie it is more unusual to cohabit and have children than to be married and have children – and most cohabitants live in rented housing whereas most married couples live in their own property.[69]

Since marriage has been opened up to those who could not have access to it and – as we will see – the dissolution of marriage has been made much easier since 2005, this gives rise to a strong presumption in the sense that those who do not adopt the legal measures to turn their lives together as cohabitants into marriage do not wish the state to apply matrimonial rules to them. This reasoning has even swayed the Spanish Supreme Court, which has used these

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the Constitution. After several attempts, the Act 40/2007, of 4 December (BOE n 291, 5 December 2007) provides that the surviving cohabitant is eligible to the same allowance as a widow if several requirements are met: (i) a means test showing both need or financial dependence of the partner; (ii) unbroken cohabitation for at least 5 years before the partner's death; and (iii) registration as partnership, where required by the governing law.

65 See Anna Cabré Pla and Pau Miret Gamundi 'Pautas recientes en la formación familiar en españa: Constitución de la pareja y fecundidad' *Papeles de economía española* 104 (2005) 17–35, 28.

66 Meil (above n 7) 25.

67 See above n 4.

68 Pau Miret Gamundi '"Son diferentes las uniones consensuales y los matrimonios" Comparación de los censos de población de 1991 y 200' *Revista Internacional de Sociología* n 48 (2007) 68.

69 Miret Gamundi (above n 68) 64–67.

arguments to justify a u-turn in its case-law, to assert in STS 12 September 2005[70] that 'cohabitation is an institution that has nothing to do with marriage, even when both belong to family law' and that '*after same-sex marriage and unilateral divorce have been introduced it can be proclaimed that cohabitation is constituted by persons who in no way want to enter into marriage with its legal effects*' (emphasis added).[71]

(b) Marriage and divorce

(i) Marriage and divorce in the present family culture

As has already been pointed out, in spite of the dramatic changes that Spanish society has undergone over the last few decades, there is no general attitude of rejection of marriage and marriage continues to be the institutional framework of reference for the family in Spain.

Data shows that in 2006 the gross marriage rate was 4.7 marriages per thousand inhabitants and that since the beginning of the 1980s it has always been around five per thousand inhabitants.[72] There has been, however, an important change as regards the features of these marriages: the number of mixed marriages and marriages between foreigners has increased (15.67% of all marriages in 2006) and also the number of second and further marriages (9% in 2006). On the other hand, 47.71% of marriages in 2006 were civil −ie non-religious − marriages.[73]

An even more important change is that in the prevailing family culture – and not only among young generations – marriage has lost its binding force. This perception is related to a more egalitarian understanding of the family, together with the ideas that the fundamental aspects of family life must be subject to co-decision and that the family relationships must respect individual rights. Its cornerstone is the idea that the essential foundations of marriage are mutual affection and understanding between spouses. When understood this way, marriage enjoys a very wide social acceptance.

At the same time there is also a wide consensus that the continuation of marriage cannot be imposed at any price and that divorce cannot depend exclusively on a plurality of serious grounds specifically laid down by the law. There is a clear tendency to accept that, in addition to serious reprehensible conduct such as domestic violence or infidelity, or to serious pathologies such as alcoholism or drug addiction, emotional or personal problems may also justify divorce. It is thus considered that divorce should also be obtained when situations such as incompatibility of characters, lack of reciprocal

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70 RJ 2005148.

71 These words are recalled obiter in later rulings: STS 5 December 2005 (RJ 20050185), 26 January 2006 (RJ 200617) and 19 October 2006 (RJ 2006976).

72 INE Base Main Demographic Indicators (see n 1 above).

73 Movimiento Natural de la Población 2006. Matrimonio. Datos definitivos (Tables 1, 3 and 4). By 1981 only 5.6% of marriages were non-religious marriages.

communication, lack of time for the other spouse, inattention to domestic tasks, lack of common interests and the like bring about a worsening in the relationship between the spouses that make life in common unbearable for one of them or for both.[74]

As in other Western European countries divorce has become something of a 'norm' in Spain. Currently only a very small minority of the population agrees with the traditional values of the essential permanence and indissolubility of marriage. At any rate, in the period between 1981 and 2005, 1,200,000 legal separations and 950,000 divorces had been decreed. Actually, if by the middle 1980s it could be asserted that the divorce rate in Spain was very low (0.1 per thousand) in only 15 years it has risen to around two per thousand inhabitants. Moreover, between 1993 and 2004 the divorce rate has risen from 0.7 to 2.4 per thousand inhabitants and currently more than one-half of divorces and one-third of legal separation are carried out according to non-adversarial legal proceedings.

Over the years, however, social change has not been accompanied by a process of legal change aiming to keep legal norms in step with social demands. The 1981 reform of the Civil Code reintroduced divorce into the Spanish legal system but tried to calm those social sectors opposing divorce by drafting a regulation that gave divorce the appearance of a last resort remedy to marriage crisis. For this reason, in most cases, it provided for the need to decree legal separation as a first step towards divorce, with the consequence that most couples had to follow two legal proceedings, the first one for legal separation and, once it was over, a subsequent one for divorce. This forced duplicity, prolonged the resolution of marriage conflicts, increased the costs of the system and introduced the dangerous possibility that disputes that had already been closed during separation could be reopened in subsequent divorce proceedings.[75]

A general consensus regarding the need to resolve this absurd situation by amending the legislation on divorce had already existed for many years[76] and over the last few years several proposals for amendment had been put forward, basically, by accepting that spouses could 'directly' resort to divorce on the same grounds already established for legal separation. If these proposals had been accepted they would have opened the possibility of divorce by mutual agreement and would have shortened the waiting periods when divorce was

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[74] Meil (above n 7) 21–24. Such a process is common in other Western Countries (see, for instance, the case of the Netherlands, as explained in Paul M de Graaf and Matthijs Kalmijn 'Divorce Motives in a Period of Rising Divorce' (2006) 27 *Journal of Family Studies*, 483–505.

[75] Ángel Carrasco Perera 'Divorcios rápidos' *Actualidad Jurídica Aranzadi* 642, 2004. For an economic analysis of the likely effects of the changes brought about by Act 15/2005, see Laura Alascio Carrasco and Ignacio Marín García 'Contigo o sin ti: regulación e incentivos al divorcio. Aproximación al análisis económico del divorcio en la Ley 15/2005' *InDret* 1/2007 (available at: www.indret.com).

[76] Family lawyers and judges widely share these criticisms: see the socio-economic analysis conducted in Juana Balmaseda Ripero and César Manzanos Bilbao (eds) *La Ley de Divorcio en España. Criterios y propuestas de modificación* (Dykinson, Madrid, 1999).

requested by one of the spouses without the consent of the other and on a legal ground. The factual situation was, however, that many courts had already started disregarding the legal grounds for separation and had already admitted that 'lack of *affectio maritalis*' could be sufficient to decree legal separation. This all-encompassing ground coined by the case-law permitted judges to decree separation when to detect or to prove the existence of a ground for separation laid down in the law was difficult.[77] Thus, for instance, the Court of Appeal of Alava could decree the legal separation of two spouses on the grounds of 'loss of love or affection between spouses, continuous reproach and arguments, and a distant and cold relationship between them'.[78]

All the above-mentioned amendment proposals presented during the term of the conservative government (1996–2004) were unsuccessful. When, in 2004, the government and the parliamentary majority changed, it demolished the model of divorce established in the 1980s in a sudden and surprising manner. In one stroke, the *Ley 15/2005, de 8 de julio*, *por la que se modifican el Código Civil y la Ley de Enjuiciamiento Civil en materia de separación y divorcio* (Act modifying the Civil Code and the Act for civil procedure regarding separation and divorce) abolished the legal grounds for separation and divorce and enshrined 'direct' divorce on the request of both spouses and, even, on the request of one of them without the consent of the other. The only requirement now is the lapse of a minimum of 3 months since the celebration of marriage unless 'it is proven that there is a risk for the life, the physical integrity, the freedom, the moral integrity or the sexual freedom and indemnity of the spouse requesting divorce, or of common children or of children of any of the spouses' (Art 81.2º *in fine* CC). In such cases, the lapse of 3 months is no longer required.

In sharp contrast to the previous regulation now repealed, the new regulation not only reinforces self-determination of the spouses by admitting the dissolution of marriage by mutual consent, but also enshrines the unilateral aspiration of any of them not to continue to be married to the other.[79] Thus, what the regulation actually accepts is a 'right to get divorced', a right whose sole limit consists in that it must be exercised following certain court proceedings once 3 months from the date of marriage have elapsed. No further hindrance stands in the way of the petition filed on the request of one of the spouses. Act 15/2005 does not include a reflection period that must be observed before or after filing the petition either.

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[77] See Miquel Martín-Casals, Jordi Ribot and Josep Solé Feliu 'Spanish Report on the Grounds for Divorce' in Katharina Boele-Woelki, Bente Braat and Ian Sumner (eds) *European Family Law in Action*, Vol I *(Grounds for Divorce)* (Intersentia, Antwerpen, Oxford, London, New York, 2003), and more references therein.

[78] SAP Álava 14 May 1999 (AC 1999109).

[79] On the goals of Act 15/2005, see − at that time Minister of Justice in office −Juan Fernando López Aguilar 'Los criterios constitucionales y políticos inspiradores de la reforma del Derecho Civil en materia matrimonial' *Actualidad Jurídica Aranzadi* 655 (2005) and Lorenzo Prats Albentosa 'La nueva regulación del derecho matrimonial español: bases y principios' *Revista Jurídica UAM*, 2006, 15–32. See also Alfredo García Gárate 'Hacia una reforma radical del Derecho matrimonial' in *Estudios Díez-Picazo* (Cívitas, Madrid, 2003), 4617–4629.

Act 15/2005 came into force on the 10 July 2005. Ever since, two consequences can be detected. The first one, a foreseeable effect, is that many separation proceedings have been turned into divorce proceedings.[80] The second one is that all data seems to indicate that an increase in the total number of divorces has taken place. Thus, whereas during the first semester of application of the Act divorces increased by 21.61% with regard to divorces decreed during the same period of the previous year,[81] the existing data on separations and divorces corresponding to 2006 places the Spanish divorce rate at 3.26 divorces per thousand inhabitants.[82] It remains to be seen, however, whether this acute tendency to rise will continue or whether, in spite of a continuous increase in the number of divorces, this increase will be, as it was until 2005, more gradual.[83]

(ii) Legal change and the limits to radical reform in Family Law

Act 15/2005 has made divorce so much easier and speedier that in common parlance it has been nicknamed the Act for 'divorce-express'. It must be emphasised, however, that it still requires separation and divorce to be decreed by a court and according to two different proceedings, depending on whether the petition for divorce is based on mutual consent or on the consent of one of the spouses only. Nevertheless, in all cases judges must confine themselves to decreeing the divorce, since they cannot investigate what reasons have impelled the petitioner to request divorce or whether these reasons are serious enough and have been proven. Since the petition of separation or divorce must be admitted at any rate and cannot be subject to dispute or assessed in its merits, it has been questioned whether the traditional consideration of divorce as a matter of public policy, not subject to the free disposal of the parties, is still valid today.[84] Moreover, it has been suggested that it could also seem reasonable to consider that court proceedings should not be necessary any longer since, according to the new substantive regulation, a declaration of any of the spouses before the Register of Marriages and Births,[85] or before a civil servant or a judge[86] could be sufficient to give rise to divorce.

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[80] The increase in the number of divorces in 2006 is 74.3% whereas legal separations have decreased by 70.7%. Cf INE Press release 16 December 2007 (available at: www.ine.es/prensa/prensa.htm) (accessed 8 February 2008).

[81] Cf Consejo General del Poder Judicial. Datos de Justicia, n 4 (Separaciones y divorcios tras la ley 15/2005) (February 2006). Available at: www.poderjudicial.es (accessed 8 February 2008).

[82] INE Press release 16 November 2007, available at: www.ine.es/prensa/prensa.htm (accessed 8 February 2008).

[83] Provisional data available concerning divorce proceedings entered into until the third trimester of 2007 (97,752) lead to the conclusion that the final amount will not reach the maximum of 2006 (141,317 cases), though the sum is already higher than all proceedings of divorce opened during 2005 (93,536). Cf Consejo General del Poder Judicial. Sección de Estadística Judicial, available at: www.poderjudicial.es (accessed 6 February 2008).

[84] Francesc Vega Sala 'La reforma de la separació i el divorci' *Revista Jurídica de Catalunya* 1/2006, 59. See also Enrique José Ramos Chaparro 'Objeciones jurídico-civiles a las reformas del matrimonio' *Actualidad Civil* 10/2005, 7.

[85] Vega Sala (above n 84) 46.

[86] Isabel Tapia Fernández 'El nuevo proceso de divorcio tras la promulgación de la Ley 15/2005, de 8 de julio "Necesidad de un proceso especial" "Necesidad de un proceso"' *Aranzadi Civil*

As regards the effects of separation and divorce on the spouses and their children, Act 15/2005 has not significantly altered the model existing prior to its introduction. The current regulation maintains the idea that the provisions that are going to govern the personal and financial matters after separation or divorce must be issued together with the divorce decree and as part of it. In particular, the decree must establish: who the children are going to live with; who will live in the family home; how the matrimonial assets are to be divided and how the matrimonial economic regime is to be liquidated; which amounts must be paid as maintenance for children or as a compensatory allowance for the other spouse, etc.

The main novelty of Act 15/2005 has been the amendment of the regulation existing on two crucial aspects of marriage breakdown: the regime of the financial claims of the spouse to whom marriage breakdown causes a detriment against the other spouse (compensatory allowance) and the criteria used to grant physical custody of common minor children. Both aspects are part of the agenda for radical legal change to which the legislature has dedicated all its efforts. The premise for these amendments is, here again, social change and the transformation of family relationships. As regards a compensatory allowance, change is required because it is considered that the regulation introduced in 1981 does not conform any longer to the type of marriages that undergo breakdown in the present; in the case of physical custody of minor children, because the legislature has aimed at promoting forms of custody that after the marriage breakdown allow both parents to participate in the education and upbringing of their children on an equal footing.

The transient nature of the compensatory allowance: clean break and the survival of 'traditional' family models

After Act 15/2005 the 'compensatory pension' in Art 97 CC has been renamed the 'compensatory allowance'. This change, however, does not alter its foundations and legal characteristics. As before, the allowance is still a remedy for the worsening of the financial situation of one of the spouses resulting from divorce when the new situation is compared to the one existing during marriage.[87] The main changes have been to expressly accept that this compensation can be made in a single payment and that it can have a temporary character, an aspect that was not clear in the previous wording of the Code. Thereby, the legislature has stressed two aspects which aim at a clean break that enables former spouses to resume their lives without keeping any bonds (not even financial ones) to each other and at preventing indefinite, post-divorce situations of dependence from taking place.

7–8/2006. See also Francisco Javier Pastor Vita 'Una primera aproximación al proyecto de ley de reforma del Código Civil en materia de separación y divorcio' *La Ley,* n 6235, 20 April 2005.

87 Prior to the 2005 reform, see an outline of the main features of the remedies available after marriage breakdown in Encarna Roca Trías 'Dealing with the economic consequences of divorce for wives: alimony under the Spanish civil code' (2000) 14 *International Journal of Law, Policy and the Family* 45–58.

Nevertheless, the rules regarding the satisfaction of the allowance in a single payment leave many questions up in the air. Although they allow this form of payment they do not establish whether, lacking the agreement of the spouses, the judge can order it or not and, if so, in which cases. Moreover, it does not elucidate whether it is possible to satisfy this payment with assets instead of money or what will happen if the spouse entitled to it remarries or starts cohabiting with another person after he or she has received this single-payment.[88]

The temporary character of this allowance had already given rise to much controversy in legal scholarship and to hesitation in case-law. However, a few months before Act 15/2005 was passed the Supreme Court had already ruled that it was possible to decree a compensatory allowance with a temporary character. It set out in STS 10 February 2005[89] that, pursuant to Art 3.1 CC – an interpretation rule establishing that legal provisions must be construed in accordance with the social reality of the time when they are applied – Art 97 CC had to be applied according to the existing social reality. It also echoed the reasoning – albeit with some reservations – already laid down in the decisions of many Courts of Appeal emphasising that compensatory allowances must not aim at 'perpetuating the financial balance between separated or divorced spouses' but at 'rebalancing a financial imbalance which can be temporary'. The Supreme Court recognised that the temporary character of the allowance could play 'the instrumental function of a stimulus or incentive for … autonomous development and, in particular, for finding employment promptly' and that it accomplishes 'a preventive function against the idleness and indolence of the recipient and embodies a sign of trust towards future employability'.

Stressing that marriage does not afford a right to obtain maintenance for life from a former spouse, and that it is expected that after divorce former spouses continue their lives depending solely on their own resources, is clearly in tune with the social changes that Spain has undergone over the last few decades. Female activity in the labour market has continued to increase until it has reached, especially among younger women, almost the same level as male activity.[90] Additionally, attention must be paid to the fact that the increase in the number of separations and divorces coincides with a much lower average length of marriage, so that when spouses divorce they are much younger than those divorcing in the 1980s. Data from 2006 reveals that 45% of dissolved marriages are of childless couples and that only one out of four marriages

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88 Cf Ángel Luis Rebolledo Varela 'La compensación económica del Article 97 CC en la Ley 15/2005 de 8 de julio' *Aranzadi Civil* 20/2005, 13–14. Although it seems logical that such events do not interfere with payments already made, doubts arise as long as the reform has left the legal grounds for ending the right to compensatory allowance untouched (see Art 101 CC). Accordingly, one may wonder, for instance, whether the pending instalments of a postponed payment might be cancelled in the event of the remarriage of the creditor.

89 RJ 2005133, commented upon by Ana Laura Cabezuelo Arenas in CCJC 69/2005, 1369–1397. See also Rebolledo Varela (above n 88) 11 ff.

90 See above n 3.

ended by divorce has lasted longer than 20 years.[91] From all this data it can be drawn that divorce mostly affects comparatively young spouses whose marriage has lasted between 7 and 10 years. Also it seems reasonable to require them to resume their lives depending on their own resources and regardless of the standard of living they may have enjoyed during marriage.

One cannot deny, however, that the new regulation of a compensatory allowance also uncovers some of the paradoxes in the implementation of an agenda for radical change. In fact, some of these reforms have gone down very badly among some feminist groups. They point out that there are still many divorces affecting women who depend financially on their husbands and insist on the idea that the number of allowances is very low (since it is granted in 10% of proceedings only), something which leads to the assumption that it is granted when it is strictly required according to the circumstances of the case. Seen from this point of view, they contend, legal change serves only to worsen the position of those who are more vulnerable and need an allowance more. Additionally, Spanish married women, especially among elder generations, continue to be dependent on their husbands as regards their access to public and private insurance benefits as in the case of financial protection in old age, in particular.[92]

It is true that, together with the data that points to the rapid process of social and financial emancipation of women, one must also bear in mind the still limited scope of this process and the persistence of factors that reduce the impact of any reform in this area. It must be remembered that, until very recently, Spain has been one of the Western countries that has devoted less of its budget to social services and programmes in favour of families. The lack of public policies towards forms of reconciliation of work and family life that allowed women to pursue a professional career while bringing up their children has led a considerable number of women to quit their employment in order to take care of their families and, therefore, it has generated situations of financial dependence. Moreover, a redefinition of the division of labour between men and women, both in the household and the workplace, is still pending. In many Spanish families the professional or working activity of married women is still subordinated to the activity of their husbands, and the distribution of household chores and of the tasks in bringing children up is still far from the levels of equality reached in the most advanced European countries.

Family law cannot be unaware of this social reality and, above and beyond the ideal models underpinning the legal change brought about by the implementation of a radical agenda, courts must keep their feet on the ground and adjust their daily activity to the existing social reality. In this sense, for instance, many decisions refuse to grant compensatory allowances on a temporary basis if they deem this is an inadequate solution according to the

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91 Cf INE Press release 16 November 2007, available at: www.ine.es/prensa/prensa.htm, (accessed 8 February 2008).

92 Cf Altamira Gonzalo Valgañón 'Las últimas modificaciones del Derecho de Familia' *Themis. Revista Jurídica de Igualdad Jurídica*, n 0, 2006, 65.

circumstances of the case,[93] ie if the sociological profile of the spouse entitled to it does not match the profile that the legislature had in mind when it opted for limiting it in time. In this sense, the Supreme Court has pointed out that 'one cannot be unaware of the fact that in many cases the only way to compensate the financial imbalance that separation or divorce causes to one of the spouses is a compensatory allowance for life'. Accordingly, the position of the Supreme Court is that it is perfectly possible to grant compensatory allowances with a temporary character but that this is correct if 'all the known factors indicating a real basis for this temporary limitation' are present. Among these factors, a fundamental one is 'that there is a situation of aptitude or suitability to overcome the financial imbalance that makes the extension in time inadvisable' and that there is a 'certainty or actual potentiality established according to high probability rates' as regards conditions or circumstances that define temporality.[94]

Shared physical custody: ideal models of family roles and social realities

The uneven pace in the change of the different aspects of family life, and the important caesura between the ideal models of family roles and the actual behaviour of individuals as family members, has also been demonstrated in the controversy around shared physical custody of children.

This topic marked a great part of the political and social debate during the processing of the Bill related to Act 15/2005, whose final result was – paradoxically – contrary to the initial intention of the government.

Although the regulation then in force did not prohibit the judge from decreeing shared physical custody, it did not mention it either,[95] and the social reality then existing favoured that, after separation or divorce, courts in practice regularly separated one of the parents from their children, typically the father.[96] The government wished to overcome this situation by promoting in the new law the idea of shared parenting and, in particular, of shared physical custody after separation and divorce.[97] However, when processing the Bill the Socialist parliamentary group and the government itself underwent a serious period of

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[93] Among many others, see for instance SAP Barcelona 10 January 2007 (RJC 200758) (the recipient of the compensatory allowance was a 39-year-old woman who got married to the defendant 19 years previously, leaving her career to take care of her family). See also SAP Madrid 18 July 2006 (La Ley 92314006).

[94] The Supreme Court stressed also that time-limits to the compensatory allowance must be set prudently, assessing 'the foreseeability that the recipient will overcome the imbalance situation' and laying down flexible deadlines together with measures that prevent leaving all protection needed.

[95] Uncertainty and confusion prevail until Act 15/2005 enters into force. See the account of Herminia Campuzano Tomé 'La custodia compartida. Doctrina jurisprudencial de las Audiencias Provinciales' *Aranzadi Civil* 22/2005, 3 ff.

[96] See Rivero Hernández (above n 50) 676–677 (stressing that only in 2% of the decisions examined in the survey did judges grant shared physical custody).

[97] The draft bill of 20 September 2004 provided that parents could agree that the custody of minor children was released to one of them or was exercised jointly. Otherwise, the judge would be able to decree what deems more appropriate thereof (Art 4).

hesitation and, in a sudden and unexpected manner, changed their position several times.[98] Under the relentless pressure of powerful feminists groups that strongly opposed the sharing of physical custody,[99] the changes in the Bill were so abrupt that the government even retraced its steps and devised the possibility of decreeing shared physical custody when one of the parents opposed to it as something 'exceptional'. Moreover, in cases of a unilateral request, shared physical custody required a favourable report from the public prosecutor and could be granted only when it was the only way to protect the best interests of the child adequately.[100] These criteria have finally become the cornerstone of the regulation currently in force.

It is no surprise that none of the social sectors in conflict on this matter is satisfied with this ambiguous result. In spite of its exceptions, the feminist groups complain that the Act admits shared custody when one of the parents opposes it. They consider that this is a very disturbing possibility and that it can undermine the bargaining position of women who wish to divorce.[101] The groups of separated and divorced fathers, on the contrary, criticise the fact that shared custody has been relegated to a marginal position and consider that this could have made their situation even worse in comparison to court practice existing before the reform.

Almost 3 years after Act 15/2005 has come into force, it can be stated that its effectiveness as regards promoting a considerable change in the practical legal landscape has been rather modest.[102] Although ordering shared physical custody is possible, even in cases of contested proceedings, as far as we know, there is only one decision of a Court of Appeals that ordered it after concluding that shared physical custody was the most adequate solution in the case at hand.[103]

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98 See the detailed account of the passing of the new wording of Art 92 CC provided by Ana Seisdedos Muiño 'Las medidas relativas a los hijos en los procesos de divorcio y de separación matrimonial: primera aproximación al nuevo texto del Código Civil' (La Ley 15/2005) *Aranzadi Civil* 22/2006.

99 For instance, see Angela Alemany Rojo 'Custodia compartida, "cómo"', available at: www.mujeresjuristasthemis.org/documentos/Familia/index.htm (accessed 8 February 2008).

100 Amendment n 48 presented by the Socialist Group in the Congress. Cf BOCG, Congreso, VIII Legislatura, Serie A, n 16–8, 15 March 2005.

101 Eva Pleguezuelos Puixell 'La custodia compartida como instrumento de presión en la negociación', available at : www.custodiaresponsable.org. See also Altamira Gonzalo Valgañón 'Las últimas modificaciones del Derecho de Familia' *Themis. Revista Jurídica de Igualdad de Género*, n 0, 2006, 64.

102 Carolina del Carmen Castillo Martínez 'La determinación en la guarda y custodia de los menores en los supuestos de crisis matrimonial o convivencial de sus progenitores. Especial consideración de la guarda y custodia compartida tras la Ley 15/2005, de 8 de julio', *Actualidad Civil* 15/2007, 1738.

103 SAP Barcelona 20 February 2007 (RJC 2007, 649). In this case the public prosecutor upheld the petition of shared physical custody made by the father because the homes of both parents were quite close to each other, the children had made clear their willingness to share the same amount of time with their father as their mother and both parents were apt and available to perform their tasks. Quoting some decisions upholding the shared custody, as agreed upon by the parties, see Silvia Tamayo Haya 'La custodia compartida como alternativa legal' *Revista Crítica de Derecho Inmobiliario* 83 (2007) 667–707.

By contrast, judges have regularly refused petitions and appeals filed to modify decrees establishing sole custody with the purpose of replacing it by shared custody. There are even decisions addressed to replace, with sole custody, regimes of shared custody initially agreed by the parents[104] or ordered by the court arguing that shared custody can result in the detriment of the children involved.[105]

Certainly, there is no indication showing that judges echoed the ideal model that the legislature has tried to implement. As a general rule, the tendency to attribute custody of the children to the mother remains, a result which generally conforms to the usual distribution of family roles that is only very slowly beginning to change.

This slow evolution of the Spanish family towards 'new parentality' forms and attitudes does not materialise in a generalisation of shared custody or in a greater frequency of its adoption. At a legal level, the response of judges and courts to the increased participation of parents in the upbringing of their children has had an impact on the extension of access rights in divorce proceedings granting sole custody to one of the parents. Thus, non-custodial parents can gradually enjoy longer periods of access to their children and an increase in the flexibility of communication and visits.[106] It can be seen, moreover, that courts are lately more watchful in situations that can be perceived as pathological and where the custodial parent obstructs access of the non-custodial parent to children or manipulates them to instigate them to reject spending time with the non-custodial parent or communicating with him or her.[107]

It can be hardly doubted that the prejudice that judges have shown when making a routine allocation of custody to mothers in separation and divorce proceedings would not have taken place if the social changes in family life had been well-established and a more egalitarian distribution of the gender roles in marriage had been commonplace. A fact that has not contributed to avoiding the polarisation of the debate is the link made by Art 96 CC between the family

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[104] Court of First Instance n 5 of Gavà 24 July 2006 (La Ley 293224/2006) and SAP Barcelona 20 December 2006 (RJC 2007, 651).

[105] SAP Castelló de la Plana 7 March 2007 (JUR 200736253).

[106] For instance, see SAP Barcelona 8 January 2007 (RJC 200748). In this case, the court refused the petition for shared custody made by the father on the basis of his troubled relationship with his former spouse; it nevertheless modified the divorce decree to afford more time to the father to be spent with the children during their school holidays.

[107] Art 776.3 of the Act on Civil Procedure expressly provides that 'repeated infringement of obligations arising from the right of access, either by the custodial parent or by the non custodial parent, may entail the modification of the custody regime or of the access rights'. In this sense, some courts have recently made a step forward by withdrawing custody from mothers that had allegedly caused their children to have the so-called 'Parental Alienation Syndrome'. See SAP València 25 May 2007 (JUR 200736253) and Court of First Instance Manresa 4 June 2007 (JUR 200709316).

home and child custody, a provision which allocates the use of the family home to the custodial parent, even when the title of the property belongs to the non-custodial one.[108]

Seen within this context, and until more progress towards a redefinition of the patterns in the division of labour between spouses is made, it is also difficult to predict the practical effects of a new well-intended provision introduced in Art 68 CC by Act 15/2005. The text added to the old Art 68 CC, dealing with rights and duties between spouses, establishes now that spouses 'must share domestic responsibilities and the care and attention to ascendants and descendants and to other dependent persons in charge' (cf Art 68). As Samuel Johnson once said 'Hell is paved with good intentions' and we could add that law becomes symbolic when, as in this case, no coercive measure is provided to back up the rule when infringed.

[108] See for instance SAP Barcelona 20 December 2006 (RJC 200751), which rejected the shared custody agreed upon by the parents consisting of assigning the family home to the daughter and distributing the use of it between the parents on an annual basis. Another case where shared custody triggered the temporary assignment of the use of the family home to each one of the parents was decided by the Court of First Instance n 2 of Madrid in 19 July 2007 (JUR 200776161).

Sweden

ADJUSTING TO REALITY – AWARENESS OF DOMESTIC VIOLENCE CALLS FOR CHANGES IN SWEDISH FAMILY LAW

*Anna Singer**

Résumé

En 2006 et au début 2007, quelques modifications mineures ont été apportées au *Code suédois des parents et des enfants* en matière de droit de garde, ainsi qu'à la *Loi sur le mariage* quant au partage des biens après divorce. Ces changements législatifs ont été dictés par une prise de conscience accrue en ce qui regarde la violence domestique et par la faillite du système judiciaire dans la prise en charge de cette problématique en matière familiale. Le *Code des parents et des enfants* oblige désormais les autorités sociales ainsi que les tribunaux, lorsqu'il s'agit de déterminer le meilleur intérêt de l'enfant, à tenir particulièrement compte du risque qu'un enfant ou qu'un autre membre de la famille puisse être victime d'abus, du risque que l'enfant soit enlevé, illégalement retenu ou qu'il subisse une autre forme de préjudice. Une nouvelle disposition prévoit que les tribunaux doivent être particulièrement attentifs à la capacité des parents de coopérer, avant d'accorder une garde partagée, l'idée étant d'éviter ou du moins de limiter la solution de la garde partagée lorsqu'il y a des soupçons de violence domestique.

La seconde question examinée concerne le partage des biens après divorce. En cas de dissolution du mariage, que ce soit par décès ou par divorce, la première règle est qu'en principe chaque conjoint a droit à la moitié de la valeur totale des biens de la communauté, après déduction des dettes. La loi prévoit désormais qu'un époux peut exclure du partage l'indemnité reçue pour dommages personnels et pour dommages aggravés. Dans la même veine, si un époux est endetté en raison soit d'amendes criminelles, soit d'une condamnation à des dommages-intérêts, soit de la confiscation de certains de ses biens, la part de l'autre époux dans le partage des biens matrimoniaux sera calculée en faisant abstraction de telles dettes.

I INTRODUCTION

The development of Swedish law reported on in the 2006 Survey concerned reforms from 2004 called for by international instruments and a growing need to adjust the legislation to a more internationalised world. In 2005 there were no significant changes to Swedish family law. However, in 2006 and early 2007

* Associate Professor, Faculty of Law, Uppsala University.

some interesting, albeit limited, reforms were made to the Children and Parents Code concerning custody[1] and to the Marriage Act regarding the division of property between spouses following divorce. Focus had thereby turned to the national scene and to the reality in which the law functions. During the years preceding the reforms there had been a growing awareness of the existence of domestic violence and the failure of the courts to pay attention to this when dealing with family law matters. This inability to properly assess domestic violence in a legal context could in part be explained by a lack of understanding of the problem, but it was also a result of shortcomings in the law. The law was consequently amended.

II JOINT PARENTAL RESPONSIBILITY

(a) Background

The Swedish legislation concerning parental responsibility has been amended many times in order to encourage and facilitate joint custody for parents no longer living together. Already in 1976 it became possible for separated parents to agree to have joint custody of their children. Since 1984, married parents automatically retain joint custody after divorce if neither of them ask for sole custody. Research carried out after the 1976 reform showed that children with separated parents had better contact with the parent they were not living with when the parents had joint custody than when one of the parents had sole custody. Consequently, the law was changed again in 1992 stipulating that the main rule should be joint custody for separated parents unless one of them expressly opposed this. A further step was taken in 1998 when the courts were given the option of deciding on joint custody, even if one of the parents opposed this, if joint custody was deemed to be in the best interests of the child.[2] However, joint custody cannot be imposed by the court if both parents are against it. The court is entitled to refuse to dissolve joint custody or to decide on such custody against the will of one of the parents, on the condition that this is considered to be in the best interests of the child. When joint custody has been granted the court can decide on alternating residence against the will of one parent.

In the *travaux préparatoires* to the law it was stated that *sole* custody *in most cases* would be in the best interests of the child if one of the parents is unfit as a custodian, where one parent is guilty of violent acts towards the child or the other parent or where the conflict between the parents is so severe and deep that it is impossible for them to co-operate.[3]

The Supreme Court interpreted the 1998 provision as meaning that one of the parents should be given sole custody only when special circumstances indicated

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1 Swedish law does not use the term 'parental responsibility'. Instead the law refers to custody, residence, access and guardianship.

2 Government Bill 1997/98:7.

3 Government Bill 1997/98:7, 49.

that joint custody was not in the best interests of the child.[4] In court practice this was perceived as a presumption for joint custody that should be abandoned only under very special circumstances.[5] The result was that joint custody against the will of one parent was decided in cases where there were well-founded suspicions of domestic violence. In some instances joint custody was also decided as a means to force the parents to co-operate. In short, joint custody was used in such a way that it could be seriously questioned if it was in the best interests of the child. Also, in other respects it was questioned whether the application of the law concerning custody, residence and access really was carried out from a genuine child perspective, particularly where there were signs of domestic violence in the family.[6]

The legislators and courts had turned a blind eye to this problem for some time. In 2002 however, a government commission was appointed to evaluate the 1998 reform of the custody rules. The Commission's report in 2005 resulted in some changes to chapter 6 of the Children and Parents Code. The new amendments came into force on 1 July 2006.[7]

(b) Procedural changes

An ambition to encourage the parents to reach out-of-court settlements on questions concerning parental responsibility has long characterised the regulation of conflict resolution in disputes concerning parental responsibility. Already in the beginning of 1970s, co-operation talks under the auspices of the Social Welfare Committee were introduced as a means of helping parents reach an agreement on questions relating to parental responsibility. The Social Welfare Committee is under an obligation by law to assist parents with co-operation talks.[8] Since 1991 the court can also instruct the Social Welfare Committee to arrange for co-operation talks in the interests of the child, with a view to achieving an agreement between the parents.[9] From 1 July 2006 courts have an obligation to promote, when appropriate, friendly settlements in disputes concerning parental responsibility. This means that the court is required to encourage the parents to reach an amicable solution that is compatible with the best interests of the child. The court can also instruct a mediator to help the parents reach a friendly solution in the best interests of the child.

The process of enforcement of decisions concerning custody, residence and access has now been transferred from the administrative courts to the general courts. In this way the same court decides on the material questions, such as custody, and if necessary on the enforcement of the same matter. The reason

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4 NJA 1999, 451.

5 See, eg, NJA 2000, 345.

6 Barnombudsmannen, När tryggheten står på spel. BO2005:02. (The Children's Ombudsman, When security is at stake).

7 Government Commission Report SOU 2005:43; Government Bill 2005/06:99.

8 Social Services Act (2001:453), ch 5, s 3.

9 Chapter 6, s 18 of the Children and Parents Code.

for this change was primarily the desire to reduce the number of protracted proceedings through a more coordinated processing of contentious cases.

(c) The child perspective

A primary motive behind the legislative changes in 2006 was to underline the importance of a child perspective in all decisions concerning children. This has been achieved in different ways.

Chapter 6, s 2a of the Children and Parents Code previously provided that the best interests of the child should be *the primary consideration* in the determination of all questions regarding custody, residence and contact. The rule now stipulates that the best interests of the child must be *the determining factor* in all decisions concerning custody, residence and access. In the *travaux préparatoires* it is underlined that courts, as well as the social authorities, should clarify their reasoning concerning the best interests of the child in the individual case. Court decisions in relation to custody, residence and access should include details of the court's reasoning concerning, for example, the child's relation to both parents, the child's own view of the situation and the suitability of the parents as custodians. The best interests of the child is not to be used in a routine-like manner.

The importance of considering the risk that the child could come to harm has also been further emphasised in the law through the 2006 reform. When assessing the best interests of the child, the social authorities and the court must now take into account, in particular, the risk of the child or any other member of the family being abused, or of the child being unlawfully abducted, retained or otherwise coming to harm. In case-law there had previously been a tendency to give the child's interest in having close and good contact with both parents after their separation priority over the risk of harm.

The main purpose of the 2006 custody rules reform, however, was no doubt to impress on the courts that joint custody should, in contrast to the previous court practice, be decided against the will of one parent only when it is in the best interests of the individual child. In addition to the above-mentioned changes of the law, an explicit provision has also been included in the Children and Parents Code, stipulating that when assessing whether or not joint custody is to be decided, the court must 'take into account particularly' the parents' ability to co-operate on issues involving the child.[10] According to the Government, joint custody normally requires that the parents have a reasonably conflict-free co-operation. This means that they do not always have to have the same opinion on matters concerning the child, but they must be able to handle their conflicts in a way that does not harm the child.

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[10] Chapter 6, s 5 of the Children and Parents Code.

(d) Ability to co-operate as a condition for joint custody

The 2006 reform was mainly motivated by a desire to prevent or at least limit the use of joint custody for parents when there were suspicions of domestic violence. The provision stating that the courts should pay particular attention to the parents' ability to co-operate before deciding on joint custody was introduced in order to achieve this. What is to be considered 'reasonably conflict-free co-operation' was however left for the courts to decide in the individual case. This was determined by the Supreme Court for the first time in June 2007.[11] The case concerned a child born to an unmarried mother who was not living with the child's father. The father wanted to share the parenting with the mother on an equal basis, including time spent with the child. Since the mother had sole custody from the child's birth and did not want to have joint custody with the child's father, he had to turn to the court for a decision on custody. The Supreme Court decided, almost 3 years after the case was initiated, to give the mother sole custody. The reason was that the parents had had conflicts concerning the child, resulting in continuous court proceedings, during the child's entire life. No analysis of the reasons behind these conflicts was made by the court; the continuous proceedings were taken as evidence of co-operation difficulties. Since an unmarried mother has sole custody from the birth of the child, she has in a sense control of the child and there are now fears that the Supreme Court decision, in effect, gives the mother the power to decide when the custody is to be joint or not. If the child's father does not conform to the instructions of the mother, co-operation problems will, by definition, occur if he turns to court and joint responsibility is thereby ruled out.

III DIVISION OF PROPERTY ON DIVORCE

The second change to the law discussed here concerns the division of property between spouses after divorce. The Swedish marital property system employs a system of deferred community property rights. Each spouse owns and administers his or her property during marriage. On the dissolution of a marriage, by a spouse's death or divorce, the main rule is that each spouse in principle has a right to half of the total value of both spouses deferred community property, after deduction of debts. This equal division rule is aimed at sharing the assembled value in the family, thereby achieving economic balance between the spouses.

All property of a spouse is deferred community property (marital property) unless it is separate property by reason of a marital agreement or conditions set up by someone else than the other spouse on the acquisition of the asset. The right to share the value of the spouses' property applies as a main rule to all deferred community property of a spouse. The deferred property right is thus far-reaching, since it applies also to all assets a spouse had when entering marriage and all assets acquired during marriage. However, there are

[11] NJA 2007, 382.

exceptions. Some property, although it is marital property, is not included in a division of the marital property. Personal property such as clothes and personal items and gifts can be held outside the division if the value is reasonable in relation to the total value of that spouses' property. Rights which may not be transferred or are otherwise personal, eg the right to compensation not yet paid, immaterial rights and some pension rights are also excluded from the property division. Such rights are included in the value to be divided when they are liquidated.

In 2002 the media reported on some cases where one spouse had been the victim of abuse by the other spouse. The abusive spouse had consequently been convicted of a violent crime and the victim spouse had been awarded damages for personal injuries and compensation for aggravated damages. Since the damages had been paid to the victim before divorce was sought, the compensation was included in the property division between the spouses on the dissolution of the marriage. Furthermore, in the cases where the offending spouse had contracted a debt in order to pay damages, the offending spouse was permitted to deduct the resultant debt from the assets value before the division. Moreover, the right to deduct debts incurred by criminal offences was not limited in any way. This meant that when the offending spouse had incurred debts to victims other than the other spouse, eg children, the resulting debt could be deducted before the property division. Thus, the offender could deduct his debt, thereby reducing the value of his property and at the same time, where the victim was the spouse, receive half of the value of the compensation paid to his victim! This was described as an unsatisfactory system.[12] Considering that this way of calculating each spouse's part of the deferred community property on the dissolution of the marriage had been in force for almost 30 years, it is rather remarkable that the problem had not been noticed earlier.

The law was consequently changed and new rules came into effect on 1 July 2007. The law now states that each spouse can exclude compensation paid for personal damages and aggravated damages from the division of property between spouses. Compensation for loss of income or expenses can be excluded only to the extent that they refer to time after the divorce proceedings were initiated. If the marriage is terminated by the death of a spouse, only the surviving spouse has the right to exclude property of this kind. The purpose of this rule is to ensure that the offended spouse can keep his or her compensation. This, of course, means that damages are included in the division when the deceased spouse during his or her lifetime received compensation from the surviving spouse because of abuse.

Correspondingly, if a spouse has debts incurred by a criminal offence resulting in fines, damages or forfeit of property, the other spouse's part in the matrimonial property shall be calculated as if the debt did not exist. The debt will instead reduce the offending spouse's part in the matrimonial property. It is

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[12] Government Bill 2006/07:32, 8.

of no importance who the victim of the crime is. Only debts that have occurred within 3 years preceding the dissolution of the marriage can be compensated in this way.

Already from the beginning it was clear that the rule that compensates the non-offending spouse had been given a more far-reaching applicability than was originally intended. A spouse, who has incurred a debt for whatever reason, as long as it is the result of an offence, will now have his or her part of the marital property reduced to compensate the other spouse. For instance, debts for speeding fines will be reason for compensation. This is not really consistent with the intended purpose of the law, which was to protect the rights of a spouse who has suffered abuse.

IV CONCLUDING REMARKS

The changes to the law, described here, reflect a growing awareness of domestic violence that has hitherto been unnoticed or ignored in Swedish family law and practice. The fact that a spouse who had abused the other spouse was in some instances given the right to half of the compensation paid to the victim was indeed a remarkable flaw in the law. Even more urgent was the change of the custody rules. For too long the courts had neglected the harmful effects on children growing up in a family environment where violence is present. Instead, to strive for equality between mothers and fathers has been the guiding principle. A misguided desire to give mothers and fathers the same rights in respect of the child has resulted in joint custody being decided in situations where it clearly should not have been. It is obvious that the best interest of the child has not always been protected.

The legislative changes have to a large extent been prompted by a vivid debate in society, in particular by the media. It could be questioned whether this demand for immediate change of the law might have influenced the legislator to make changes that go further than was actually planned. The starting point for the legislator for the amendment of the rules for dividing property between spouses was a desire to protect the right to damages for an abused spouse. The present rule of compensation goes beyond what was intended and gives the spouse who is not indebted compensation in situations where it is not necessarily desirable to do so. The same words of caution are even more appropriate concerning the reform of the custody rules. Present court practice, since the reform, indicates that it is not difficult for a non-co-operative parent to create such circumstances in the case that the court will find that the parents have problems co-operating and therefore rule out joint custody. This is not what was intended. The goal was to prevent joint custody for parents who could not reasonably be expected to co-operate because of violence between them, not to rule out joint responsibility in cases where one parent does not follow the other parent's instructions, for example, of how the child should be dressed. Questions of custody should always be decided after considering the merits of each individual case, and the reasons behind the difficulties for the

parents to co-operate must be examined. One parent should not be given the opportunity to create difficulties in the co-operation between the parents simply in order to get sole custody. This would be contrary to the goal to give children with separated parents good and close contact with both of them. When responding to public demand for stricter rules in order to prevent domestic violence, which of course is highly desirable, it is important to be cautious. Otherwise there is a risk of throwing the baby out with the bath water.

Switzerland

NEW STATUTORY RULES ON REGISTERED PARTNERSHIP AND PROTECTION AGAINST DOMESTIC VIOLENCE

Ingeborg Schwenzer[*] *and Anne-Florence Bock*[**]

Résumé

Le droit de famille suisse fut marqué principalement par deux nouvelles lois en 2007: Le 1er janvier 2007 la loi fédérale sur le partenariat enregistré entra en vigueur, et le 1er juillet 2007 des provisions renforçant la protection des victimes de violence domestique furent insérées dans le Code Civil suisse.

L'article donne un bref aperçu de la nouvelle situation légale des partenariats homosexuels en Suisse, traitant entre autres des questions principales de la formation du partenariat, du régime patrimonial, des effets généraux et des droits parentales, ainsi que des questions plus spécifiques comme le droit fiscal et la sécurité sociale, concluant par le droit international privé. Une grande partie des dispositions de la nouvelle loi correspond au droit matrimonial – une décision législative approuvable en principe, mais aussi précipitée dans certains points où la communauté homosexuelle diffère du mariage. La nouvelle loi s'avère critiquable aussi dans la domaine des droits parentales des couples homosexuels.

La seconde partie de l'article présente les nouvelles dispositions concernant la protection renforcée des victimes de violence domestique, des mesures innovateurs pour autant que jusqu'à l'entrée en vigueur des nouvelles dispositions, au niveau fédéral, les autorités tentassent à combattre la violence conjugale surtout avec les moyens du droit criminel – des procédures orientées au passé et à la rétorsion au lieu de la prévention. Les nouvelles provisions, par contre, visent à une intervention plus rapide et efficace, avec le but de surtout permettre aux victimes de rester au domicile commun et de limiter la possibilité d'une offensive répétée, réalisant ainsi un effet préventif. De l'attention spéciale est accordée à la situation des victimes migrantes selon les dispositions de la nouvelle loi sur les étrangers entrée en vigueur le 1er janvier 2008.

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* Prof Dr iur, LLM (UC Berkeley), Professor for Private Law, University of Basel, Switzerland.
** lic iur, Research and Teaching Assistant, University of Basel, Switzerland.

I INTRODUCTION

Swiss family law in 2007 was characterised by two statutory amendments: First, the enactment of a new law permitting same-sex couples to register their partnership, and secondly, the Swiss Civil Code was amended to include new provisions affording stronger protection to victims of domestic violence.

II A NEW REGIME FOR SAME-SEX PARTNERS

Switzerland is no longer the outsider among European countries and has now established a regime for same-sex couples. After Denmark enacted the first law on the recognition of same-sex couples in 1989,[1] and after many surrounding countries have in recent years followed suit,[2] the Swiss Federal Law on Registered Partnership[3] (LRegP) entered into force on 1 January 2007. The new law was accepted by 58% of the voting population in a referendum initiated by Christian and populist parties.[4] Before the LRegP entered into force, registration for same-sex couples had already been possible in the cantons of Geneva,[5] Neuchâtel[6] and Zurich.[7] Such cantonal registered partnerships had, however, only a limited effect, treating registered partners equally in cantonal matters such as cantonal tax, procedural and public welfare law.[8] The new status has been a success; in the first 8 months since its enactment, over 1,000 couples chose to register their partnership. Remarkably, over 70% of the newly registered partners were men.[9]

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1 Lov om registreret partnerskab, Nr 372 vom 7 Juni 1989.

2 For an overview see M Coester, *Same-Sex Relationships: A Comparative Assessment of Legal Developments Across Europe* (Die Praxis des Familienrechts, 2002) 748 et seq.

3 Bundesgesetz vom 18 Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (PartG), SR 211.231 (Federal Law on Registered Partnership).

4 On the legislative history of the new law see Büchler, Herz and Bertschi 'Allg. Einl. IV Die Entstehung des Partnerschaftsgesetzes' in A Büchler (ed) *Familienrechtskommentar Eingetragene Partnerschaft* (Berne, 2007) n 1 et seq (in the following cited as *FamKomm Eingetragene Partnerschaft*).

5 Loi sur le partenariat of 15 February 2001, entry into force on 5 May 2001; see also Neue Zürcher Zeitung of 14 February 2005, 8.

6 RSN 212.120.10. The Neuchâtel model was open to heterosexual and homosexual couples, see Neue Zürcher Zeitung of 5 October 2004, 14.

7 Gesetz über die Registrierung gleichgeschlechtlicher Partner of 21 January 2002, entry into force on 1 July 2003; see Neue Zürcher Zeitung of 6 June 2003, 45 and Neue Zürcher Zeitung of 18 August 2002, 27. For an overview over all three cantonal regimes see Pulver and Einleitung in T Geiser and P Gremper, *Zürcher Kommentar zum Partnerschaftsgesetz* (Zurich, Basel, Geneva, 2007) n 61 et seq (in the following cited as *ZH-Komm*).

8 Cottier 'Registered Partnerships for Same-Sex Couples in Switzerland: Constructing a New Model of Family Relationships' in M Maclean (ed) *Family Law and Family Value* (Oxford, 2005) 181, 183; see also Neue Zürcher Zeitung of 17 February 2005, 53.

9 Data by the Federal Office of Statistics, available at: www.bfs.admin.ch/bfs/portal/de/index/themen/01/06/blank/key/07.html (accessed 24 October 2007); Neue Zürcher Zeitung of 27 July 2007, 15.

Of the five different models evaluated in the legislative process,[10] Switzerland has chosen an opt-in solution which mirrors marriage in many aspects. The new status has been named 'registered partnership'. Rather than inserting the new provisions in the Swiss Civil Code, which would have been the obvious position for such a regime considering its similarities to marriage,[11] the new status is governed by a separate law. The provisions are thus clearly separated from the rules governing marriage, showing the intention to substantively separate registered partnerships from other family forms.[12]

(a) Formation of a registered partnership

Registered partnership is only open to two persons of the same sex.[13] In all other respects, the provisions on the conclusion of a registered partnership largely mirror the provisions on the conclusion of marriage under Swiss law. Both partners must be of age, ie 18 years old, and have the capability to understand the legal and personal significance of entering a registered partnership. Persons under guardianship need the consent of their legal guardian. Similarly to marriage, the new status is based on the principle of monogamy – only persons, who are neither living in another registered partnership nor married, may conclude a registered partnership.[14] A registered partnership is prohibited between persons who are direct descendants of each other as well as siblings.

Differently from matrimonial law, the position of adopted children is not addressed. It seems clear, however, from the explanatory material, that the Parliament intended to prohibit the conclusion of a registered partnership between the adopted child and its adoptive family as well. This follows from the principle that adopted and biological children are legally treated the same, and because the prohibitions of registered partnership are motivated by protecting social family relations.[15] The question remains whether an adopted child may conclude a registered partnership with a member of her biological family, since by adoption kinship of the adopted person with her biological family is legally

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[10] The Federal Office of Justice had considered the following five options: (i) selective amendments to existing laws with the aim of putting same-sex couples on equal footing at least in migration, (ii) inheritance and tax law, (iii) a partnership contract with limited effects, (iv) two different forms of registered partnership and (v) the opening of marriage to same-sex couples. See Bundesamt für Justiz *Die rechtliche Situation gleichgeschlechtlicher Paare im schweizerischen Recht, Probleme und Lösungsansätze* (Berne, 1999) 54 et seq.

[11] K A Hochl *Gleichheit – Verschiedenheit. Die rechtliche Regelung gleichgeschlechtlicher Partnerschaften in der Schweiz im Verhältnis zur Ehe, Diss* (St Gallen, 2002) 45 et seq.

[12] Schwenzer, *Registrierte Partnerschaft: Der Schweizer Weg, Die Praxis des Familienrechts* (2002) 223, 225. Generally on the advantages and disadvantages of opening marriage to same-sex couples see Büchler, Eherecht und Geschlechterkonstruktion 'Ein Beitrag zur Abschaffung der institutionalisierten Zweigeschlechtlichkeit' in Z Verein Pro Fri (ed) *Recht Richtung Frauen* (St Gallen, 2001) 59, 75 et seq.; Büchler 'Das Familienrecht der Zukunft' in R Vetterli *Auf den Weg zum Familiengericht* (Berne, 2004) 45, 52 et seq.; Hochl (above n 11), 45 et seq.

[13] Art 2(1) LRegP.

[14] Arts 3 and 4 LRegP.

[15] A Büchler and R Vetterli *Ehe, Partnerschaft, Kinder* (Basel, 2007) 152.

terminated.[16] Swiss matrimonial law explicitly prohibits marriage between an adopted child, its offspring and its biological ancestors.[17] In spite of this, the biological considerations underlying this prohibition speak against an extension of this prohibition to same-sex couples, where it is biologically impossible to have common children.[18]

The procedure of registration has been modelled upon the procedure of marriage.[19] The future registered partners must submit an application for registration at the civil registry office at the place of residence of one of the partners.[20] Similarly to marriage, the new law allows the future registered partners to choose the place of registration[21] since, contrary to what might be expected from its wording, Art 5(1) LRegP only refers to the preparatory procedure. The partners must submit their application in person, if possible, and must personally declare that the preconditions for a registered partnership have been met. The registrar then examines whether the preconditions for the conclusion of a registered partnership are met, and registers the statements made by the partners in the public registration procedure. Unlike marriage, witnesses are not required. Once the registration procedure has been concluded, the new status of the partners – 'in registered partnership' – takes legal effect.

When the new Law on Foreigners[22] enters into force on 1 January 2008, the registrar will have to deny the registration of the partnership if it appears obvious that one of the partners only intends to register the partnership to circumvent the provisions of migration law and to obtain a residence permit in Switzerland. To this effect, the registrar may question the partners and even third persons.[23] How this provision will be applied in practice is yet to be seen. So far, it has provoked substantial opposition by the civil registration officials, who consider themselves neither able nor competent to conduct such an examination, and believe that the detection of marriage fraud should be left to the migration authorities.[24]

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16 Art 267(2) Swiss Civil Code; C Hegnauer *Berner Kommentar* (Berne, 1984) Art 267 ZGB, n 13 et seq.

17 Art 95(2) Swiss Civil Code.

18 A Büchler and M Michel *FamKomm Eingetragene Partnerschaft*, Art 4, n 2; Schwenzer (above n 12), 227.; Geiser, *ZH-Komm*, Art 4, n 7 reaches the same conclusion.

19 Arts 5–8 LRegP; Arts 75a-75l Zivilstandsverordnung (ZStV), SR 211.112.2 (Ordinance on the Civil Registry). See also the Explanatory Report of the Federal Council, Botschaft zum Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare, Bundesblatt 2002, 1288, 1312, that explains that the conclusion of the partnership is largely based on matrimonial law, but has been slightly simplified, e g no witnesses are required. Geiser 'Eingetragene Partnerschaft: Fast wie die Ehe' *plädoyer 3|2005*, 26, 27.

20 Art 5(1) LRegP.

21 Art 75f ZStV. Geiser, *ZH-Komm*, Art 5–8, n 35.

22 Bundesgesetz über die Ausländerinnen und Ausländer (AusG), Bundesblatt 2005, 7365.

23 Bundesblatt 2005, 7365, 7422. This new law will add Art 6(2) and (3) and Art 9(1)(c) to the LRegP. Furthermore, if a fictitious partnership is concluded, any interested party will have the possibility to file an application to have the registered partnership declared invalid. See Geiser, *ZH-Komm*, Art 5–8, n 23 et seq.

24 Rigendinger, Lieber Trauen als Misstrauen, NZZ am Sonntag of 2 November 2003, 17; Heikle 'Kontrolle von Ehen' Neue Zürcher Zeitung of 26 September 2007, 17; c f also Neue Zürcher

If one of the partners was acting under a mistake at the time of entering the registered partnership, or was deceived or threatened into concluding the registered partnership, the partner may file an application to declare the registered partnership invalid within 6 months after the partner gained knowledge of such circumstances, but no later than 5 years after the registration of the partnership.[25] If one of the partners lacked the capability of understanding at the time of registration, if the partners are related by a prohibited degree of kinship or if one of the partners is already married or in another registered partnership, any interested party may file an application to declare invalid the registered partnership. In such circumstances, no time-limits restrict the right to contest the validity of the partnership.[26]

(b) Legal consequences of the registered partnership

(i) Name, nationality and citizenship

Unlike marriage, a registered partnership does not change the name of the partners. While it is a rather modern choice and surely appropriate not to require registered partners to change their name, there is no justifiable reason for denying registered partners the option and symbolism of carrying the same name.[27] What remains is the possibility to carry the so-called 'Allianz-name' – i e a name where the family name of the partner is added to the own name by a hyphen. All the same, such a name, although commonly recognised, has no legal relevance.

A registered partnership does not affect nationality or citizenship of the partners. However, a foreign registered partner of a Swiss national profits from facilitated conditions for naturalisation, as only 5 years of residence (instead of 12 years) in Switzerland are required if the partnership has lasted at least 3 years.[28]

Zeitung of 8 March 2007, 'Heirat nur zum Schein oder grenzenlose Liebe?', 53; critical also Papaux Van Delden, Mariages fictifs, Jusletter of 22 October 2007, n 4 et seq.; Dolivo 'Quelques facettes du projet de loi sur les étrangers', Revue de droit administratif et de droit fiscal (Revue genevoise de droit public) 2003, 1, 13; Sandoz 'Dann doch lieber falsche Ehen', NZZ am Sonntag of 11 June 2006, 22.

25 Art 10 LRegP.

26 Art 11 LRegP.

27 Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 228; Büchler and Michel 'Das Bundesgesetz über die eingetragene Partnerschaft im Überblick' in S Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Berne, 2006) 1, 28; Wolf and Genna, *ZH-Komm*, Art 13, n 11 et seq.

28 Art 15(5) and (6) Bundesgesetz über den Erwerb und den Verlust des Schweizerischen Bürgerrechts (BüG), SR 141.0 (Federal law on naturalisation and the loss of Swiss citizenship). See also Roth 'Die öffentlich-rechtlichen Aspekte des Partnerschaftsgesetzes auf den Ebenen des Bundes und der Kantone, mit besonderer Berücksichtigung der Rechtslage im Kanton Bern' in S Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Berne, 2006) 103, 112.

(ii) Mutual respect, support and maintenance

Registered partners owe each other mutual respect and support.[29] They are supposed to jointly provide for their livelihood,[30] the same obligation as that which exists for spouses. If one of the partners is a parent, the other partner has the obligation to support his partner when fulfilling his duties of parental responsibility and maintenance of the child.[31]

Contrary to matrimonial law, the law does not provide for compensation in the situation where one of the partners has contributed significantly more to the common livelihood than could be expected from him. This may be the case if, for example, one partner works in the other partner's business, or contributes more than his share to the common expenses with his income or property. According to the explanatory report, such relations shall be governed by the applicable contract and labour law. This presumption does not sufficiently take into account the emotional relationship of the partners, and may therefore complicate achieving fair monetary compensation especially in cases where the partners have not contractually regulated their relationship in this respect. This provokes the question of why it should be easier for registered partners to reach an agreement than for spouses, where the legislature recognised the need for such a provision back in 1984.[32]

Further, the law gives the court the power to order various measures for the protection of one of the partners if necessary, such as ordering one partner to provide information about his financial situation[33] or the power to make an order fixing the respective maintenance contributions due by each partner.[34]

(iii) Partnership property law

Partnership property law reflects the legislature's concept of two economically independent individuals who pursue their careers separately;[35] this is different from the general concept in matrimonial property law of spouses living the 'traditional' role model of homemaker and breadwinner. Partnership property law also takes into account that, generally, no partnership related detriments are to be expected.[36]

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29 Art 12 LRegP. M Grütter and D Summermatter *Das Partnerschaftsgesetz, Die Praxis des Familienrechts 2004*, 449, 541.

30 Art 13 LRegP.

31 Art 27 LRegP.

32 See also Büchler and Michel in S Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Berne, 2006) (above n 27) 32 et seq.; Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 229.

33 Art 16 LRegP.

34 Art 13(2) LRegP. The effect of this provision is reinforced by Art 13(3) LRegP, according to which the court may order debtors of the defaulting partner (most importantly, her employer) to directly pay the maintenance sums due to the other partner.

35 Explanatory Report of the Federal Council, Bundesblatt 2002, (above n 19) 1311; see Cottier (above n 8) 189 et seq on different concepts of the 'model' same-sex couple.

36 Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 226, approves of this.

The statutory property regime is separate property,[37] ie the registered partnership neither affects the ownership of the partners, nor provides for an equal sharing of partnership related benefits at the dissolution of the partnership. This has been the subject of controversy. On one side, it was emphasised that, in a same-sex relationship, no partnership related detriments were to be expected. Therefore, it was regarded as appropriate not to apply special compensation or sharing mechanisms by default, as long as the partners have the option to contractually agree on another solution where the statutory solution was not appropriate.[38] On the other side, it was pointed out that partnership should, as marriage, be regarded as a common endeavour, which justifies sharing benefits and an increase in wealth obtained during the partnership. Further, it was argued that because nuptial agreements are in practice only rarely concluded, one should not have too much faith in the corrective function of partnership agreements.[39]

Equal sharing is frequently justified by the presumption that both partners contribute equally to the common good, although non-monetary contributions may be difficult to measure,[40] and the protection of the socially and economically weaker party.[41]

Registered partners will very likely not live the 'traditional role model' according to which one partner is the homemaker and the other the breadwinner. Considering that the law should provide a solution adapted to the majority of partnerships, it is at least understandable why the legislator chose a different property regime for registered partners from that for spouses.

Another question is that of the consistency of the individual provisions of the Law on Registered Partnership. Remarkably, the legislature seemed to adopt a different concept when it decided that social security entitlements were to be shared equally by the partners. There is more on the legal consequences of these divergent rules below.

In any case, according to Art 25 LRegP, the partners have the chance to conclude a 'property contract' and thereby tailor the financial consequences of

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[37] Art 18 LRegP et seq. S Wolf *Ehe, Konkubinat und registrierte Partnerschaft gemäss dem Vorentwurf zu einem BG, recht 2002*, 157, 162.

[38] Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 229.

[39] Gremper *Vermögensrechtliche Wirkungen der eingetragenen Partnerschaft, Die Praxis des Familienrechts 2004,* 475, 484. Cf.also in detail Wolf *recht 2002* (above n 37) 164 et seq.; Hochl (above n 11) 61; Büchler and Michel in S Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Berne, 2006) (above n 27) 50. Pichonnaz, Kapitel 6. Der Partnergüterstand der eingetragenen Partner in A R Ziegler et al (eds) *Rechte der Lesben und Schwulen in der Schweiz* (Berne, 2007) 206, even speaks of an unconstitutional discrimination in this respect.

[40] Hausheer 'Eheliche Gemeinschaft, Partnerschaft und Vermögen im Europäischen Vergleich' in D Henrich and D Schwab (eds) *Eheliche Gemeinschaft, Partnerschaft und Vermögen im europäischen Vergleich* (Bielefeld, 1999) 223 et seq, 252; Büchler and Vetterli (above n 15) 52; see also *Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht)* (Bundesblatt, 1979) 1191 et seq, 1320.

[41] Cf Gremper *Die Praxis des Familienrechts 2004* (above n 39) 486.

their partnership to their individual situation.[42] Such a contract must be notarised.[43] Yet, the extent of party autonomy afforded to the partners by this provision is not clear.[44] The wording of Art 25 LRegP allows the partners to 'agree on special provisions to apply at the dissolution of the partnership',[45] namely to choose the statutory matrimonial property regime of community of acquisitions ('*Errungenschaftsbeteiligung*'). Further, the explanatory report expressly states that it was not intended to allow registered partners to choose the property regime of community of property.[46]

It is not clear, however, whether the partners may agree to an individual and new property regime. This must be doubted since, under Swiss matrimonial property law, spouses may only choose between one of three property regimes, and may only depart from these rules where this is explicitly provided for by the law.[47] The Law on Registered Partnership does not contain a parallel restriction. However, there is no indication that the legislature intended to privilege registered partners over spouses in this respect. As long as there is no court practice to the contrary, it must therefore be assumed that registered partners' possibilities to contractually adapt their property relations are as limited as those of married partners.[48]

The provisions governing the property relationships between the partners are further completed by provisions governing the partners' respective rights to information about their partner's financial situation;[49] the right to request the participation in drawing up an inventory of the assets;[50] rules on mutual

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42 For a practical viewpoint and examples see Liatowitsch and Matefi 'Arbeitskreis 6: Eingetragene Partnerschaften: Vermögens- und Partnerschaftsverträge' in I Schwenzer and A Büchler (eds) *Dritte Schweizer Familienrecht§tage* (Berne, 2006) 177 et seq.

43 Art 23(3) LRegP.

44 Wolf *recht 2002* (above n 37) 164.

45 Although the text of this provision merely limits the effect of a property contract to the dissolution of partnership, commentators unanimously hold that a partnership contract affects partnership property also if the property regime is dissolved without a dissolution of the partnership. Wolf and Steiner 'Das Vermögensrecht und die weiteren für das Notariat relevanten Aspekte des Partnerschaftsgesetzes' in S Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Berne, 2006) 53, 88 et seq; Gremper, *Die Praxis des Familienrechts 2004* (above n 39) 500; Büchler and Matefi *FamKomm Eingetragene Partnerschaft* Art 25, n 23 et seq; S Wolf *Die Auswirkungen der eingetragenen Partnerschaft auf Notariat und Grundbuchführung, Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht* (2007) 157, 168.

46 Explanatory Report of the Federal Council, *Bundesblatt 2002* (above n 19) 1318. Critical: Geiser, Partnerschaftsgesetz und Notariat, Allgemeine Juristische Praxis 2007, 3, 10.

47 Art 182(2) Swiss Civil Code. Generally on the scope of marriage contracts under Swiss law see H Hausheer, R Reusser and T Geiser *Berner Kommentar zum Schweizerischen Privatrecht* (Berne, 1992) Art 182, n 27 et seq.

48 Gremper, *Die Praxis des Familienrechts 2003* (above n 39) 494; cf also Grütter and Summermatter *Die Praxis des Familienrechts 2004* (above n 29) 462; in detail Wolf and Steiner (above n 45) 82 et seq; Geiser *Allgemeine Juristische Praxis 2007* (above n 46) 10; cf also Wolf *Die Auswirkungen der eingetragenen Partnerschaft auf Notariat und Grundbuchführung* (above n 45), 164 et seq; in detail see Gremper *ZH-Komm* Art 25, n 23 et seq.

49 Art 16 LRegP.

50 Art 20 LReg P.

representation in transactions for the day-to-day needs of the partners;[51] and rules on protective measures, such as restricting a partner's right to dispose of certain assets if this is necessary to protect the economic basis of the registered partnership.[52]

(iv) The common residence

As for spouses, the legislator has enacted special provisions protecting the spatial centre of the partnership, the common residence. Each of the partners may only terminate the lease of the common residence with the consent of the other partner.[53] Consent by both partners is also required for the sale of the property or any other legal transaction which affects the rights to the common residence.[54] The right to stay in the common residence is also protected at the dissolution of the registered partnership. If one of the partners is dependent on the apartment or house for important reasons, the court may transfer the rental contract to him and may even grant the non-owning partner a right of residence against the owning partner if this may be fairly expected from the other partner.[55] Important reasons requiring the reallocation of the common residence may primarily be children, although the Swiss concept of registered partnership does not promote same-sex parenting. Further important reasons include the situation where one of the partners is disabled or is specifically dependent on the former common residence for business reasons.[56]

(v) Children

Article 28 LRegP prohibits registered partners from adopting children and denies them access to medically assisted reproduction technology. This is explained by 'the natural condition that every child must have a father and a mother who each play their specific role in its development'.[57] Paradoxically, the law thereby penalises same-sex couples who wish to assume responsibility by entering into a registered partnership, while single persons are eligible for adoption regardless of their sexual orientation.[58] Sociological research revealing that children growing up in same-sex relationships do not suffer any disadvantages on a psychological or sociological level when compared to their peers, but that two caring parents affect the child's development more positively

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51 Art 15 LRegP.

52 Art 22 LRegP.

53 In detail see Hulliger 'Mietrechtliche Aspekte des neuen Partnerschaftsgesetzes' *Mietrecht aktuell* 2007, 1 et seq.

54 Art 14 LPartG. In detail see Büchler and Vetterli, *FamKomm Eingetragene Partnerschaft* Art 14, n 1; Wolf and Genna, *ZH-Komm* Art 14, n 1 et seq; Pfäffli, *Partnerschaftsgesetz und Sachenrecht, Die Praxis des Familienrechts 2007*, 600 et seq.

55 Art 31 PartG.

56 Büchler *FamKomm Eingetragene Partnerschaft* Art 32, n 16 et seq.

57 Explanatory Report of the Federal Council, Bundesblatt 2002, (above n 19) 1320. Critical in this respect Schweighauser *ZH-Komm* Art 28, n 14 et seq, who points out that the best interests of the child would have been better ensured by examining the eligibility and parental skills of the prospective parents on a case-by-case basis.

58 Schwenzer *FamKomm Eingetragene Partnerschaft* Art 28, n 15.

than one, casts even more doubt on this prohibition.[59] Further, international developments point in the direction of a gradual recognition of same-sex parentage.[60]

The question of same-sex adoption was much disputed in Parliament.[61] Apart from conservative moral concepts, one reason why adoption by same-sex couples was not permitted may lie in the Swiss direct democracy system. Considering that wide parts of the Swiss population do not yet favour same-sex adoption, a more progressive solution would have endangered the acceptance of the new law in a referendum.[62]

The fact that children will grow up with same-sex parents is nevertheless recognised.[63] If one partner is a parent, the other partner has the obligation to support his partner in the fulfilment of the duty of parental responsibility and maintenance of the child. The social ties that may be established by the non-parent partner are partly protected by the possibility to apply to the guardianship authorities for the right to visit and have contact with the child if the registered partnership is dissolved or if the partners no longer live together.[64]

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59 Stacey and Biblarz '(How) does the Sexual Orientation of Parents Matter?' (2001) 66 American Sociological Review 159, 176; Rauchfleisch *Gleichgeschlechtliche Partnerschaften aus psychologischer Sicht, Die Praxis des Familienrechts 2004* 507, 516; Dittberner *Lebenspartnerschaft und Kindschaftsrecht* (Thesis, Frankfurt aM, 2004) 160 et seq; American Psychological Association *Lesbian and Gay Parenting: A Resource for Psychologist* (Washington DC, 1995) 8, available online at www.apa.org/pi/parent.html (accessed 6 November 2007); cf also Murray 'Same-Sex Families: Outcomes for Children and Parents' (2004) 34 Family Law 136, 137 et seq. For an overview of studies analysing the situation of children in same-sex partnerships see U Rauchfleisch *Alternative Familienformen. Eineltern, gleichgeschlechtliche Paare, Hausmänner* (Göttingen, 1997) 70 et seq; Fthenakis 'Gleichgeschlechtliche Lebensgemeinschaften und kindliche Entwicklung' in: J Basedow, J Hopt, H Kötz and P Dopffel *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (Tübingen, 2000) 251, 382 et seq; B Eggen *Homosexuelle Paare mit Kindern, Die Praxis des Familienrechts 2007* 823 et seq; Stacey, 'Legal Recognition of Same-Sex Couples: The Impact on Children and Families' (2004) 23 Quinnipiac Law Review 529, 531 et seq; K Muscheler *Das Recht der eingetragenen Lebenspartnerschaft* (Berlin, 2004) 335.

60 For an overview see Schwenzer 'Convergence and Divergence in the Law on Same-Sex Partnerships' in M Antokolskaia (ed) *Convergence and Divergence of Family Law in Europe* (Antwerp, Oxford, Amsterdam, 2007) 145, 150 et seq. Adoption has been extended to same-sex couples in – among others – many US states and Australian territories, England and Wales, Belgium and Spain.

61 See Amtliches Bulletin 2003, n 1823 et seq.

62 See the vote of Member of the Federal Council Ruth Metzler, AB 2003, N 1825. See more generally Büchler and Vetterli (above n 15) 147; Schweighauser *ZH-Komm* Art 28, n 1.

63 Art 27 LPartG; see also Geiser *plädoyer* 3/2005 (above n 19) 28.

64 The prerequisites are that such contact is in the best interests of the child and is required by important reasons, ie a close relationship of the partner with the child. For the special situation of children 'planned' together by same-sex partners see Schwenzer *FamKomm Eingetragene Partnerschaft* Art 27, n 30 et seq. Critical with respect to the competence of the guardianship authorities Grütter/Summermatter *Die Praxis des Familienrechts 2004 (*above n 29) 465. The authors point out that in the context of the dissolution of the partnership, it would have been appropriate to decide on the contact with the child in the same procedure.

(vi) Inheritance Law

According to Art 462 Swiss Civil Code, a surviving registered partner is put in the same position as a surviving spouse, ie she has a statutory right of inheritance and has a right to a legal portion of her partner's inheritance, which is protected against disposition of her partner by will.[65]

(vii) Social security

Social Security Law also treats registered partners the same as spouses – this is explicitly stated by Art 13a ATSG.[66] Consequently, registered partners enjoy the same benefits and restrictions as spouses under Old Age, Survivors' and Disability Pension Law (AHV and IV), medical insurance, accident insurance, military insurance, unemployment insurance etc.[67] In general, this is well justified, since these benefits and restrictions mirror the benefits and disadvantages resulting from their community.[68] By contrast, the splitting of the Old Age and Survivors' pension entitlement ('AHV-Splitting') is unsuitable for registered partners. The AHV-Splitting was meant to equalise the disparity that resulted for housewives that were not able to build up sufficient social security entitlements. As pointed out above, at least in the majority of registered partnerships, no partnership related detriments will exist. This indicates that splitting social security entitlements will not be substantively justified in the majority of cases.[69] After all, a registered partnership in itself is not a legitimate ground to equalise a disparity in income which is not related to the partnership itself.

(viii) Tax Law

At the federal level, Art 9(1bis) DBG[70] requires that registered partners are treated the same as spouses for tax purposes. Also, Art 3(4) StHG[71] obliges the cantons to treat spouses and registered partners the same for the cantonal income and property tax.[72]

Nonetheless, instead of being an advantage, equal treatment is likely to lead to a higher tax burden in this instance, particularly in dual-income partnerships.

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65 In detail Wolf and Genna *ZH-Komm, Erbrecht der eingetragenen Partnerschaft*, n 1 ff.

66 Bundesgesetz vom 6 Oktober 2000 über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG), SR 830.1 (Federal law on the general part of social security law).

67 In more detail Wolf (above n 28) 116 et seq. The only difference exists after the death of one partner, where the surviving partner is put into the position of a *widower*, this is slightly less favourable than the legal position of a widow. In detail see Rumo-Jungo and Gerber Jenni *ZH-Komm, Sozialversicherungen*, n 8 et seq.

68 Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 231.

69 Ibid.

70 Bundesgesetz über die direkte Bundessteuer, SR 642.11 (Federal Law on the Direct Federal Tax).

71 Bundesgesetz vom 14 Dezember 1990 über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (StHG), SR 642 (Federal Law on the Harmonisation of the cantons' direct taxes).

72 More in detail Roth (above n 28) 114.

On one side, the partners benefit from higher tax deductions and special tax rates; on the other side, the income of the partners is added together to determine the applicable tax rate. In cantons which raise taxes on a progressive scale, this frequently outweighs the benefits of partnership tax rates, and leads to an overall higher tax burden compared to cohabitants. This discrimination of married and registered partners – commonly referred to as the 'marriage-penalty' – is regarded as unconstitutional,[73] and is currently under revision. A specific reform proposal has, however, not yet been agreed on.[74]

Inheritance and gift taxes are solely within the competence of the cantons. It has been argued, however, that the duty not to impede federal law[75] and also the constitutional prohibition of discrimination[76] requires the cantons to provide for equal treatment nevertheless. So far, most cantons are preparing to enact provisions which grant registered partners the same benefits as spouses.[77]

(ix) Migration Law

In Migration Law registered partners are treated the same as spouses.[78] A foreign national living in a registered partnership either with a person of Swiss nationality or a foreigner with a residence permit in Switzerland is required to share a residence with her partner. An exception to this provision is possible if this is required by important reasons and if they still form a couple.[79] A special and more favourable regime applies to EU-nationals.[80]

(c) Dissolution of the registered partnership

(i) Conditions for the dissolution of the registered partnership

As is the case with marriage, a registered partnership can only be dissolved by a court, and not merely by an administrative authority.[81] This is meant to underline the importance of dissolution, and to ensure a judicial control of the consequences.[82] It remains questionable, however, whether a merely

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[73] The Supreme Federal Court has declared this to be unconstitutional in its decision BGE 110 Ia 7. However, until today no law removing this discrimination has been adopted.

[74] Detailed information is available at: www.efd.admin.ch/index/index.html?action=id&id=220&lang=de (accessed 28 October 2007).

[75] Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 232.

[76] Cf Hangartner *Verfassungsrechtliche Grundlagen einer registrierten Partnerschaft für gleichgeschlechtliche Paare, Allgemeine Juristische Praxis 2001*, 252, 260.

[77] Ramseier *FamKomm Eingetragene Partnerschaft*, Anh 24 DBG/25 StHG, n 12.

[78] Art 52 AusG (above n 22).

[79] See Pulver *ZH-Komm*, Art 52 AuG/Art 7 + 17 ANAG, n 28 et seq.

[80] See the Convention between the Swiss Confederation and the European Community and its member states on the free movement of persons of 21 June 1999, SR 0.142.112.681. Among other things, no common residence is required.

[81] Art 29 LPartG et seq. In detail see Nguyen 'Le regroupement familial dans la loi sur les étrangers et dans la loi sur l'asile révisée' in A Achermann et al (eds) *Jahrbuch für Migrationsrecht 2005/2006* (Berne, 2006) 31 et seq.

[82] Büchler and Vetterli (above n 15) 163, point out that this corresponds to the institutional character of registered partnership.

administrative dissolution might not have been preferable, since the conditions for the dissolution of a partnership are less strict than for divorce, and since no partnership related detriments which ought to be adjusted are to be expected in the majority of cases.[83]

The law provides for two grounds of dissolution. First, the partners may jointly request the dissolution of their partnership having reached an agreement on the consequences of separation which is suitable for approval by the court; secondly, after one year of separation either of the partners may file a suit for dissolution.[84] Hardship does not constitute a ground for dissolution. This may be explained by the comparatively short separation period. The shorter separation period compared to marriage and the lack of a period of deliberation after separation by consent may be explained by the expectation that normally no common children will exist in a registered partnership.[85]

The procedure for dissolution is governed by the corresponding rules of divorce law.[86]

(ii) Effects of the dissolution of the partnership

General

As indicated above, the partners may agree on the consequences of their separation. Such an agreement must be approved by the court. The conditions for approval are not strict. The court may only examine whether the agreement is clear, complete and not obviously inadequate and whether the convention was agreed to by free will and with due consideration by the partners.[87]

Maintenance

Article 34 LRegP sets forth the principle that in general, each of the partners is responsible for his own maintenance after separation. This provision reflects the standard situation that no partnership related detriments follow from a registered partnership. Article 34(2) nevertheless provides for financial adjustment if one of the partners reduced or did not engage in employment

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83 Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 233.

84 Art 29 and 30 LRegP. Swiss matrimonial law, by contrast, provides for three grounds for divorce: a joint request of the spouses, separation of 2 years, and if the continuation of marriage (i e the status, not living together) is unbearable for one of the partners.

85 A modern solution could thus lie in shortening the separation period for divorce as well, as certain commentators have suggested, but then maybe in differentiating between partnerships in which the interest of third persons requires a prolonged time for consideration. A similar solution has been adopted, eg, in Sweden (Swedish Marriage Code, Ch 5, s 1–2); c f also Schwenzer *Model Family Code* (Antwerp, Oxford, 2007) 24.

86 Art 35 LRegP refers to Art 135–149 Swiss Civil Code.

87 On the contents and clarity required by the law see (for matrimonial law) Fankhauser *Ausarbeitung und Besonderheiten von Scheidungskonventionen, Die Praxis des Familienrechts 2004*, 287, 289 et seq. On the extent of control with regard to the content see Leuenberger and Schwenzer, Art 140, n 17 et seq, in Schwenzer (ed), *Familienrechtskommentar Scheidung* (Berne, 2005) (in the following cited as *FamKomm Scheidung*).

because of the division of roles adopted by the partners. In any case, maintenance payments can be claimed only until the partner in need is able to provide for his living by his own efforts. A second ground justifying maintenance payments exists if the dissolution of the partnership causes need for the other partner, and if the payment of maintenance does not place an inappropriate burden on the providing partner.[88]

Further, Art 34(4) LRegP refers to the provisions on maintenance in divorce law. This includes, inter alia, the conditions under which a maintenance claim is regarded as obviously inequitable[89] and the conditions under which maintenance orders may be modified.[90]

Pension sharing

Registered partners are treated the same as spouses for the occupational benefits plans scheme,[91] not only with regard to pension entitlements, but also with regard to pension sharing at the dissolution of the partnership.[92] Article 33 LRegP provides for an equal splitting of pension entitlements per reference to divorce law. A first point of criticism is that this rule is not suitable for the standard situation in which both registered partners continue to pursue their individual careers without either partner suffering from a detriment due to the registered partnership. More significantly, the pension splitting provision may lead to arbitrary results in connection with partnership property law. If one partner is self-employed and thus not required to join a pension fund, he will normally provide for his retirement either by saving or investing money, by purchasing a life insurance policy or otherwise. Such private provisions do not have to be shared according to the property regime of separate property. The other partner would by contrast have to share his pension entitlements, without participating in his partner's savings.[93] Here, it is problematic that the solution found in matrimonial law was applied to registered partners without considering the factual difference between the two relationships or the internal consistency of the law.

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88 In more detail Grütter and Summermatter *Die Praxis des Familienrechts 2004* (above n 29) 471 et seq.

89 Art 125(3) Swiss Civil Code, namely if the person entitled to maintenance has grossly breached obligations to contribute to the living of the family; has deliberately caused her own neediness; or has committed a grave crime against the person obliged to pay maintenance or a person close to the maintenance debtor.

90 Art 128 et seq Swiss Civil Code.

91 Bundesgesetz vom 25 Juni 1982 über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVG), SR 831.40.

92 For a detailed account of the consequences of a registered partnership on pension entitlements see Moser 'Die Lebenspartnerschaft in der beruflichen Vorsorge nach geltendem und künftigem Recht' *Aktuelle Juristische Praxis* 2004, 1057 et seq.

93 Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 235. Gremper *Die Praxis des Familienrechts 2004* (above n 39) 492, also observes this inconsistency. However, he concludes that this indicates that separate property is not the proper property regime.

(d) Private International Law

(i) General principles

Whereas, prior to the enactment of the Law on Registered Partnership, the main point of discussion was whether a union between same-sex partners was contrary to public policy or whether the Private International Law Provisions on marriage could be applied by analogy,[94] the introduction of registered partnership caused the need to amend the Swiss Private International Law Act.

The new provisions inserted into the Swiss PILA[95] mainly refer to the corresponding provisions on marriage. The prevalent connecting factor is therefore the common residence of the partners.[96] According to the explanatory report, the reason for this – comparatively singular – approach is that an increasing number of states have enacted provisions affording legal protection and a new status to same-sex couples, with yet more legal systems expected to follow suit.[97] The connecting factor of the common residence is expected to ensure a closer connection to the applicable law than the *lex loci celebrationis*, the importance of which diminishes if the partners move into another legal environment. On the other side, the connecting factor of common residence has the disadvantage of possible shifting, and may further cause problems if the place of residence has not yet enacted a regime for same-sex partners.[98]

The qualification of 'registered partnership' according to the PILA warrants a closer look. Here, one may not simply apply the corresponding concept of national law, since the forms of legally recognised regimes for same-sex partners vary widely; ranging from marriage itself to more contract-like forms, with hardly any resemblance to marriage. The PILA does not itself define what is meant by 'registered partnership'. The explanatory report states that the scope of the new provisions is supposed to extend only to partnerships that affect the legal status of the partners *and* have effects similar to marriage.[99] Such a narrow interpretation would, however, exclude national concepts which on the substantive level differ from marriage, but are nevertheless regarded as

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94 See among others Girsberger and Droese, 'Registrierte Partnerschaften – schweizerisches IPR de lege ferenda' *Schweizerische Zeitschrift für internationales und europäisches Recht 2001*, 73 et seq; Kren Kostkiewicz 'Registrierte Partnerschaften gleichgeschlechtlicher Personen aus der Sicht des IPR (de lege lata)' *Schweizerische Zeitschrift für internationales und europäisches Recht 2001*, 101 et seq; Guillaume 'Une proposition de réglementation du partenariat insérable dans la LDIP' in Guillaume and Arn (eds) *Cohabitation non maritale. Evolution récente en droit suisse et étranger* (Geneva, 2000) 180 et seq. For an overview of the legal situation prior to 1 January 2007 see Widmer *FamKomm Eingetragene Partnersc*haft Teil 4 Internationales Privatrecht, n 5 ff.

95 Bundesgesetz vom 18 Dezember 1989 über das Internationale Privatrecht (IPRG), SR 291 (Federal Private International Law Act, in the following cited as PILA).

96 Eg Art 48 Swiss PILA.

97 Botschaft zum Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare, Bundesblatt 2002, 1288, 1359.

98 Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 3.

99 Botschaft zum Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare, Bundesblatt 2002, 1288, 1360.

an institutionalised form of partnership in their country of origin.[100] Excluding partnership models with more contractual characteristics would result in the application of the PIL provisions on contract law, which would not lead to appropriate results.[101] For the same reasons, partnership models recognising de facto relationships should be subsumed under the PIL-definition of 'registered partnership'. In conclusion, a publicly recognised and mutually exclusive union of two people which entails consequences in private law should be regarded as partnership in the Swiss PILA.[102]

(ii) Registration in Switzerland

The aim of the provisions governing registration was to prevent foreign couples without sufficient ties to Switzerland from registering their partnership there. Consequently, Art 65a and 43(1) PILA require at least one of the partners to be a Swiss citizen or to have his residence in Switzerland. Unlike marriage, registration is not possible for two foreign partners only because the registration would be recognised in their country of origin or residence.

According to Art 44(1) PILA, Swiss law is applicable to partnerships registered in Switzerland.

(iii) Recognition of partnerships registered abroad

The rules on recognition of a registered partnership are governed by the principles of *'favor validitatis'*. Pursuant to Art 45(1) and 65a PILA, a partnership concluded abroad is recognised. A partnership is deemed to be concluded abroad if it is valid either according to the law of the country of origin or of residence of either partner, or in the country where the partnership was concluded.[103] A special restriction applies to Swiss nationals: if two Swiss nationals conclude a partnership abroad, it is valid as long as the foreign place of registration was not chosen with the intention to circumvent the Swiss law's grounds for invalidity of the partnership.[104]

Finally, Art 45(3) PILA specifically deals with the situation that same-sex partners have concluded a marriage abroad. Since in Switzerland, it was explicitly regarded as inappropriate to allow same-sex partners to marry, such a marriage formed abroad will only be recognised as a registered partnership in Switzerland.

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[100] Bucher *Le couple en droit international privé* (Basel, Geneva, Munich, 2004) n 521; Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 43.

[101] Bucher 'Le regard du législateur suisse sur les conflits de lois en matière de partenariat enregistré' in Institut suisse de droit comparé *Aspects de droit international privé des partenariats entrgistrés en Europe*, 137, 140.

[102] Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 30 et seq.

[103] Ibid n 73.

[104] Ie the prohibited degrees of kinship and, as of 1 January 2008, also the provisions aiming at the prevention of fictitious partnerships, see above 'Formation of a Registered Partnership'.

(iv) The law governing the legal consequences of a registered partnership

Although Art 48 PILA generally governs the law applicable to the partnership rights and duties, the practical significance of this provision is very limited. Most legal consequences of a registered partnership are dealt with in special provisions applicable to these areas of law. This is true for the name, the capacity to act, inheritance law, child and adoption law, maintenance law as well as for property law. In the following, the focus will therefore lie only on three specific and characteristic consequences of partnership, namely maintenance obligations, property law and the law of adoption.

Maintenance

For maintenance between partners, Art 49 PILA declares the Hague Convention on Maintenance Obligations of 1973 applicable. This means that the law of the common residence is applicable to maintenance obligations during the partnership; and if this law does not provide for maintenance, the law of the common nationality of the partners and subsidiarily the *lex fori*.[105] It is disputed whether the same applies to maintenance obligations after the dissolution of the partnership.[106] Here, Art 8 of the Convention provides for the law applicable to separation to apply. This provision has been much criticised. Consequently, certain authors hold that the law applicable to maintenance obligations after separation should be determined in the same way as for such obligations during the partnership.[107]

Property Law

For partnership property law, it is the partners' choice of law which is primarily decisive. Here, the partners may choose between the law of the common place of residence, the law of one of their countries of origin and – unlike married couples – they may choose the law of the place where they registered their partnership.[108] If the partners have not chosen the applicable law, it is first the law of their common residence, subsidiarily the law of their last common residence, and finally the law of their common nationality. If none of the conditions stated above are fulfilled, the PILA provides for separate property to apply. Since the connecting factor of the common residence is variable, the applicable law may change during the term of the partnership. Article 55 PILA declares that the law of the new place of residence applies retrospectively, if the partners have not provided otherwise.

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[105] Arts 4–6 Hague Convention on Maintenance Obligations of 1973.

[106] Volken *Zürcher Kommentar zum IPRG* (2nd edn) Art 63, n 27.

[107] Siehr *Das internationale Privatrecht der Schweiz* (Zurich, 2002) 78; Bucher *Le couple en droit international privé* (above n 100) 595.

[108] Art 65c(2) PILA.

Adoption

Finally, the lack of rules governing adoption by same-sex partners warrants a closer look. An increasing number of states have allowed same-sex adoption[109] – this provokes the question whether such family relations would be recognised in Switzerland. Article 78(1) PILA allows for the recognition of foreign adoption if such an adoption took place in the country of residence or of origin of the adopting persons. It was very uncertain whether the recognition of a same-sex adoption would be regarded as contrary to Swiss public policy, since adoption is prohibited by Art 28 LRegP, and because same-sex marriages are only recognised as registered partnerships in Switzerland pursuant to Art 45(3) PILA.[110] Relatively recently the Federal Office of Justice has clarified this question and has informed the cantonal civil registry authorities that an adoption by a same-sex couple abroad is not contrary to Swiss public policy, and should be recognised in Switzerland if this is consistent with the best interests of the child.[111]

(v) Dissolution of the partnership

Registered partners may jointly apply for the dissolution of their partnership in Switzerland if either partner lives in Switzerland. If the partners cannot agree on a dissolution by consent, a plaintiff may only sue for dissolution in Switzerland, if he is additionally either of Swiss nationality or if he has lived in Switzerland for at least one year.[112] If neither partner lives in Switzerland, Swiss courts have jurisdiction for dissolution only if one of the partners is a Swiss national and if it is not possible or reasonable to dissolve the partnership in either country of residence.[113] Finally, if neither partner is a Swiss national or lives in Switzerland, the partnership may be dissolved at the Swiss place of registration, if it is not possible to apply for dissolution at the place of residence of either partner.[114]

If Swiss courts are competent to dissolve the partnership, they will apply Swiss law, unless the partners are of a common foreign nationality and do not both live in Switzerland, in which case they will generally apply the law of the

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[109] For an overview see Schwenzer 'Convergence and Divergence in the Law on Same-sex Partnerships' (above n 60) 150 et seq.

[110] Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 188; Schwander *ZH-Komm*, Art 45 Abs 3/Art. 65a-d IPRG, n 156; Copur 'Kapitel 8: Die Elternschaft gleichgeschlechtlicher Paare' in Ziegler et al (eds) *Rechte der Lesben und Schwulen in der Schweiz* (Berne, 2007) 305 et seq. All authors cited above do not regard the recognition of same-sex adoptions as contrary to Swiss public policy, as this would be contrary to the overriding principle of the best interests of the child.

[111] Letter of the Federal Office of Justice to the cantonal civil registry authorities of 20 December 2006. Available online at: www.bj.admin.ch/bj/fr/home/themen/gesellschaft/zivilstand/weisungen/kreisschreiben.html (accessed 24 October 2007).

[112] Art 59 PILA.

[113] Art 60 PILA.

[114] Art 65b PILA.

common nationality of the partners.[115] If that law does not allow dissolution of the partnership, or unduly impedes dissolution, Swiss law is applicable.[116]

(e) Concluding remarks

In conclusion, the new law on registered partnership certainly constitutes an improvement since it allows for legal recognition and protection of same-sex relationships. The new provisions mirror matrimonial law to a large extent. This is positive, since same-sex partnerships and marriages are alike in many respects. However, such equal treatment should perhaps have been more carefully reflected in other areas. In particular, the provisions on the splitting of social security entitlements are not only expected to lead to inappropriate results for many registered partners, but are furthermore not adapted to the provisions on partnership property law. Other problematic aspects include the provisions on parental responsibility and the prohibition of adoption. Here, more regard to social reality would have been preferable. Biological ties are losing their importance with the increase of medically assisted reproduction technique, and have thus already created a recognised situation of social parentage.[117] Placing registered partners, who have formalised their relationship and publicly taken responsibility for each other, in an inferior position to those who have not, cannot be justified.

In summary, the new law on registered partnership constitutes a step in the right direction and an important innovation, while in certain areas more objectiveness and reflection would have been desirable.

III STRONGER PROTECTION FOR VICTIMS OF DOMESTIC VIOLENCE

The second important development in Swiss family law in 2007 pertains to an altogether different area of law. On 1 July 2007, new provisions in the Swiss Civil Code affording better protection to victims of domestic violence entered into force.[118] The main focus of the long-awaited provisions lies on the eviction of the offender from the common home.[119] The new provisions constitute an innovation also because they provide for civil law remedies. Up to now, in Swiss law the protection of domestic violence victims' rights was predominantly

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[115] Arts 61 and 65c PILA.

[116] Either according Art 61(3) PILA, if one of the partners is a Swiss citizen or has been resident in Switzerland for 2 years or according to Art 65c(1) PILA, if the law of the country of origin does not recognise registered partnerships at all. The second provision considerably diminishes the importance of the restrictions of the first provision.

[117] On the gradual recognition of social parentage see Schwenzer 'Tensions Between Legal, Biological and Social Conceptions of Parentage' in Schwenzer (ed) *Tensions Between Legal, Biological and Social Conceptions of Parentage* (Antwerp/Oxford, 2007) 1, 11 and 26; Büchler 'Das Familienrecht der Zukunft' in Vetterli (above n 12) (Berne, 2004) 45, 55.

[118] AS 2007 137.

[119] The new provisions were promoted under the slogan 'Who beats must leave'.

regarded as a matter of criminal law, with the courts of only a few cantons granting relief based on the existing provisions of private law.

In the following, after briefly explaining the factual context of domestic violence in Switzerland and the legal situation prior to 1 July 2007, the new provisions shall be presented and commented upon.

(a) The factual background of domestic violence in Switzerland

Sociological data on domestic violence in Switzerland is sparse.[120] In 1997, the first comprehensive study on the occurrence of domestic violence found that 20.7% of 1,500 participating women indicated having been subject to physical and/or sexual violence,[121] whereas 40.3% indicated that they had suffered from emotionally abusive behaviour.[122] A recent study of the Swiss Federal Office of Statistics revealed that the majority of women who are killed are killed by their current or former partners.[123] Whereas age, nationality or social status seem to be of limited importance, the most striking factor is that the victims are mainly women.[124] This data conforms to statistics reported on the European and global level.[125] Obtaining reliable information on the occurrence of domestic violence is, however, complicated by the fact that a significant number of unreported incidents must be assumed,[126] which makes information derived from criminal statistics unlikely to be conclusive, and a minimal estimate at the most.

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120 For an overview see Rufino and von Salis *Aktiv gegen häusliche Gewalt* (Liestal, 2006) Ch 9.

121 Gillioz, De Puy and Ducret *Domination et violence envers la femme dans le couple* (Lausanne, 1997) 71.

122 Ibid 69.

123 246 women out of the 429 cases from 2000–2004, ie 57.3%. Zoder and Maurer *Tötungsdelikte. Fokus häusliche Gewalt. Polizeilich registrierte Fälle 2000–2004* (Bundesamt für Statistik, Neuchâtel, 2006). See also Opfer und Täter in der Statistik, Neue Zürcher Zeitung of 13 October 2007, 13.

124 Gloo and Meier 'Interventionen von Polizei und Justiz bei Anzeigen zu Gewalt im sozialen Nahraum. Empirische Untersuchung zu Veränderungen im Kanton Basel-Stadt, 1995–2000' *Die Praxis des Familienrechts 2001*, 651 et seq, 656; Büchler 'Zivilrechtliche Interventionen bei Gewalt in Lebensgemeinschaften. Rechtstatsachen – Rechtsvergleich – Rechtsanalyse' *Die Praxis des Familienrechts 2000*, 583 et seq, 584; for the canton of Baselland see Rufino and von Salis (above n 120), Ch 4, 4, here, 71% of the victims are women; for the canton of Zurich see Schneiter, Eggenberger and Lindauer *Gemeinsam gegen häusliche Gewalt* (Zurich, Basel, Geneva, 2004) 25 (in n 7); Gloor et al *Interventionsprojekte gegen Gewalt in Ehe und Partnerschaft* (Berne, Stuttgart, Wien, 2000) 28. Godenzi *Gewalt im sozialen Nahraum* (Basel, Frankfurt am Main, 3rd edn, 2006) 394, concludes that therefore, a gender-specific response should be considered.

125 The WHO multi-country Study on Women's Health and Domestic Violence Against Women, 2005, 27 has shown that 20% to 33% of the women at most investigated sites experienced physical and sexual violence. See García Moreno et al *WHO Multi-country Study on Women's Health and Domestic Violence against Women* (Geneva, 2005).

126 Wetzels and Pfeiffer, *Sexuelle Gewalt gegen Frauen im öffentlichen und privaten Raum – Ergebnisse der KFN-Opferberatung 1992, KFN Forschungsbericht Nr. 37* (Hannover, 1995) 12, estimate the number of unknown cases at 93.3%. Cf Schwander 'Interventionsprojekte gegen häusliche Gewalt: Neue Erkenntnisse – neue Instrumente' *Schweizerische Zeitschrift für Strafrecht 2003*, 195. Cf also Medina-Ariza and Fe-Rodriguez 'Critical Issues Related to the

(b) The legal situation until 1 July 2007

Until 1 July 2007, it was mainly through criminal law that the state intervened against domestic violence. No specifically tailored civil law remedies against domestic violence existed. Nevertheless, a minimal level of protection could be achieved according to matrimonial law and the provisions protecting the rights of personality in general.[127] All the same, many questions remained unclear, and the existing legal remedies were neither widely known nor frequently ordered. For unmarried couples, achieving a sufficient level of protection was even more difficult.

(i) Protection according to criminal law

In criminal law, domestic violence is punished if criminal offences such as murder, battery, assault, coercion, threatening behaviour or crimes against the sexual integrity of persons are committed. Insofar as these offences are not normally prosecuted ex officio,[128] the position of the victims of domestic violence is facilitated by waiving the requirement to file charges for certain offences.[129]

Unfortunately, the impact of these provisions is diminished by the possibility of the law enforcement authorities[130] provisionally to close the proceedings.[131] The idea behind this provision is to avoid inappropriate interference with the personal life of the victim in situations where the victim's legitimate interests to waive criminal prosecution overweigh the state's interests in prosecuting criminal offences.[132]

Measurement of Intimate Partner Violence: A Clustering Analysis of Psychometric Scores' in Smeenk and Malsch (eds) *Family Violence and Police Response* (Aldershot, Burlington, 2005) 35, 56; Ollus and Nevala 'Challenges of Surveying Violence Against Women: Development of Research Methods' in Smeenk and Malsch (eds) *Family Violence and Police Response* (Aldershot, Burlington, 2005) 9, 11 et seq; cf Godenzi (above n 124) 137 et seq.

127 Art 28 Swiss Civil Code et seq. The concept of 'rights of personality' encompasses the protection of the physical and psychological integrity, name, reputation, economic independence, picture, privacy, freedom of movement, the protection of the right of an author to claim authorship etc.

128 This is the case for 'simple' battery (Art 123 Swiss Criminal Code), assault (Art 126 Swiss Criminal Code) and the offence of threatening a person (Art 180 Swiss Criminal Code). Before 1 April 2004, rape (Art 190 Swiss Criminal Code) and sexual assault (Art 189 Swiss Criminal Code) were not prosecuted *ex officio* if the victim was married to the offender and living in the same household.

129 If the offences of 'simple' battery, assault or threatening of a person are committed against the spouse or registered partner of the offender or against a partner with whom the offender shares a common residence for an undetermined period of time, during the time of such a relationship or the time of shared residence and one year afterwards, criminal proceedings against the offender are initiated without the victim having to file charges. See Colombi 'Gewalt in der Ehe und in der Partnerschaft – zur Auslegung der neuen Art. 123, 126 und 180 StGB' *Schweizerische Zeitschrift für Strafrecht 2005*, 297 et seq.

130 Ie courts, the examining magistrate or the prosecutor.

131 Art 55a Swiss Criminal Code.

132 See Stratenwerth and Wohlers *Schweizerisches Strafgesetzbuch, Handkommentar* (Bern, 2007) Art 55a, n 1 et seq.

Although the law enforcement authorities have discretion as to whether to comply with such a request of a victim, they frequently neither have the means nor the chance to ascertain that the withdrawal was not unduly influenced by the offender. Additionally, the characteristic dynamics of domestic violence tend to increase the victim's willingness not to press charges. Sociological research has shown that domestic violence tends to occur in three phases.[133] The first phase is characterised by emotionally abusive behaviour and minor incidents of physical violence. In this phase, the victim tries to avoid an eruption of violence at any cost and often even feels responsible for causing her partner's behaviour. The second phase, which can be very short, is the point where the violent behaviour erupts. In the third phase, the offender is remorseful, and desperately tries to save the relationship, apologising and promising to improve in the future. The victim, wishing to believe these assertions and wanting to help the offender to change, at this point frequently revokes her testimony and withdraws her complaint. The possibility of provisionally closing the proceedings upon the victim's request therefore exactly corresponds, and even reinforces, the above-mentioned dynamics of domestic violence, and thereby frequently renders the protection of the victim's rights void.[134]

Criminal law's utility as a means to counter domestic violence is also doubtful because it focuses mainly on the past and on retribution rather than on prevention and intervention. Also, criminal proceedings may take a very long time to initiate and then conclude, and can therefore be painful for the victims of domestic violence, without empowering them to improve their situation.[135]

(ii) Protection according to civil law

A core point here is the question of who has to leave the family home. The family home's importance as a social centre does not have to be emphasised. In

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[133] See Dutton *Rethinking Domestic Violence* (Vancouver, 2006) 211 et seq; Godenzi (above n 124) 144; Schwander 'Interventionsprojekte gegen häusliche Gewalt: Neue Erkenntnisse – neue Instrumente' *Schweizerische Zeitschrift für Strafrecht 2003*, 195, 205.

[134] Kottmann 'Opferschutz am Beispiel der häuslichen Gewalt' *Jusletter* of 11 September 2006. By contrast, in Canada a 'pro charge policy' was implemented in the 1980s, meaning that charges against an offender were pressed without regard to the victim's will. Seith *Öffentliche Interventionen gegen häusliche Gewalt* (Berne, 2003) 35. Gloor et al, (above n 124) 67, note very high numbers of withdrawal of cases by victims. These numbers seem even more alarming if taking into consideration that these were victims who had actively pressed charges. Cf Büchler 'Gewalt in Ehe und Partnerschaft' *plädoyer* 2/1999, 28, 30, who summarises that the biggest obstacle for criminal law intervention against the offender is the victim herself. For an in-depth analysis on the reasons why victims do not press charges see Leuze-Mohr *Häusliche Gewalt gegen Frauen – eine straffreie Zone* (Baden-Baden, 2001) 276 et seq.

[135] Büchler *Gewalt in Ehe und Partnerschaft, Polizei-, straf- und zivilrechtliche Inverventionen am Beispiel des Kantons Basel-Stadt* (Basel, Geneva, Munich, 1998) 248; cf also Seith (above n 134) 241, who points out that only a comprehensive system of civil law, criminal law and migration law remedies will make an effective protection of victims of domestic violence possible. Further, the low proportion of criminal complaints indicates that from a victim's perspective, criminal law does not promise the anticipated effect, Leuze-Mohr (above n 134) 322 and 330.

the context of domestic violence, it is also the close proximity of victim and offender that increases the victim's exposure to repeated offences and diminishes her capability to defend herself.[136] It has therefore long been demanded that the offender must leave – not only to make the point that he is the one who has done something wrong, but also to relieve the victim of bearing the risk of relocation, of being homeless and also of practical problems such as the distance to the children's school.[137]

Prior to 1 July 2007, only limited protection was afforded by certain provisions pertaining to matrimonial law and by the provisions protecting the right of personality in general.[138] In spite of these provisions, however, many questions were unresolved.[139]

In more detail, the legal situation was characterised by the following shortcomings. Married victims' right to stay in the common residence was protected. It was, however, uncertain whether other measures could be ordered before divorce proceedings had been initiated.[140] Unmarried partners were in a difficult situation with regard to the protection of the common home. Additionally, the possibility of obtaining other protective orders such as non-molestation orders or orders prohibiting the offender from approaching the victim or certain areas was uncertain.[141] Overall, the protection afforded by

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[136] Keel '"Wer schloht, dä goht", Massnahmen gegen häusliche Gewalt: das St. Galler Modell' *Schweizerische Zeitschrift für Strafrecht 2006*, 321, 322.

[137] Büchler *Gewalt in Ehe und Partnerschaft, Polizei-, straf- und zivilrechtliche Interventionen am Beispiel des Kantons Basel-Stadt* (above n 135), 242 et seq.

[138] See above 'The Legal Situation until 1 July 2007'.

[139] In detail see Büchler *Gewalt in Ehe und Partnerschaft, Polizei-, straf-, und zivilrechtliche Interventionen am Beispiel des Kantons Basel-Stadt* (above n 135), 251 et seq; Büchler, *Die Praxis des Familienrechts 2000* (above n 124) 583, 595 et seq.

[140] Already before the new Art 28b Swiss Civil Code entered into force, the judge could decide which of the partners was entitled to remain in the family home according to Arts 175 and 176(1)(2) Swiss Civil Code; i e it was possible to order the offender to leave the common apartment or house. The legal situation with regard to further protective measures such as orders prohibiting the offender from molesting or approaching the victim was more difficult. It was disputed whether such measures could be ordered according to Art 28a Swiss Civil Code at all, and whether these general provisions belonging to the law protecting the right of personality were also applicable in matrimonial law, since Art 172(3) Swiss Civil Code limited the judge's power to order only the measures explicitly named in the law. This resulted in the absurd situation that spouses, for whom a special protection regime existed, were, according to the practice of some cantons, in this respect in an inferior position to cohabitants. The situation improved if divorce proceedings had been initiated, as then the available measures were no longer limited. However, this was of limited use to the victim who at least needed some time to deal with the situation, and could not be expected to take such a decision prematurely only to get access to the necessary protective measures. In some cantons, however, the courts nevertheless ordered such measures, see Schneiter, Eggenberger and Lindauer (above n 124) 60. See also Jaquiery and Vaerini Jensen 'La violence domestique à l'égard des femmes en droit international, européen et Suisse' in Besson, Hottelier and Werro (eds) *Human Rights at the Center* (Geneva, Zurich, Basel, 2006) 415, 443.

[141] If the victim of domestic violence formed a cohabiting couple with the offender, she only had the right to make her partner leave the apartment immediately if she was the sole tenant. Although an order to leave the home could at least in theory be based on Art 28a Swiss Civil Code, the practical importance of this provision was limited, as the court was not able to

the general provisions protecting the person was widely unknown and not frequently ordered, making the lack of a specifically tailored regime evident.[142]

(iii) Select innovations on the cantonal level

Because protection against domestic violence was not sufficiently ensured on the federal level, some of the Swiss cantons enacted special provisions in their police laws.[143] The lead was taken by the cantons of St Gallen[144] and Appenzell Ausserrhoden, which as of 1 January 2003 adopted provisions allowing the police to evict the offender from the common home and to prohibit him from returning to ensure that the violence stopped.[145] Subsequently, the other cantons followed suit, so that now up to 15 cantons have enacted similar rules, and most of the others are in the process of adopting such provisions.[146] At the cantonal level, the intervention against domestic violence is in most cases accompanied by expanding information and consultation services for victims and offenders,[147] by providing that the cost of the public intervention is borne by the public, and by training police officers how to best cope with situations of domestic violence. The focus here lies on treating domestic violence as a criminal offence, rather than just a 'family dispute', and in instructing the

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interfere with property rights or landlord and tenant law, and since the special provisions protecting the matrimonial home were not applicable to cohabitants, and the offender could not be hindered from terminating the lease or selling the apartment. Further orders such as prohibiting the offender to approach the victim were only possible if a balancing of the interests resulted in favour of the victim. Cf also Cabernard and Vetterli *Die Anrufung des Zivilgerichts bei häuslicher Gewalt, Die Praxis des Familienrechts 2003*, 589, 595 et seq.

142 Cf Büchler *Gewalt in Ehe und Partnerschaft, Polizei-, straf-, zivilrechtliche Interventionen am Beispiel des Kantons Basel-Stadt* (above n 135) 341.

143 Other cantonal projects focused on a comprehensive approach to domestic violence, including increasing communication between the institutions involved with domestic violence, specialised training of the persons involved, an improvement of the services rendered, public campaigns and training programmes for offenders, eg the project 'Halt-Gewalt' (Stop the Violence) in Basel-Stadt, which was evaluated by Gloor et al (above n 124) 89 et seq. On the intervention project in the canton of Berne see Schwander *Schweizerische Zeitschrift für Strafrecht 2003*, 211. For Zurich see Eggenberger and Weingartner 'Das Zürcher Interventionsprojekt gegen Männergewalt ZIP von 1996 bis 2000' in *Frauenfragen 2000/2, Violence Domestique: Comment intervenir?*, 62 et seq.

144 Polizeigesetz vom 10 April 1980, sGS 451.1, Art 43 et seq. See in detail Keel *Schweizerische Zeitschrift für Strafrecht 2006* (above n 136) 323 et seq; Frei 'Wegweisung und Rückkehrverbot nach st. gallischem Polizeigesetz' *Aktuelle Juristische Praxis* 2004, 547 et seq.

145 This is in line with the finding that women often mainly seek short-term goals from an intervention, such as an immediate cessation of violence. See Kelly 'Moving in the Same or Different Directions? Reflections on Recent Developments in Domestic Violence Legislation in Europe' in Smeenk and Malsch *Family Violence and Police Response* (Aldershot, Burlington, 2005) 81, 87.

146 For an overview of the legal situation in the 26 Swiss cantons, see Schwander *Violence domestique, Analyse juridique des mesures cantonales* (Bureau federal de l'égalité entre femmes et hommes, Berne, 2006) (above n 136) 113 et seq.

147 Increasingly, the need for offender oriented programmes is recognised, see, eg, for the cantons of Baselland and Basel-Stadt where the number of participants has nearly tripled from 2001 to 2005, Rufino and von Salis (above n 120) Ch 6, 2. Unfortunately, only one-third (Baselland)/one-fourth (Basel-Stadt) of the participants actually completed the programme.

police officers to behave accordingly, ie to merely record the facts.[148] Attempts to reconcile the partners have proven rather to reinforce the offender's position and dominance.[149]

An evaluation of the measures adopted in St Gallen and Appenzell Ausserrhoden shows that the offender was evicted from the home in 28.6% (St Gallen) and 53.5% (Appenzell Ausserrhoden) of the interventions. The measure was overall well accepted (only one person filed an appeal) and approved of by all experts and institutions involved.[150]

Despite the new provisions that have been inserted in the Swiss Civil Code, the cantonal measures are still expected to play an important role in the future, primarily because the police are accessible at any time and because such measures take effect immediately, in contrast to measures which have to be ordered by a court in a civil procedure.[151]

(c) The new provisions: focus on the rights of the victim to stay in her familiar surroundings

While civil law provided only insufficient means, and while in criminal law the possibility of closing the proceedings often prevented criminal proceedings, the cantonal projects were evaluated very positively, and thus emphasised the need for similar provisions on the federal level in order to ensure a uniform regime of protection.

The new provisions against domestic violence consist of two new articles that were inserted in the Swiss Civil Code after the general provisions protecting the right of personality (Art 28b and 28c), and by two amendments to existing provisions which improve the victim's position if she applies for interim measures of protection (Art 28d(2) and (3)) and ensure that the new provisions apply in matrimonial law as well (Art 172(3)).

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148 This was the main point of criticism against police intervention in Switzerland, see Seith (above n 134) 33. On the corresponding project in the canton of Zurich see Schneiter, Eggenberger and Lindauer (above n 124) 32 and 107 et seq. Sociological research has revealed that such behaviour reduces the recidivation rate, see Godenzi (above n 124) 371 et seq.

149 Cf Leuze-Mohr (above n 134) 132 et seq.

150 See Wyss *Gegen häusliche Gewalt, Interventionsprojekte in den Kantonen St. Gallen and Appenzell Ausserrhoden: Erste Erfahrungen mit der Umsetzung der polizeilichen Wegweisung* (Berne, 2005) 30. For Appenzell: Schlussbericht zum Projekt Massnahmen gegen häusliche Gewalt vom Frühjahr 2004, available online at: www.ar.ch/KAPO/SchlussberichtAR.pdf (accessed 27 September 2004). For St Gallen: *Gewalt.Los – Interventionsprojekt gegen Häusliche Gewalt des Kantons St. Gallen. Bericht zum Abschluss der Phase I und II*, available online at: www.opferhilfe-sg.ch/files/__29__/schlussbericht_st._gallen.pdf (accessed 27 September 2004).

151 This is implicitly recognised by the provision in Art 28b(4) Swiss Civil Code, according to which the cantons must designate a competent authority to immediately evict the offender from the common home in case of a crisis. According to the explanatory report by the legal commission of the national council, it may be expected that this will primarily be the police. Report of the law commission of the national council of 18 August 2005, Bundesblatt 2005, 6871, 6889.

(i) Definition of domestic violence

Article 28b Swiss Civil Code contains a very broad definition of domestic violence. Violence, threats and stalking are explicitly named, which is meant to ensure that physical violence as well as psychological violence is covered. Violence means behaviour that directly harms the physical, psychological, sexual or social integrity of a person.[152] The violence must reach the level of a violation of the right of personality[153] – meaning that not every kind of socially improper behaviour is legally relevant. A threat is behaviour causing fear of inflicting unlawful harm to the victim or a person to whom she is close – be it physical, psychological, sexual or social harm.[154] Stalking denotes obsessively and continuously following and molesting a person, eg by spying on the victim. Such behaviour must cause substantial fear in the victim, and occur repeatedly.[155]

(ii) Personal scope of application

The new provisions protect any victim of the above-mentioned behaviour. In particular, no restrictions with respect to sex, age or marital status exist, nor is it required that the offender is – or was – in any kind of relationship with the victim. Article 28b Swiss Civil Code thus has a wider scope of application than the traditional situation of domestic violence. In order to protect the victim's right not to initiate proceedings, only the victim herself can apply for protective measures, and not other persons who are close to the victim.[156] Orders can be made against the offender and anybody who participated in the violent behaviour.[157]

(iii) Orders that can be made

Article 28b(1)(1–3) Swiss Civil Code contains a non-exhaustive list of orders that may be made by the court. More specifically, the court may prohibit the offender from approaching the victim, may order the offender to stay beyond a certain distance from her apartment or other places, and not to contact or molest the victim in any way. The court should have particular regard to all interests at issue, and only make an order if it concludes that this is proportional and the most suitable solution for the individual case. The measure does not necessarily have to be limited to a certain period of time, although this may be appropriate if the measure substantially interferes with

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[152] Report of the law commission of the national council of 18 August 2005, Bundesblatt 2005, 6871, 6884.

[153] Art 28 Swiss Civil Code.

[154] Report of the law commission of the national council of 18 August 2005, Bundesblatt 2005, 6871, 6884.

[155] Ibid.

[156] Contrary to certain proposals during the consultation period.

[157] Report of the law commission of the national council of 18 August 2005, Bundesblatt 2005, 6871, 6885.

the offender's rights. Compliance with the court's order may be assisted by including the threat of criminal proceedings in case of infringement.[158]

Article 28b(2) and (3) Swiss Civil Code contain special remedies if the offender and the victim share a common residence. According to Art 28b(2) Swiss Civil Code, the victim can file an application to evict the offender from the common home for a certain time. This period can be extended once. The victim can still apply for this measure if she left the common home directly after the violent act occurred. A balance between the victim's rights and the offender's interests is achieved by the option to order the victim to compensate the offender appropriately for her sole use of the home.[159]

Further, the court may transfer the rental contract to the victim if the landlord agrees. This measure is aimed at resolving the situation in which an offender who is the sole tenant is evicted from the common home longer than the ordinary notice period of 3 months, and could therefore seek to terminate the lease. Already prior to the enactment of the new provisions, if the common home qualified as the family home of a married couple or of registered partners,[160] a termination of the lease was only possible if both partners explicitly agreed.[161] Article 28b(3) Swiss Civil Code now ensures that also cohabiting partners and other persons sharing an apartment are suitably protected, and may help in finding a permanent solution to the housing needs of the victim if the landlord agrees.

Finally, the cantons must designate a competent authority who can immediately intervene and evict the offender from the common home in case of a crisis,[162] and provide consultation services for victims as well as offenders.[163]

(iv) The procedure

The establishment of the procedure in which victims of domestic violence may apply for the measures described above is left to the Swiss Cantons. Articles 28c and 28d Swiss Civil Code, however, explicitly recognise that such measures may also be ordered as interim measures,[164] and even via a procedure which does not grant the offender the right to be heard.[165] The victim's procedural position is further strengthened by granting her access to such interim measures even if she has unduly delayed her application and by exempting her from the duty to provide security for the offender's possible damages.

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158 Under Swiss law, this may be done by any competent authority by explicitly mentioning Art 292 Swiss Criminal Code and its sanction of a fine. If any person disobeys an order containing such a provision, he has concluded a criminal offence and is sanctioned with a fine.

159 Art 28b(3) Swiss Civil Code.

160 Ie the spatial centre of matrimonial and family life.

161 Art 266m Swiss Code of Obligations.

162 See above n 151.

163 Art 28b(4) and (5).

164 Art 28c Swiss Civil Code.

165 Art 28d Swiss Civil Code, so-called 'super-provisional' measures.

(v) Special issues in connection with Swiss migration law

Family law has – apart from immediate effects on the personal level – an impact on other areas of the law such as migration law. In the context of domestic violence, the so-called 'derivative permits of residence' raise a problem.

On 1 January 2008, the new Swiss Law on Foreigners will enter into force.[166] According to this law, the foreign spouse or registered partner of a Swiss national or of a foreigner with a permanent residence permit in Switzerland is only entitled to a residence permit as long as she lives together with her partner.[167] For victims of domestic violence, this constitutes an obstacle to effectively making use of the new remedies. If they cease to share a residence with their spouse or partner, they run the risk of losing their permit of residence in Switzerland, especially if their marriage has been short and they do not have children. Frequently, in such a situation, returning to their country of origin would not be socially acceptable, making it preferable to suffer, but maintain a common residence. As a result, foreign partners are significantly exposed to violent behaviour of their partners.

In the consultation process of the new law against domestic violence, the insertion of a provision protecting the rights of foreign victims of domestic violence by automatically granting them a residence permit was a controversial issue. Such a provision was, among other reasons, not enacted because the Civil Code was not regarded as the proper place for provisions of public law.[168]

The new Law on Foreigners recognises this concern. Although foreign victims of domestic violence are not automatically entitled to a permit of residence, the law provides that foreigners have the right to a prolongation of their residence permit if 'important personal reasons require a further stay in Switzerland', and explicitly states that important personal reasons exist namely if the spouse was the victim of domestic[169] violence, and if the social integration in the country of origin appears to be at risk.[170] This is already a significant improvement if compared to the legal situation before the entry into force of

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166 The new law (above n 22) was accepted by the Swiss People in a referendum on 24 September 2006.

167 In the old law on Foreigner's Residence in Switzerland, only the spouses of non-Swiss nationals had to share a common residence with their partner. The requirement of living together is meant to be an obstacle against marriage fraud. Cf Gafner 'Les femmes migrantes face à la loi sur le séjour et l'établissement des étrangers (LSEE), à la loi sur les étrangers et à la loi sur l'asile (LAsi)' *Revue de droit administratif et de droit fiscal* (Revue genevoise de droit public) 2003, 16, 20; Kantonale Fachkommission für Gleichstellungsfragen Bern (ed) *Migrantinnen: Aufenthaltsrecht und häusliche Gewalt. Erteilung und Verlängerung von Aufenthaltsbewilligungen* (Berne, 2004) 14 et seq; Reetz 'Wer schlägt bleibt. Zur rechtlichen Situation gewaltbetroffener Migrantinnen' in Frauenfragen 2005/1, *Häusliche Gewalt und Migration*, 29 et seq.

168 Cf Opinion of the Federal Council, Bundesblatt 2005, 6897, 6898.

169 The wording of Art 50(2) AuG only mentions 'matrimonial' violence. However, Art 52 AuG states that the provisions of the preceding chapter regarding foreign spouses are to be applied by analogy to foreign registered partners.

170 Art 50(2) AuG (above n 22).

the new Law on Foreigners. In those circumstances the authorities had wide discretion when deciding whether to grant a permit of residence, which had led to a widely divergent practice by the cantonal authorities.[171] It is hoped that this provision in practice proves itself as an effective means to aid foreign victims of domestic violence.[172]

(d) Conclusion

Considering the presumed extent of domestic violence in Switzerland, and the international developments in this field, the fact that Switzerland has finally decided to implement the necessary innovations in the Swiss Civil Code is to be commended. The new provisions help to intervene against the specific exposure of the victims of domestic violence to the threat of repeated offences; a threat which is increased by the close vicinity to the offender. They are therefore to be appreciated as a new and efficient means in the struggle against domestic violence, through which Switzerland has finally achieved similar standards of protection to its surrounding countries.

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[171] On the legal situation then see Schneiter, Eggenberger and Lindauer (above n 124) 68 et seq.; DuBois and Vetterli *Häusliche Gewalt, erste Erfahrungen mit neuen Gesetzen, Die Praxis des Familienrechts 2004*, 851, 855 et seq.

[172] In more detail Gafner *Revue de droit administratif et de droit fiscal (Revue genevoise de droit public) 2003* (above n 167) 21 et seq.

Turkey

'FELLOW-WIFE' AND THE LAW

Selma Çetiner[*] *and Armağan Ebru Bozkurt Yüksel*[**]

Résumé

Cet article s'intéresse au droit familial et plus particulièrement à la façon dont le Code civil turc aborde la problématique de la «deuxième compagne» (entendue dans le sens de seconde conjointe non mariée vivant avec le mari et son épouse). Ce sujet soulève des problématiques différentes selon qu'il s'agit du droit civil, du droit criminel ou de la psychologie. Cependant, le présent texte n'aborde la question que du point de vue du droit civil. Nous concluons qu'une telle situation constitue un motif de divorce pour l'épouse qui peut également réclamer de son mari une indemnisation pour le dommage psychologique que lui cause la présence d'une deuxième compagne.

I INTRODUCTION

In Turkey, until 2002, family law was regulated by the second book of the Turkish Civil Code 743. The Code was one of the revolutions of Atatürk – the founder of Turkish Republic – in using the law to achieve modern standards of civilization. Before the foundation of the Turkish Republic, civil law relations were regulated by the Islamic Civil Code, Mecelle. However, Mecelle became insufficient in the course of time. Also, it did not include all civil law relations. The regulation of civil law relations by a new code was certainly necessary. In fact, this necessity was recognised during the latter part of the Ottoman Empire and a Family Law Decree was issued in 1917. A man's absolute right of divorce and plural marriage were restricted by the Family Law Decree. Unfortunately, the Family Law Decree was abolished and Mecelle brought back into force again in 1919. After the foundation of the Republic, the idea of the adaptation of a modern law from the West was preferred instead of enacting a code based on the former law. Since the Swiss Civil Code was the latest, modernistic, secular, practical code and gave scope for judicial discretion, the Government decided to adopt the Turkish translation of it with a few changes. New family formation was regulated with the enactment of the Civil Code 743, in 1926. Monogamy and equality of status for men and women became the rule.

* Law Professor, Dean of Hacettepe University Faculty of Law, Ankara.
** Research Assistant, Dokuz Eylül University, Izmir.

Whether daughter or son, children became equal in heirship. The Government had the control of marriage and divorce. The marriage service had its religious features split off.[1]

The Civil Code stayed in force for 75 years and was abolished by Civil Code 4721 on 1 January 2002. The new Civil Code 4721 contains new rules about family law. For example, the marriageable age for a man was 17 and 15 for a woman in the former Code. The new Civil Code, regulates the marriageable age for both man and woman at the age of 17. To take another example, under the former Code, a woman was allowed to get married with the judge's permission at the age of 14, or 15 for a man, in extraordinary situations. The new Civil Code regulates the marriageable age in extraordinary situations with the judge's permission at 16 for both men and women. The article in the former Civil Code which provided that the head of the conjugal community must be a man has been abolished by the new Civil Code which states that both spouses head the conjugal community. The new law also states that the spouses will choose their family dwelling together. In summary, the new Civil Code abolished all the articles containing inequalities between men and women.[2]

Another new regulation in Turkey that also provides for equality between men and women in family law concerns adultery. The Turkish Criminal Code 743 regulated adultery committed by a married woman and married man in different ways. The elements, the conditions and punishment of adultery depended on the sex of the offender. The relevant article of the Turkish Criminal Code regulating a man's adultery was abolished on 27 December 1997 as it went against the principle of equality before law in the Turkish Constitution. The article which regulated a woman's adultery was abolished on 23 August 1998. At present, adultery does not constitute a crime but is a reason to divorce under the Civil Code 4721.[3]

II FELLOW-WIFE AND THE LAW

'Fellow-wife' is a concept which occurs more often in eastern culture and hence requires definition.

Many encyclopaedias explain fellow-wife as, 'formerly, each one of the concubines that a man has other than his first wife' or 'the name of the wife of a man among his other wives'.[4] 'Fellow-wife' is an old concept. In today's Turkish legal system a man cannot marry more than one woman according to Art 145 of the Civil Code. In this context, the latter definition is not valid today

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1 See www.ait.hacettepe.edu.tr/egitim/ait203204/II3.pdf (accessed 1 May 2007) for information about Law Revolution with the Republic and the New Law System.

2 T Akıntürk *Medeni Hukuk* (Beta Publishing House, Istanbul, 2004) 46–47.

3 See www.die.gov.tr/tkba/mevzuat.htm (accessed 1 May 2007) for an example of the Women's Information Network in Turkey with information about international conventions, women's rights, legal regulations and statistics.

4 *Meydan Louresse* (Meydan Publishing House, Istanbul, 1992) Vol 12, 37.

from a legal perspective. A definition that could now be given for fellow-wife is 'a woman living with a married man other than his legally married wife'.

If a married woman accepts a fellow-wife, public law cannot intervene. Adultery used to be a crime that could be prosecuted upon complaint of the injured party. However, it is not a crime any more. So, what are the rights of a woman against a fellow-wife?

> 'To be able to speak of a right there must be a benefit to an individual, it has to be within the power of the beneficiary, it has to be protected by law and it must not violate the public interest.'[5]

Surely the legal wife has a right to reject the fellow-wife? However, does the law protect this and does the wife have any rights other than Art 161 of the Civil Code which gives the woman a right to divorce?

Philosophical anthropology states that man is a disharmonious creation that comes into the world with a good and bad 'nucleus'.[6] Conscience[7] is an inner voice which warns us when we make a bad cultural value judgment. However, conscience is not always such a preventive power. There must be a power to take the place of conscience, an authority to be referred to. A conscientious man would not humiliate his wife in this way, however, when people cease behaving fairly, the government's power should come into force and regulate relations between people in the moral area.[8] What has been provided in today's regulations against this unfairness?

According to Art 5 of the Turkish Constitution, providing the necessary conditions in order to offer comfort and peace to individual persons and the public and to improve the monetary and moral fortune of the people are among the fundamental purposes and goals of the Government. Yet, under Art 41 of the Turkish Constitution 'the family is the basis of Turkish community' and constitutionally the family is founded upon marriage:

> 'The Government takes the necessary measures and makes organizations for providing comfort and peace to the family and especially for protecting mother and children and for teaching and executing family planning.'

In this context the Law Relating to Protecting Family 4320 has been enacted. In relation to the legal basis of this law, it has been stated that it has fulfilled one of the requirements in Art 41 of the Constitution. Article 1 of the Law Relating to Protecting the Family is as follows:

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5 A Zevkliler *Aile Hukuku* (Savas Publications, Ankara, 1989) 107.

6 T Mengüşoğlu 'Hukuk ve Devlet Felsefesi' 1 *Hukuk Felsefesi ve Sosyolojisi Arkivi* 77 (Istanbul Bar Publications, Istanbul, 1997).

7 According to Tolstoy, conscience is the name of the God's heavenly light in our hearts. L Tolstoy *GizlenenKitap* (Karakutu Publications, Istanbul, 2005) 23.

8 Mengüşoğlu, above n 6, at 79.

'Apart from the measures regulated in Turkish Civil Law, if a claim of violence has been submitted by one of the spouses or children or any other person from the family living in the same house or a spouse who has a separation order from the court or a legal right to live separately, or a spouse living separately de facto although he/she is married or by Public Prosecutor, then the Family Court Judge may decide one of or some of the measures explained below or any other measures under the circumstances of the case ex officio:

The culpable spouse or the other member of the family,

- not to act or speak violence or fear oriented to the other members of the family,
- to be sent away from the common house and allocate the house to the other members of the family and forbidden to come closer to this house or the workplace of the other members of the family,
- not to damage the properties of the other members of the family,
- not to disturb the other members of the family by communication devices,
- to deliver his/her weapons if any to the police force,
- not to come to the house or workplace of the victim of violence as drunk or loaded and not to use these in the same places,
- to apply to a health center for diagnose or therapy.'

This Law refers to spousal violence but it does not expressly mention physical violence. However, the word 'violence' connotes physical violence which gives the judge a reason to interfere in a physical, concrete way. Yet, violence is not only physical. It can also be economic, political or psychological. Refined violence, which does not include bullying, can be more dangerous than physical violence and can leave permanent psychosomatic scars. It is easier to prove and treat physical violence. For example, it is difficult for a spouse to prove that he or she was unable to leave the house because the other spouse did not provide him or her with money and it is even more difficult to illustrate the psychological effects of such treatment.

At present a new concept has entered the law: that of mobbing or psychological harassment. The word 'mobbing' in Turkey comes from the English word which, in turn, was originally derived from Latin. Mobbing means psychological violence, domination, to surround, harass, cause disquiet or burden. Mobbing was once used to describe bullying among children; today, the word is more widely used to describe emotional abuse that occurs in the workplace.[9]

When the law dealt with physical harassment, the concept of mobbing brought the psychological effects to the fore. In Turkey, a lecturer at a university received compensation because of psychological harassment.[10] Thus, torment done by one person to another person in the workplace has been accepted as a crime. Hopefully this acceptance will carry over to unscrupulousness in marriage and maybe in love. A law concerning spousal violence came into force

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[9] See http://en.wikipedia.org/wiki/Mobbing (accessed 16 July 2007).
[10] See www.sendika.org (accessed 12 June 2007).

on 13 October 2001 in Japan, which is deemed to be a developed country. Before the Law Relating to Protecting Family, the courts in Japan had no authority to intervene in a marriage even if there was spousal violence. However, the Prevention of Spousal Violence and the Protection of Victims Law has been enacted and physical and psychological violence has been accepted as an offence after 90 women were killed by their husbands over the period of one year, rising to 134 in 2000 which amounts to 10% of the total murders in Japan.[11]

Some legal authors state that physical violence is not the only situation where legal measures are enforced, they can be enforced in the case of psychological torment as well.[12] According to a famous saying: 'the legislative organ forms the statutes, judges form the law'. If judges do assess psychological torment and spiritual injury within the realm of violence and the framework of the statutes, then they will enforce the measures. Therefore, if a woman is forced to live with another woman, brought into the same house by her husband, surely this should be assessed as a crime of psychological torment and spiritual injury? A woman who is well-off because she has a job or has enough money to live on would not tolerate this situation and can divorce and claim damages for mental anguish. But what if that woman does not have any place to go or does not want to be far from her children? The other regulation on this subject is set out in paras 2 and 3 of Art 185 of the Civil Code which concerns the responsibilities of spouses. According to these paragraphs, spouses must provide happiness in their marriage together, live together, be faithful and help each other. Once again according to Art 195 of the Civil Code, if one of the spouses does not fulfil the responsibilities of the conjugal community, the other spouse may apply for the intervention of the judge. In this situation the judge may: (a) warn the spouses about their responsibilities; (b) try to conciliate the spouses; or (c) ask for expert help with the consent of both of the spouses. In Art 172 of the Swiss Civil Code which regulates the same subject, asking for help from marriage and family offices takes the place of asking for expert help in the Turkish Civil Code. According to Turkish law, the judge can warn the spouse about not being faithful due to the presence of his fellow-wife. However, for expert help there must be consensus between the spouses. In Turkish law, authority should be given to the judge to apply for expert help without the consent of the spouses as it is in Swiss Law. In the United States, if one of the spouses does not want to continue the marriage, whether at fault or not, it is accepted that the conjugal community has been fundamentally injured and the judge should rule for divorce.[13] In reality, dismissing a divorce claim where one of the spouses does not want to continue the marriage is a punishment on the other spouse. Marriage should not be a sentence. But, if the spouse who does

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[11] I Keiko and O Koji 'The Prevention of Spousal Violence and the Protection of Victims in Japan' in A Bainham (ed) *The International Survey of Family Law 2005 Edition* (Jordan Publishing, 2005) 371.

[12] A Zevkliler, B Acabey and E Gökyayla *Medeni Hukuk* (Seckin Publishing House, Ankara, 2000) 171, 768.

[13] A Bianchi *Understanding the Law, A Teen Guide to Family Court and Minors' Rights* (Rosen Publishing Group, New York, 2000) 40, 42.

not want to carry on the marriage is at fault, then the judge should decide that that spouse should see an expert to understand his or her fault. If the spouse does not understand his or her fault and behaves in the same way more than once, then divorce will be granted. For this reason education of the spouse at fault will stop that person from carrying the same faults into a new marriage and a social purpose will be served as well.

If the husband has a fellow-wife, the legal wife certainly has the right to apply for divorce (Art 161 of the Civil Code). She can also claim compensation at the same time as the divorce suit or separately in another suit. As is stated in a Supreme Court decision: 'Compensation for mental damages is a kind of recovery for the injury to the moral balance. For this reason compensation should be proportional to fault'.[14] On the other hand, no matter how high the compensation given to the spouse, it would not be easy to recompense the moral injury. Unfortunately, compensation rates are not high for personal rights injuries in Turkey. In contrast, this kind of divorce leads to very high compensation in the United States and European countries. Even in Malaysia, where it is permitted to marry up to four wives, the court granted a divorce and ordered the spouse to pay $14m compensation for having a fellow-wife.[15]

[14] Appeal Court 2nd Civil Office Decision, 14 December 1971, No 7403/122.
[15] *Sabah Gazette*, 23 October 2006.

United States

DIVERGENT PATHS: SAME-SEX PARTNERSHIP RIGHTS IN THE UNITED STATES

Ann Laquer Estin[*]

Résumé

Les états ont commencé à bouger la question des relations conjugales entre personnes de même sexe aux États-Unis, mais ils l'ont fait dans deux directions différentes. Plusieurs événements en 2006 ont confirmé cette tendance, que ce soit des décisions d'ordre constitutionnel rendues par les plus hauts tribunaux d'appels dans plusieurs états, de nouvelles législations relatives à l'union civile ou au partenariat domestique dans quatre états et, finalement, de nouveaux amendements à la constitution de sept états qui prohibent la reconnaissance du mariage entre personnes de même sexe. À la lumière de ces développements, il est possible d'identifier un groupe d'états plus libéraux qui reconnaissent désormais un statut légal aux couples de même sexe sous différentes formes, ainsi qu'un autre groupe d'états plus conservateurs où la loi et la constitution érigent des barrières à toute forme de reconnaissance. Chacun de ces groupes représente une portion importante de la population entière de la Nation. Entre ces états et au sein de ceux-ci, le débat continue à faire rage et la carte nationale demeure fluide et changeante. Il est improbable que dans un avenir prévisible, l'une ou l'autre de ces approches l'emportera et cela entraîne des défis importants tant pour le fédéralisme que pour le droit international privé.

The legal status of same-sex couple relationships has been intensely debated in the United States since 1993, when a Hawaii Supreme Court decision first opened the possibility that full marriage rights would be extended to gay and lesbian partners.[1] Several contributions to the Survey have addressed this debate during this period.[2] Since the essay published in the 2006 Survey, a number of significant new developments have occurred, including rulings from the highest appellate courts in four states, civil union or domestic partnership

* Professor of Law, University of Iowa College of Law, Iowa City IA 52240.

1 *Baehr v Lewin*, 852 P2d 44 (Hawaii 1993).

2 For example, Thomas Oldham 'Developments in the US – The Struggle over the Creation of a Status for Same-Sex Partners' in A Bainham (ed) *International Survey of Family Law 2006 Edition* (Jordan Publishing, 2006); Wardle 'Unconventional Relations: Developments in Family Law in the USA in 2001' in A Bainham (ed) *International Survey of Family Law 2003 Edition* (Jordan Publishing, 2003).

legislation in another four states, and constitutional amendments in seven states that prohibit recognition for same-sex marriages. These developments are reviewed in the pages that follow.

With the latest developments, the broader legal picture has begun slowly to resolve, revealing two distinct groups of states with divergent approaches to this question. In one group, located in the New England region and the Pacific west, same-sex couples are accorded some or all of the legal rights and responsibilities of marriage under state law. At the other end of the social and political spectrum, a significant group of more conservative states centered in the middle of the country have amended their state constitutions and statutes to prevent any form of recognition for same–sex marriages or partnerships. Between these two groups lies another collection of states, in which same-sex couple relationships have no official status at this time but in which the barriers to recognition are lower and courts and legislators have demonstrated some willingness to extend other legal rights to gay and lesbian individuals and partners. There is every indication that these broad differences among the states will continue into the foreseeable future, with the legal and policy debate focusing primarily on the direction to be taken by the middle states.

The complexity of this problem in the United States results from the substantial autonomy of the states in family law matters, and the strongly divergent attitudes toward same-sex marriage in different parts of the country. At the national level, the Defense of Marriage Act (DOMA) of 1996 provided that no state would be obligated to give effect to an act of another state 'respecting a relationship between persons of the same sex that is treated as a marriage' under the laws of the other state.[3] In addition, DOMA included a provision that defined the terms 'marriage' and 'spouse' for purposes of federal law to refer to 'only a legal union between one man and one woman as husband and wife'.[4] Thus, while DOMA recognised that each individual state might approve same-sex marriage, and could choose to extend recognition to same-sex marriages celebrated in other states, it also prevented those marriages from having any effect in important areas of national law including immigration, income taxation, and social security benefits.[5]

I RECENT APPELLATE COURT RULINGS

The highest courts in three states ruled on challenges to state marriage laws in 2006. In *Hernandez v Robles*,[6] the New York Court of Appeals concluded that provisions of the state's Domestic Relations Law that limit marriage to opposite-sex couples did not violate either the due process or equal protection

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3 Codified at 28 USC § 1738C (2007).

4 Codified at 7 USC § 7 (2007).

5 While there has been a debate for more than a decade over the constitutionality of DOMA under various provisions of the national constitution, challenges to the act are not likely to prevail in the relatively conservative climate of the current US Supreme Court.

6 *Hernandez v Robles*, 855 NE2d 1 (NY 2006).

principles of New York's constitution. In *Andersen v King County*,[7] the Washington Supreme Court upheld a 1998 state statute prohibiting same-sex marriages, in the face of similar challenges under the Washington State Constitution. The outcome was different in *Lewis v Harris*,[8] in which the New Jersey Supreme Court ruled that committed same-sex couples must be afforded the same rights and benefits available to married opposite-sex couples, based on the equal protection provision of the New Jersey Constitution.[9]

(a) *Hernandez v Robles*

In *Hernandez v Robles*, the New York Court of Appeals signalled its conclusion at the outset of its opinion:[10]

> 'We hold that the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.'

In its analysis, the majority opinion begins with consideration of whether the limitation of marriage to opposite-sex couples could be defended as a rational legislative decision, employing the most lenient level of scrutiny used in constitutional adjudication, and concluding that: 'Plaintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, based solely on ignorance and prejudice against homosexuals'. Pointing out that 'heterosexual intercourse has a natural tendency to lead to the birth of children', the Court determined that the Legislature could rationally find that 'such relationships are all too often casual or temporary'. The Court noted that same-sex couples 'can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse'. Based on this difference:[11]

> '. . . the Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationship will help children more.'

The Court's second rationale was that the state legislature 'could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father'. Describing this as a 'commonsense premise', the court noted that the legislature was not required to have 'conclusive scientific evidence' to proceed on this assumption in order 'to encourage formation of opposite-sex households'.[12]

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7 *Andersen v King County*, 138 P3d 963 (Wash 2006).

8 *Lewis v Harris*, 908 A2d 196 (NJ 2006).

9 In addition to these three cases in 2006, see *Conaway v Deane*, 932 A2d 89 (Md 2007), which upheld a state law providing that only opposite-sex marriages are valid in the state.

10 *Hernandez*, 855 NE2d at 5.

11 Ibid at 7–8.

12 Ibid at 8.

Rational-basis scrutiny of this sort is undertaken only in constitutional due process and equal protection cases that do not involve either what the courts have called a fundamental right or a suspect classification. Acknowledging that the right to marry has been treated as a fundamental right, one that is 'deeply rooted in this Nation's history and tradition', the Court found, however, that the constitutional right to marry was not so broad as to include a right to same-sex marriage, which 'has not even been asserted until relatively recent times'.[13] For equal protection purposes, the New York Court rejected the argument that the marriage limitation constituted discrimination on the basis of sex, which would require a heightened level of scrutiny, because it 'does not put men and women in different classes, and give one class a benefit not given to the other'. While the court agreed that the law does confer advantages on the basis of sexual preference, and suggested that in some cases a classification on this basis should trigger a higher level of scrutiny, it concluded that rational basis scrutiny was appropriate here because '[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best'.[14]

Throughout its relatively short opinion, the majority stressed its view that the determination of whether to permit same-sex marriage belongs to the state legislature and to the democratic process. A concurring opinion in the case took the same approach, but a dissenting opinion by Chief Judge Judith Kaye squarely rejected this position, concluding that the limitation of marriage to opposite-sex couples failed even a rational-basis review. While the dissenters agreed that the legislature has a legitimate interest in 'encouraging opposite-sex couples to marry before they have children', they asserted that 'the *exclusion* of gay men and lesbians from marriage in no way furthers this interest'.[15] The dissenters also rejected the majority's argument from tradition: 'Simply put, a history or tradition of discrimination – no matter how entrenched – does not make the discrimination constitutional'.[16] The dissent emphasised the fundamental right at issue in the case, and concluded that the law constituted discrimination on the basis of both sex and sexual orientation. Thus, they viewed the law as properly subject to heightened equal protection scrutiny.

After the decision in *Hernandez*, the new Governor of New York, Eliot Spitzer, proposed legislation to legalise same-sex marriage in the state, which one of the two houses of the state legislature quickly passed.[17] A separate issue that is still working through the New York courts is whether same-sex marriages or civil unions validly created in another state are entitled to recognition in New York.[18] Despite the outcome of *Hernandez,* New York remains a relatively

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13 Ibid at 9.
14 Ibid at 10–11.
15 Ibid at 30 (Kaye CJ, dissenting) (emphasis in original).
16 Ibid at 33.
17 N Confessore 'Keeping His Word, Spitzer Asks for Same-Sex-Marriage Law', *NY Times*, 28 April 2007.
18 For example, *Langan v St Vincent's Hospital*, 817 NYS2d 625 (App Div 2005); Att'y Gen Opinion No 2004–1, 3 March 2004.

liberal state on these issues. Second parent adoptions by same–sex couples have been approved for more than a decade,[19] and state laws also include important protections against employment discrimination on the basis of sexual orientation.[20]

(b) *Andersen v King County*

Less than 3 weeks after *Hernandez* was announced, the Supreme Court of Washington issued its opinion in *Andersen v King County*, upholding the state's 1998 Defense of Marriage Act (DOMA) in the face of a similar challenge framed under the Washington constitution.[21] As in New York, the Washington Court was divided on the question of how much deference to the legislature was appropriate, with the majority concluding that it should apply a 'highly deferential rational basis standard of review' and the dissenters concluding that the legislation should be subject to heightened scrutiny.

In *Andersen*, the plaintiffs argued that the Washington DOMA violated the state constitution's privileges and immunities clause, which provides that: '[n]o law shall be passed granting to any citizen, class of citizens or corporation … privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations'. The Court rejected this claim, concluding that the challenged law did not represent 'a grant of positive favoritism to a minority class', and determining that the appropriate analysis was the same as what would be applied in an equal protection case. Turning to the due process and equal protection analysis, the Court rejected the assertion that gay and lesbian persons should be treated as a 'suspect class' for equal protection purposes, and also rejected the argument that there is a fundamental right to same-sex marriage, formulating the case as one calling for rational basis review. Similarly, the Court rejected the claim that there is a right of personal autonomy, protected by the privacy and due process clauses of the state constitution, which would extend to the interest in marrying a person of one's choice who is of the same sex.[22] In reaching these conclusions, the Court repeated its view that its role was limited to 'measur[ing] the challenged law against the constitution and the cases that have applied the constitution', noting at several points the lack of prior precedent or authority under these constitutional provisions that would support the plaintiffs' claims of a constitutional right to same-sex marriage.[23]

In its analysis, the Washington Court sounded very similar to the New York Court's opinion in *Hernandez*:[24]

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19 See *Re Jacob*, 660 NE2d 397 (NY 1995).

20 Sexual Orientation Non-Discrimination Act of 2002, NY Laws ch 2, § 1 (2002).

21 *Andersen v King County*, 138 P3d 963 (Wash 2006).

22 Ibid at 985–987. Additionally, the Court rejected plaintiffs' claims under the Equal Rights Amendment of the Washington constitution, which states that: 'Equality of rights and responsibility under the law shall not be denied or abridged on account of sex', at 987–990.

23 *Andersen*, 138 P3d at 968, see also at 975, 978–979.

24 Ibid at 983.

> 'Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.'

The plurality opinion stated that over- or under-inclusiveness of a statutory classification does not make it irrational, and thus the court was not troubled by the arguments that the law permits opposite–sex married couples to marry regardless of their intent to procreate and denies same-sex couples access to marriage even when they intend to raise children together. The Court acknowledged that same-sex couples 'enter significant, committed relationships that include children', and that 'courts and legislatures are increasingly faced with the need to answer significant legal questions regarding the families and property of same-sex couples'.[25] But it also noted that the plaintiffs 'have affirmatively asked that we not consider any claim regarding statutory benefits and obligations separate from the status of marriage. We thus have no cause for considering whether denial of statutory rights and obligations to same-sex couples, apart from the status of marriage, violates the state or federal constitution'.[26] At the end of its opinion, the Court repeated this point, referring to 'the narrow issues on which the plaintiffs requested we rule'.[27]

These comments suggest a level of sympathy with the plaintiffs in *Andersen*, but a concurring opinion on behalf of two members of the court took a harder line against the plaintiffs' claims, concluding that the state has 'a compelling governmental interest in preserving the institution of marriage, as well as the healthy families and children it promotes'.[28] As in *Hernandez*, there was also a dissent, arguing that:

> '. . . the plurality and concurrence condone blatant discrimination against Washington's gay and lesbian citizens in the name of encouraging procreation, marriage for individuals in relationships that result in children, and the raising of children in homes headed by opposite-sex parents, while ignoring the fact that denying same-sex couples the right to marry has no prospect of furthering any of those interests.'

For this reason, these dissenters also concluded that there was no rational basis for denying same-sex couples the right to marry.

After the decision in *Andersen*, the Washington legislature enacted a domestic partnership law establishing a statewide registry for same-sex couples (and opposite-sex couples where at least one partner is aged 62 or older).[29] The Washington legislation extends a limited series of rights to registered domestic partners, including rights to inherit from and administer a partner's estate, rights to give consent to health care for a partner who is not competent, the right to bring a wrongful death survival action, and rights to participation on

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[25] Ibid at 985.
[26] Ibid at 985 and 990.
[27] Ibid at 990.
[28] Ibid at 1010.
[29] Washington Laws 2007, ch 156.

the same basis as married couples in public employee benefit plans.[30] Thus, despite the Court's refusal to mandate same-sex marriage on constitutional grounds, Washington's state laws include a range of protections for same-sex couples.

(c) *Lewis v Harris*

Advocates for same-sex couple rights achieved an important victory before the New Jersey Supreme Court in *Lewis v Harris*, which found all of the seven justices agreeing that the state constitution required legal recognition of same-sex unions.[31] The Court did not accept the argument that there was a fundamental right to same-sex marriage, noting that no other jurisdiction in the United States, including Massachusetts, had reached this conclusion.[32] The Court did agree with the plaintiffs that 'denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee' of the New Jersey Constitution. To remedy this violation, the Court ruled that 'the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples'.[33] A group of three justices would have gone further to recognise a fundamental right to same-sex marriage in New Jersey. Their opinion, which concurred in part and dissented in part, also concluded that the right to the 'title of marriage' was one of the rights and benefits that should be made available to same-sex couples as a matter of equal protection.[34]

Like the other cases discussed here, *Lewis* involved a group of same-sex couples as plaintiffs challenging the denial of marriage licences by state officials. In response to their claim, however, New Jersey did not argue that limiting marriage to heterosexual couples was 'necessary for either procreative purposes or providing the optimal environment for raising children'. Rather, the state argued that the definition of marriage was a rational exercise of social policy by the legislature based on the long-held historical view of marriage. Although the plaintiffs 'pursued the singular goal of obtaining the right to marry', the Court majority determined not to take an 'all-or-nothing' approach, considering separately the constitutional claim to the rights and benefits of marriage and the claim of a right to have same-sex permanent committed relationships recognised by the name of marriage.[35] By focusing its analysis primarily on the benefits and privileges available to heterosexual couples under

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30 In addition, the courts in Washington have extended community property principles to unmarried couples, including same-sex couples, who cohabit in settled, long-term relationships. See *Vasquez v Hawthorne*, 33 P3d 735 (Wash 2001).

31 *Lewis v Harris*, 908 A2d 196 (NJ 2006).

32 Ibid at 211.

33 Ibid at 200.

34 Ibid at 224 (Portiz CJ, concurring and dissenting).

35 Ibid at 206.

the law, the Court therefore charted a course that permitted it to sail between the arguments of the plaintiffs and defendants to reach a conclusion that gave each side part of what they sought.

In its equal protection analysis, the Court applied a test that asked whether there was a substantial relationship between the classification made in the law and a legitimate governmental purpose. By considering the claim to the rights and benefits of marriage separately from the claim of a right to marriage itself, the Court mooted the state's asserted justification, which was based on the traditional definition of marriage. In response to the state's argument that the existing law should be upheld to promote uniformity with other states' laws, the Court pointed out that New Jersey's laws were already more in line with the approach taken in jurisdictions such as Vermont, Massachusetts and Connecticut which have enacted protections for same-sex couples and families. The opinion noted that:[36]

> 'Over the last three decades, through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation,'

and concluded that:[37]

> '[i]n protecting the rights of citizens of this State, we have never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests, values, customs, and concerns of our people.'

In leaving the state legislature to choose whether to amend the marriage law to include same-sex couples, the Court cited principles of judicial restraint and respect for a coordinate branch of government, noting that the legislature should have the opportunity to make this determination in the first instance. The court wrote:[38]

> 'We have decided that our State constitution guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples. Now the legislature must determine whether to alter the long accepted definition of marriage. The great engine for social change in this country has always been the democratic process. Although courts can ensure equal treatment, they cannot guarantee social acceptance, which must come through the evolving ethos of a maturing society. Plaintiffs' quest does not end here. Their next appeal must be to their fellow citizens whose voices are heard through their popularly elected representatives.'

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36 Ibid at 213.
37 Ibid at 220.
38 Ibid at 223.

II NEW LEGISLATIVE DEVELOPMENTS

Several months after the New Jersey Supreme Court's ruling in *Lewis*, the state legislature enacted a new scheme to allow civil unions for same-sex couples.[39] Prior to taking this step, New Jersey had already enacted a statewide domestic partnership registration programme available to same-sex couples and to opposite-sex couples aged 62 or older.[40] Domestic partners in New Jersey receive a narrower range of rights including health care, property and inheritance rights, but not the full range of rights and obligations accorded to married couples. With the 2006 civil union legislation, New Jersey joined the small group of states in which the legal rights available to same-sex couples had been made equivalent to the rights of marriage.[41] Since 2006, that group has continued to expand, with the passage of a civil union law in New Hampshire and a registered partnership law in Oregon.[42] Significantly, in both New Hampshire and Oregon the new laws were enacted without a mandate from the courts, and the measure in Oregon was passed despite the existence of language in the state constitution that explicitly prohibits recognition of same-sex marriage.[43]

Under the New Jersey legislation, the term civil union 'means the legally recognized union of two eligible individuals of the same sex established pursuant to this act'. To establish a civil union, the parties must not be a party to another civil union, domestic partnership, or marriage, must be of the same sex and at least 18 years of age, and must not be related in any of the degrees of kinship in which marriages would be prohibited. The couple must obtain a licence in the same manner as parties to a marriage, and the dissolution of a civil union follows the same procedures and is subject to the same substantive rights and obligations as a dissolution of marriage.[44] According to the statute:[45]

> 'Parties to a civil union shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.'

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39 Civil Union Act, PL 2006, ch 103 (C37:1–28 et seq) (NJ 2006).

40 Domestic Partnership Act, PL 2003, ch 246 (C26:8A-1 et seq) (NJ 2004).

41 By the end of 2006, this group included California, Connecticut, Massachusetts, New Jersey and Vermont. More limited domestic partner registries had been enacted in the District of Columbia, Hawaii and Maine. See nn 59 and 60 below.

42 NH Rev Stat Ann, § 457-A (2007) (civil union legislation); cf NH Rev Stat Ann, § 457:1–2 (2007); Oregon Family Fairness Act (2007); cf Ore Const, art XV, § 5a. In addition, Washington adopted a more limited domestic partnership law, discussed in n 29 and n 32 above, after the ruling in *Andersen*.

43 Ore Const, art XV, § 5a ('It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.').

44 NJ Stat Ann, §§ 37:1–1, 37:1–2, 37:1–6, 37:1–29.

45 Ibid.

Following the passage of the New Jersey civil union legislation, the state's Attorney-General issued a formal opinion outlining the circumstances in which the state would recognise same-sex relationships formed under the laws of other states and foreign countries.[46] This question was made more complicated by the fact that New Jersey recognises both civil unions and domestic partnerships. The opinion concluded that 'the nature of the rights conferred by another jurisdiction' rather than the name used by that jurisdiction should determine how the relationship will be treated under New Jersey law. Thus, those relationships from other jurisdictions that provide substantially all the benefits of marriage will be treated as civil unions in New Jersey, and those relationships that provide some but not all benefits will be treated as domestic partnerships.[47] Under this analysis, the opinion concluded that same-sex marriages from Massachusetts as well as Canada, the Netherlands, Belgium, South Africa and Spain, and government-sanctioned same-sex relationships recognised in Connecticut, Vermont, California, Great Britain, New Zealand, Iceland and Sweden will be also valid in New Jersey and treated as civil unions in the state. Because laws recognising same-sex unions in Maine, Hawaii, the District of Columbia and some foreign nations do not 'closely approximate those of New Jersey civil unions', those relationships will be treated as domestic partnerships within the state.

III STATE CONSTITUTIONAL AMENDMENTS

During the general election in 2006, voters in seven states adopted constitutional amendments that bar recognition of same-sex marriage.[48] These amendments brought the total number of states with some type of constitutional limitation to 27. In the same election year, Arizona became the first state in which voters rejected a state constitutional amendment along these lines.[49] These state constitutional amendments generally include language similar to what is contained in the federal Defense of Marriage Act (DOMA),[50] and are often referred to as state DOMAs or mini-DOMAs. The amendment adopted in Colorado in 2006 is typical; it provides that:[51]

> 'Only a union of one man and one woman shall be valid or recognized as a marriage in this state.'

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46 NJ Att'y Gen, *Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations*, Formal Opinion No 3–2007 (2007).

47 Couples with a relationship recognised in another jurisdiction are also permitted under the New Jersey statute to reaffirm their relationship or to enter into a New Jersey civil union in order to secure all of the rights and obligations available under the civil union law.

48 These states were Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia and Wisconsin.

49 See M Davey 'Liberals Find Rays of Hope on Ballot Measures', *NY Times*, 9 November 2006.

50 See nn 3 and 4 and accompanying text.

51 Colorado Const, art II, § 31.

Six of the seven amendments approved in 2006 were intended to go beyond DOMA, however, with language that addressed not only marriage but also other forms of same-sex partnership or civil union. For example, South Dakota's 2006 amendment provides:[52]

> 'Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.'

These more stringent provisions are sometimes referred to as super-DOMA rules.

Proposition 107, the Arizona ballot initiative measure rejected in 2006, was sweeping enough to cause concern among voters that it might interfere with the legal arrangements that some opposite-sex cohabiting couples make to clarify their property or other rights.[53] If approved, Proposition 107 would have amended the state constitution to add this language:[54]

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[52] SD Const, § 0N-21–9. The other 2006 amendments provide as follows:
Idaho Const, art III, § 28: 'A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.'
SC Const, art XVII, § 15: 'A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments.'
Tenn Const, art XI, § 18: 'The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.'
Va Const, art 1, § 15-A: 'That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.'
Wisc Const, art XIII, § 13: 'Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.'

[53] See S Geis 'New Tactic in Fighting Marriage Initiatives: Opponents Cite Effects on Straight Couples', *Washington Post*, 20 November 2006.

[54] Arizona Proposition 107.

> 'To preserve and protect marriage in this state, only a union between one man and one woman shall be valid and recognized as a marriage by this state or its political subdivisions and no legal status for unmarried persons shall be created or recognized by this state or its political subdivisions that is similar to that of marriage.'

Another important judicial decision in 2006 considered a state constitutional amendment approved by the voters of Nebraska in 2000. That amendment stated:[55]

> 'Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.'

In *Citizens for Equal Protection v Bruning*[56] the federal Circuit Court of Appeals rejected a challenge to the state constitutional provision based on the national constitution. Applying a rational basis standard of review, the Court began by emphasising that 'the institution of marriage has always been, in our federal system, the predominant concern of state government'.[57] The Court ultimately concluded that the amendment did not violate either the Equal Protection Clause or the Bill of Attainder Clause, and rejected the argument that the amendment amounted to an unconstitutional deprivation of the right to associational freedom protected by the First Amendment.

IV DIVERGENT PATHS

After more than a decade of enormous popular, academic, and legal debate, there is no uniform approach to the recognition of same-sex couple relationships in the United States. The recent developments noted here have moved the laws of different states in opposite directions. Decisions in state courts rejecting the constitutional claims of same-sex marriage advocates drew substantial attention, but these decisions were balanced by legislative movement in those same states toward greater legal recognition for same-sex couples. New constitutional amendments in other states raised barriers to the same kinds of recognition. By the end of 2006 two distinct patterns had emerged, each well established in a group of states representing a substantial portion of the nation's population.

At the time of this writing, only Massachusetts has allowed same-sex partners the right to marry under state laws.[58] Another five states have established an

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55 Neb Const, art I, § 29.

56 455 F3d 859 (8th Cir 2006). *Bishop v Oklahoma*, 447 FSupp2d 1239 (ND Okla 2006), rejected a similar challenge, partly on standing grounds. See also *Smelt v County of Orange*, 447 F3d 673 (9th Cir 2006) (rejecting constitutional challenge to federal DOMA law on standing grounds).

57 Ibid.

58 See *Goodridge v Department of Public Health*, 798 NE2d 941 (Mass 2003).

alternate status for same-sex couples that confers the same legal rights and responsibilities as marriage. This group includes California, Connecticut, New Hampshire, New Jersey and Vermont.[59] Beyond these six states an additional group, including Hawaii, Maine, Oregon, Washington and the District of Columbia, now have state laws that extend many of the rights of marriage to registered same-sex partners.[60] Rhode Island might also be included in this grouping, because it extends recognition to same-sex couple marriages concluded in the neighbouring state of Massachusetts.[61] In three of these states, legal recognition for same-sex couples was spurred by litigation that eventually resulted in orders from the states' highest appellate courts mandating such recognition under state constitutions, but in the remainder the legislation securing these rights was enacted without pressure from the courts.[62] Taken together, the population of the 12 jurisdictions with relatively liberal marriage laws exceeds 67 million people, accounting for almost a quarter of the nation's residents.[63]

Another group of 18 states have erected particularly high barriers to legal recognition for same-sex couple relationships.[64] In each of these states, voters have approved amendments to state constitutions with sweeping language that seeks to prohibit recognition for same-sex marriage as well as any form of alternative status such as partnership or civil union.[65] This group of conservative states includes more than 90 million residents, or almost a third of the national population.

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[59] See Cal Fam Code, §§ 297–299 (2007) (cf Cal Fam Code, § 308.5) (2007); Conn Gen Stat, § 46b-38aa et seq (2007) (cf Conn Gen Stat, § 45a-727a (2007)); NH Rev Stat Ann, § 457-A (2007) (cf NH Rev Stat Ann, § 457:1, 457:2 (2007); NJ Civil Union Act, PL 2006, ch 103; Vt Stat Ann, tit 15, §§ 1201–07 and tit 18, §§ 5160–5169 (2007) (cf Vt Stat Ann, tit 15, § 8 (2007)).

[60] DC Code, § 32–702 (2007); Haw Rev Stat, chap 572C (Reciprocal Beneficiaries Law) (2007) (cf Haw Const, art 1, § 23); Me Rev Stat Ann, tit 22, § 2710 (2007) (establishing domestic partner registry) (cf Me Rev Stat Ann, tit 19-A, § 701(5) (2007)); Oregon Family Fairness Act (2007) (cf Ore Const, art XV, § 5a); Washington Laws 2007, ch 156 (cf Wash Rev Code, §§ 26.04.010 and 26.04.020 (2007)).

[61] See K Zezima 'Rhode Island Steps Toward Recognizing Same-Sex Marriage', *NY Times*, 22 February 2007.

[62] Legal recognition for same-sex partner relationships has been mandated by the courts in Vermont, Massachusetts and New Jersey.

[63] Population figures cited here are based on data from the 2000 census, available online at: www.census.gov.

[64] This group includes Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wisconsin. See Ala Const, Amend 774; Ark Const, Amend 83, § 1; Ga Const, art I, § 4, para 1; Idaho Const, art III, § 28; Kan Const, art XV, § 16; Ky Const, § 233A; La Const, art XII, §15; Neb Const, art I, § 29; ND Const, art XI, § 28; Ohio Const, art XV, § 11; Okla Const, art II, § 35; SC Const, art XVII, § 15; SD Const, § 0N-21–9; Tenn Const, art XI, § 18; Texas Const, art I, § 32; Utah Const, art 1, § 29; Va Const, art 1, § 15–A; Wisc Const, art XIII, § 13.

[65] In addition to constitutional or statutory provisions along these lines, a number of states also have statutes with additional restrictions, such as a prohibition of adoption by same-sex couples. See, eg, Utah Code Ann, § 78–30–1(3)(b) (2007) ('a child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state'); Okla Stat Ann, tit 10, § 7502–1.4(a) (2007) ('this state … shall not recognize an adoption by more than one individual of the same sex from any other state or

The states in these two groups can be fairly readily defined, but many of the remaining states are hard to characterise. A total of 27 states have adopted constitutional provisions that restrict the definition of marriage, but of this larger group there are nine that do not appear to bar recognition for other forms of union or partnership,[66] and two of these have comprehensive statutes defining the rights and benefits available to registered same-sex partners under state law.[67] Another group of 17 states have statutes that define marriage to exclude same-sex couples but no constitutional language on point. Several states in this category also have comprehensive domestic partnership legislation and clearly belong in the liberal group.[68] Conversely, the six states with no constitutional or statutory provisions limiting marriage to opposite-sex couples are not necessarily supportive of same-sex unions.[69]

In the group of about 21 states that occupy the middle ground, there are active campaigns underway both for and against recognition for same-sex couple

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foreign jurisdiction'). See also Fla Stat Ann, § 63.042(3) (2007) ('No person eligible to adopt under this statute may adopt if that person is a homosexual.'); Miss Code Ann, § 93–17–3(5) (2007) ('Adoption by couples of the same gender is prohibited.').

66 This group includes Alaska, Colorado, Hawaii, Michigan, Mississippi, Missouri, Montana, Nevada and Oregon. See Alaska Const, art I, § 25 ('To be valid or recognized in this state, a marriage may exist only between one man and one woman.'); Colo Const, art II, § 31('Only a union of one man and one woman shall be valid or recognized as a marriage in this state.'); Mich Const, art I, § 25 ('To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.'); Miss Const, art 14, § 263A ('Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.'); Mo Const, art I, § 33 ('That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.'); Mont Const, art XIII, § 7 ('Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.'); Nev Const, art 1 § 21 ('Only a marriage between a male and female person shall be recognized and given effect in this state.').

67 Thus, of the 27 states with constitutional provisions on same-sex marriage as of December 2006, two of these clearly belong in the liberal group discussed above and seven belong in the middle group discussed below. Compare, eg, Or Const, art XV, § 5a ('It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.') with the Or Family Fairness Act of 2007. The other example is Hawaii; cf Haw Const, art I, § 23 ('The legislature shall have the power to reserve marriage to opposite-sex couples.') with Haw Rev Stat, chap 572C (Reciprocal Beneficiaries Law).

68 The liberal states in this group are California, Maine, New Hampshire, Vermont and Washington; see nn 59 and 60 above. The others are Arizona, Delaware, Florida, Illinois, Indiana, Iowa, Maryland, Minnesota, North Carolina, Pennsylvania, West Virginia and Wyoming. See Ariz Rev Stat, §§ 25–101 and 25–112 (2007); Del Code Ann, tit 13, § 101 (2007); Fla Stat, §§ 741.04(1) and 741.212 (2007); 750 Ill Comp Stat, §§ 5/201, 5/212 and 5/213.1 (2007); Ind Code Ann, § 31–11–1–1 (2007); Iowa Code, § 595.2.1 (2007); Md Code Ann, Fam L §2–201 (2007); Minn Stat Ann, §§ 363A.27, 517.01 and 517.03.1(a)(4) (2007); NC Gen Stat, §51–1.2 (2007); 23 Pa Cons Stat Ann, § 1704 (2007); WV Code, §§ 48–2–104 and 48–2–603 (2007); Wyo Stat Ann, § 20–1–101 (2007).

69 The six states in this category include Connecticut, Massachusetts and New Jersey, which belong in the liberal group, as well as New Mexico and New York, which make no provision for same-sex marriage or partnership rights. The group also includes Rhode Island, where same-sex marriages from the neighbouring state of Massachusetts are presently given effect.

relationships. It may not be clear for some time which path these states will take. Litigation and legislative campaigns continue even in the more liberal and more conservative states, and so the map is likely to remain fluid and confusing for the foreseeable future. The general pattern is a familiar one, reminiscent of the divide between so-called red states and blue states that has been reflected in national electoral politics over the past decade.

With this wide diversity of legal approaches to same-sex couple relationships have come significant challenges in federalism and internal conflict of laws. Many scholars have discussed these questions,[70] and a few cases have reached the state and federal courts.[71] In theory, a broad national resolution of these questions could take the form of a United States Supreme Court ruling that all state and federal laws limiting marriage to opposite-sex couples violate the Equal Protection Clause of the national Constitution.[72] Whatever the legal strengths of the constitutional argument, it is extremely unlikely to prevail in the current Supreme Court.

Alternatively, a different resolution of the federalism and conflicts questions could emerge through an amendment to the national constitution, with language similar to the state constitutional amendments that define marriage and prohibit recognition of a same-sex civil union or partnership. Amending the national constitution is a much slower and more difficult process, however. One proposal for a 'marriage protection amendment', brought to a vote in Congress in June 2006, fell well short of the required level of support.[73] The same divergence of public opinion that leads to different responses within and among the states to these questions suggests that a national political resolution along these lines is also unlikely for the foreseeable future.

Looking toward the future, then, we can predict more of the same. State constitutional challenges to restrictive marriage laws are still pending in several states,[74] and there are additional state ballot initiatives waiting in the wings for the 2008 general election year. The most significant developments are likely to

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[70] See, eg, Koppelman, 'Interstate Recognition of Same-Sex Marriages and Civil Unions: a Handbook for Judges', 153 University of Pennsylvania Law Review 2143 (2005); Silberman, 'Same-Sex Marriage: Refining the Conflict of Laws Analysis', 153 U Pa L Rev 2195 (2005); Barrington Wolff, 'Interest Analysis in Interjurisdictional Marriage Disputes', 153 U Pa L Rev 2215 (2005).

[71] See, eg, *Wilson v Ake*, 354 FSupp2d 1298 (MD Fla 2005).

[72] This was the means by which interstate conflict over the validity of interracial marriages was ended by the Supreme Court in *Loving v Virginia*, 388 US 1 (1967).

[73] That amendment would have provided: 'Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.' See generally S Murray, 'Gay Marriage Amendment Fails in Senate', *Wash Post*, 8 June 2006.

[74] After this chapter was completed, the California Supreme Court held that same-sex couples must be given the same right to marry as opposite-sex couples under state law. See *In re Marriage Cases*, —Cal Rptr 3d —2008 WL 2051892 (Cal 2008). Other cases were pending in Connecticut, see *Kerrigan v Dep't of Public Health*, 909 A2d 89 (Conn Super Ct 2006); and Iowa, see *Varnum v Brien*, 33 Fam L Rep 1495 (Iowa Dist Ct 2007).

come from the slow process of sorting out that will proceed in every state as judges, legislators and voters continue to wrestle with the question of which path to follow.

Zambia

BREAKING THE TIE, ENDURING FRAGMENTATION AND REFORM BEYOND 2007: THE MATRIMONIAL CAUSES LAW

*Chuma Himonga**

Résumé

Ce texte souligne le premier changement majeur au droit des affaires matrimoniales en Zambie, introduit par la *Loi des affaires matrimoniales* de 2007, presque quarante-quatre ans après l'indépendance du pays. Il explique que la Zambie ne dépend plus désormais de «la loi telle qu'en vigueur en Angleterre», c'est-à-dire le droit actuel anglais concernant le traitement des affaires matrimoniales des couples mariés civilement. Le texte souligne également les lacunes évidentes de cette nouvelle loi. Cela va des difficultés engendrées par le fait que des pans entiers du droit anglais ont été incorporés dans la loi sans égard aux spécificités locales du pays, à celles causées par l'absence de consolidation et de rationalisation du droit des affaires matrimoniales applicables au mariage civil lui-même, ainsi qu'à celle reliée à la réforme du droit africain coutumier en matière d'affaires matrimoniales. En conséquence, l'auteur conclut qu'il faudra attendre encore avant d'avoir un régime juridique satisfaisant et cohérent pour les affaires matrimoniales en Zambie et qu'il faudra aller plus loin que les efforts déployés dans la *Loi des affaires matrimoniales* de 2007.

I INTRODUCTION

This chapter notes the changes to the Zambian matrimonial causes law brought about by the Matrimonial Causes Act 2007 (hereafter referred to as the Act unless indicated otherwise),[1] and the need for further reform to fill the gaps left by this Act. With regard to the latter, it will be necessary to consider the Act together with other legislation on matrimonial causes involving both customary and civil marriages, including the Local Courts Act,[2] as amended by the Local

* Professor of Law, University of Cape Town, South Africa.

1 Act 20 of 2007.

2 Chapter 29 of the Laws of Zambia.

Courts (Amendment) Act of 1991,[3] and the Affiliation and Maintenance of Children Act of 1995 (hereafter referred to as the 1995 Act).[4]

Forty-four years after its political independence from British rule in 1964, Zambia broke its legal ties with its colonial heritage in the field of matrimonial causes law by enacting the Matrimonial Causes Act. Although the Act has not changed the substance of the English law that applied previously, significantly it has ended the country's dependence on the 'law for the time being in force in England'[5] to civil marriages. This change marks a new epoch in the development of family law in the country, bearing in mind the slow pace at which the legislative wheels have moved since 1964 to enact this much needed Act. However, an examination of the provisions of the Act reveals gaps, the filling of which was needed in order to reform the customary matrimonial causes law, consolidate and rationalise the existing law, and to eliminate complicated interfaces between the various laws and the jurisdiction of the courts. The failure of the Act to address these issues has created the need for completion of the reform of the matrimonial causes law.

The chapter is divided into five sections. The first section outlines the jurisdiction of the courts in matrimonial causes (II). This is followed by the discussion of the severance of the connection between Zambian and English matrimonial causes law by the Act (III). The third section provides an overview of the major provisions and main features of the Act (IV). The fourth section is an attempt to make a case for the consolidation and rationalisation of the matrimonial causes law beyond 2007. This is done through a relatively extensive analysis of the maintenance provisions of the current law (V). This is followed by the conclusion (VI).

II THE JURISDICTION OF THE COURTS IN MATRIMONIAL CAUSES

The dual system of family law consisting of African customary law, which regulates the majority of Zambians' family relations, and civil law (hereafter also referred to as the received law) is somewhat reproduced in the jurisdiction of the various courts that hear matrimonial causes at first instance (ie original jurisdiction). On one hand, the local courts hear matrimonial causes in respect of customary marriages only. On the other hand, the subordinate courts and the High Court hear matrimonial causes in respect of civil marriages. Although both the subordinate courts and High Court have concurrent original jurisdiction with local courts to hear matrimonial causes under customary law, the practices of the former courts require them to hear these matters only on

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3 See Act 8 of 1991.

4 Chapter 64 of the Laws of Zambia. Munalula reported on the Local Courts (Amendment) Act and the 1995 Act in 1997 (see M Munalula 'Family Law in Zambia', in A Bainham (ed) *International Survey of Family Law* (Jordans, Bristol, 1997) 507–523.

5 This is the core of the reception of English law clause contained in s 11(1) of the High Court Act considered later below.

appeal or review. Thus, in practice, all customary law causes commence in local courts and only go to the higher courts on appeal or review. A brief summary of the description and jurisdiction of the individual courts follows. Certain aspects of their jurisdiction are discussed further in section V of this chapter.

(a) Local courts

The local courts are the lowest in the judicial hierarchy. Each local court is composed of a lay presiding justice (ie non-legal professional) either sitting alone or with other members of the court.

The jurisdiction of the local courts is regulated by the Local Courts Act, and the jurisdiction in family law is restricted to cases governed by customary law as opposed to received law.[6] Their jurisdiction in matrimonial cases is unlimited,[7] in the sense that the courts are not barred from hearing cases by considerations of the monetary value of the claims before them. 'Matrimonial cases' are defined as cases 'involving divorce, matrimonial disputes, adultery, violating the virginity of a girl, causing pregnancy, abduction of a married woman and polygamy'.[8]

Since 1991, local courts have had statutory jurisdiction to make orders for the maintenance of spouses and children following divorce in accordance with s 35 of the Local Courts Act. But this jurisdiction only extends to spouses who divorce in court and not those who divorce informally in traditional institutions, such as chiefs, headmen and family councils, in accordance with customary law.[9] There is no literature on how these extra-judicial institutions deal with issues of maintenance in current customary law practices. However, there is a likelihood that they do not award maintenance for children outside the customary law framework, according to which the care of children after divorce is the sole responsibility of the parent who has their custody or guardianship, or his or her extended family according to customary law.[10]

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6 See s 12 of the Local Courts Act; r 4(a)(ii) of the Local Courts Rules. See also *Banda v Banda* (1975) ZR 123, in which the High Court held that the effect of s 12(1)(c) of the Local Courts Act was to exclude from the jurisdiction of local courts all written laws, including the written laws of other countries, except for those which they had been specifically authorised by statutory order to administer.

7 See r 4(a)(ii) of the Local Courts Rules.

8 See s 2 of the Local Courts Act.

9 The authority of these institutions to deal with matrimonial cases under customary law is based on s 50(1) of the Local Courts Act, which states that: 'Any person who, not being duly authorized under this Act or any other written law, for the time being in force, purports to exercise judicial functions as a local court justice, or falsely holds himself out to be a local court justice, shall be guilty of an offence … *Provided that nothing in this subsection shall be deemed to prohibit any African customary arbitration or settlement in any matter with the consent of the parties thereto if such arbitration or settlement is conducted in the manner recognized by the appropriate African customary law*' (emphasis added).

10 For detailed discussion, see C N Himonga 'Zambia: Family and Succession Law' in R Blanpain (ed) *International Encyclopaedia of Laws* (Kluwer Law International, The Hague, forthcoming) paras 173–176.

It is not clear whether the local courts still have jurisdiction to entertain child maintenance cases under this section after the 1995 Act came into operation. This issue is discussed further in section V of this chapter.

(b) Subordinate courts

Next in the court hierarchy are the subordinate courts, which are presided over by professional and non-professional magistrates.[11] There are three classes of these courts, namely, first, second and third classes.[12] This division is important for the purposes of the limitation of the jurisdiction of the courts in civil matters, including matrimonial causes. The first class courts have the highest jurisdiction in terms of the value of the claim they can entertain, followed by the second and third classes.[13]

Furthermore, a subordinate court of the first or second class may hear civil proceedings that are transferred from the local courts situated within the geographical area of its jurisdiction.[14] Such cases are heard by the subordinate courts *de novo*.[15] These courts also hear appeals from local courts under customary law. However, subordinate courts of all classes have no jurisdiction to determine the following matters in respect of civil marriages: the validity, dissolution and nullity of the marriage and all matrimonial causes consequent upon the dissolution or nullification of marriages.[16]

An important part of the jurisdiction of subordinate courts in matrimonial causes is in respect of civil marriages. The courts' jurisdiction in this area is equivalent to that of a court of summary jurisdiction in England under the English Summary Jurisdiction (Separation and Maintenance) Acts 1895–1925, and s 11 of the Matrimonial Causes Act 1973.[17] It may be observed that, after the 2007 Act came into force, the subordinate courts occupy the level of the court system at which a great amount of imported English law, especially the law on judicial separation and maintenance, is applied.

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11 However, the lay magistrates receive professional training in some aspects of their work.

12 Section 3 of the Subordinate Courts Act.

13 For a detailed discussion of the jurisdiction of these courts, see Himonga, above n 10, paras 52–59.

14 See s 53 of the Local Courts Act.

15 See s 53 of the Local Courts Act.

16 See ss 20(1), 21 and 22 of the Subordinate Courts Act, and *Nambeye v Chirwa* (1979) ZR 117. Although the Subordinate Courts Act does not make reference to nullity in these sections, the fact that the courts have no jurisdiction to pronounce upon the validity of a civil marriage according to proviso (iv) of s 20(1) effectively deprives them of the power to pronounce upon the nullity of the marriages concerned and upon related ancillary matters.

17 See s 20 of the Subordinate Courts Act.

(c) High Court

The High Court is immediately above the subordinate courts. It is a court of record[18] and it has unlimited original jurisdiction in all areas of the law, including customary law.[19] It is presided over by professional judges only. In matrimonial causes, the Court shares original jurisdiction with subordinate courts in terms of the 1995 Act. However, the Court has exclusive jurisdiction under the 2007 Act to hear matrimonial causes in respect of civil marriage. The Court hears appeals from the subordinate courts.

III BREAKING THE COLONIAL TIE

Zambia, like many other African countries, inherited a dual system of family law from its colonial heritage, consisting of the customary laws of the various indigenous communities and the received law regulating civil marriages. At the inception of the colonial administration and legal system, civil marriages were designed for the white settler community. However, in later years and after Zambia's political independence, Africans were allowed to contract these marriages and many Zambians use this form of marriage today.

Generally, customary matrimonial causes law applies to customary marriages while the received law applies to civil marriages. Until 2007, much of the received matrimonial causes law was composed of English law, which has now been considerably reduced by the 2007 Act. The 1995 Act has also contributed to the reduction of the English law on child maintenance. Its relationship to the 2007 Act will be discussed in section V. In this section we focus on the extent to which the 2007 Act has broken the tie between Zambian and the English matrimonial causes law.

The large body of the family law of England received in Zambia (then Northern Rhodesia) at the inception of the British colonial state was generally not changed after Zambia's independence.[20] A brief overview of the received law shows the extent to which this country relied and continues to rely on foreign law.

First, the common law, doctrines of equity and statutes in force in England on 17 August 1911 (this being the date when the Northern Rhodesia Order in Council commenced) apply to Zambia.[21] Secondly, the English Summary

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[18] This means that the Court's acts and judicial proceedings are recorded for perpetual memory and testimony.

[19] Article 94(1) of the Constitution of Zambia; s 9(1) of the High Court Act. See also ss 43(1) and 44 of the Intestate Succession Act and s 66 of the Wills and Administration of Testate Estates Act (chapter 60 of the Laws of Zambia).

[20] There are a few notable exceptions, such as the Intestate Succession Act and the Wills and Administration of Testate Estates Act, above n 19, and the 1995 Act.

[21] See s 2 of the English Law (Extent of Application) Act (chapter 11 of the Laws of Zambia). According to Allott, in reception clauses of this kind the date of reception (i e 17 August 1911)

Jurisdiction (Separation and Maintenance) Acts 1895–1925 were imported to regulate the jurisdiction of subordinate courts with regard to spousal and child maintenance.[22] These include the Summary Jurisdiction (Married Women) Act 1895,[23] s 5 of the Licensing Act 1902, the Married Women (Maintenance) Act 1920, and the Summary Jurisdiction (Separation and Maintenance) Act 1925.[24] Thirdly, s 11(1) of the High Court Act[25] provided for the reception of the law and practice on matrimonial causes and matters for the time being in force in England.

In *Glendenning v Glendenning*,[26] the Court of Appeal held a similar provision (in the preceding High Court Ordinance) to require the High Court to apply the law and practice for the time being in force in England, including the current legislation. This is the way s 11(1) of the High Court Act has been interpreted by the courts. Consequently, current English statutes from time to time have been made to apply to Zambia automatically.

Thus, the Matrimonial Causes Act 1973 (as amended), which is one of the current matrimonial causes laws in England, was the law applicable to Zambia immediately before the coming into operation of the 2007 Act; although some courts sometimes applied the Matrimonial Causes Act 1958 and the Divorce Act 1969. But the latter statutes seem to have been applied out of the lack of awareness on the part of the courts that the law in England had changed and not by design. The 1995 Act was the first major Act after independence to repeal the English law in matrimonial causes.[27] On the other hand, the 2007 Act is the most comprehensive Act to attempt to end Zambia's dependence on English law.

The 2007 Act replaced the English Matrimonial Causes Act 1973 by implicitly repealing s 11(1) of the High Court Act. In this respect, s 4(1) states that the High Court 'shall have and exercise, subject to the provisions of this Act, jurisdiction and power in relation to matrimonial causes instituted or continued

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applies not only to legislation but to common law and equity as well (See A N Allott 'Authority of English Decisions in Colonial Courts' (1957) 1 *Journal of African Law* 25. Cf A E W Park *The Sources of Nigerian Law* (Sweet and Maxwell, London, 1963) 20 ff. He holds the view that the cut-off date applies only to statutes.

22 See s 20 of the Subordinate Courts Act.

23 Section 2 of the Married Women (Maintenance) Act of 1920 provides that 'the Summary Jurisdiction (Married Women) Act, 1895, and this Act may be cited together as the Married Women Maintenance Acts, 1895 and 1920'.

24 For this list, see s 7 of the Summary Jurisdiction (Separation and Maintenance) Act 1925.

25 Chapter 27 of the Laws of Zambia.

26 1959, cited in '*Estate of Frederick Mtonga, Deceased*' (a note) [1964] *Journal of African Law*, 41, 44.

27 See s 41 of the Affiliation and Maintenance of Children Act, which repealed the English law providing for maintenance of children. The repealed law includes that which was imported by s 20(1)(d)(ii) of the Subordinate Courts Act. Section 41 states: 'except for any claim for affiliation or maintenance or other cause which was instituted before the commencement of this Act, the Bastardy Laws Amendment Act, 1872, of the United Kingdom and any provision of the England (sic) law providing for the maintenance or custody of children, shall cease to apply in Zambia'.

under this Act'. Section 4(2) in turn requires the High Court to exercise its jurisdiction in divorce, matrimonial causes and related matters in accordance with the provisions of the Act. It provides that:

> 'Notwithstanding subsection (1) of section eleven of the High Court Act or any other written law, the jurisdiction of the Court [defined as the High Court[28]] in divorce and matrimonial causes and related matters shall, after the commencement of this Act, be exercised only in accordance with the provisions of this Act.'

According to the Act, a:

> '"matrimonial cause" means (a) proceedings for a decree of dissolution of marriage, nullity of marriage or judicial separation; (b) proceedings for a declaration of the validity of the dissolution of a marriage, annulment of a marriage or judicial separation, or a declaration of the continued operation of judicial separation or for its discharge; (c) proceedings consequent upon the dissolution of marriage, nullity or judicial separation with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of children of the family and their welfare, advancement or education; (d) any other proceedings relating to proceedings stated in (a) to (c) above; and (e) proceedings seeking leave to institute proceedings for a decree of dissolution of marriage, nullity or of judicial separation, or proceedings in relation to proceedings seeking such leave.'[29]

Thus the matrimonial causes law of Zambia will no longer change automatically as English law changes.[30] However, it is worthy of note that the Act has made little change to the substantive law that applied before it. Instead it adopted it, in many cases, verbatim. While this approach may have been expedient from the point of view of the law-making process, it is rather unfortunate. This is so because an opportunity was lost to enact a law that reflects the local social and economic conditions of Zambian families that are, obviously, different from those of the developed European country from which the Act was borrowed.

IV FEATURES OF THE ACT

The 2007 Act regulates all matrimonial causes pertaining to civil marriages in place of the English Matrimonial Causes Act 1973 and related legislation. It came into force on the date of its publication, 12 September 2007.[31] The Act has no retrospective effect, except that it applies to all matters that were filed in

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28 See s 2(1) of the Act.

29 Ibid.

30 The exception concerns court practice. The Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 will continue to apply to Zambia in matrimonial causes (see the High Court (Amendment) Act 16 of 2002).

31 Telephonic information supplied by Mrs Anne Sitali, the Chief Parliamentary Officer in the Ministry of Justice, Lusaka on 19 February 2008.

the High Court and not concluded, or were pending, at the time of its commencement.[32] The following are brief summaries of the provisions of the Act on major matrimonial causes.

(a) Void and voidable marriages

The grounds which render a marriage void are largely regulated by the common law and the Marriage Act and they remain the same as before,[33] except three that are now regulated by the 2007 Act. The first is that a marriage is void if at the time of the marriage either party was already lawfully married.[34] The second is that a marriage is void if 'the parties to the marriage are of the same sex'. Thus, persons of the same sex (ie homosexual) have no capacity to marry each other. Presumably, *Corbett v Corbett*[35] continues to represent the legal position that a person's sex is fixed at birth, which means that a man or a woman who has been operated upon to change his or her biological sex to that of the opposite sex is considered to be of the sex that he or she was born. In addition, the commission of any act of gross indecency between persons of the same sex whether in private or public is a criminal offence punishable by a term of imprisonment of between 7 and 14 years.[36] The third exception is that the Act departs from the previous law which defined the prohibited degrees of relationship for marriage purposes in accordance with the law for the time being in force in England. It contains a schedule listing the degrees of relationship that are substantially different from those under English law.[37]

Also worthy of note is the provision that a void marriage is considered to be a 'marriage' for the purposes of financial reliefs for the parties to the marriage and children of the family under Part VIII of the Act.[38] This is an interesting exception to the general effect of a void marriage at common law, that it has no legal consequences in relation to financial reliefs. It means that the parties to a void 'marriage' can claim for 'spousal' and child maintenance and property redistribution upon the nullification of their purported marriage, in the same way as spouses to a valid or voidable marriage can do upon the termination of their marriage. This bold development in the law contrasts with the laws of other countries, such as South Africa, which deny material reliefs to parties to a void marriage, or only afford such reliefs to parties who can prove that their void 'marriage' is a putative marriage.[39]

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32 See s 105 of the Act.

33 See s 27(1)(a) of the Matrimonial Causes Act 2007.

34 See s 27(1)(b) of the Matrimonial Causes Act 2007.

35 [1971] P 83.

36 See s 159 of the Penal Code (Amendment) Act 15 of 2005. A close reading of this section suggests that both gross indecency between adults and between adults and children are penalised.

37 See s 28 of the 2007 Act. For a discussion of these degrees, see Himonga, above n 10, para 101.

38 See s 51 of the Act. This section states that 'in this Part [Part VIII] "marriage" includes a purported marriage that is void or has been declared as such'.

39 C Himonga 'Marriage' in F Dubois (ed) *Wille's Principles of South African Law* (Juta & Co, Cape Town, 2007) 306, 311–312; H R Hahlo *The South African Law of Husband and Wife* (Juta & Co, Cape Town, 1985) 107, 116.

The grounds that render a marriage voidable are also similar to those of the previous law, except the ground that 'at the time of the marriage, the respondent was suffering from venereal disease …'.[40] The new ground replaces venereal disease with 'sexually transmitted disease'.[41] It is submitted that this ground is broader than the previous ground and that it may include HIV/AIDS. The latter proposition is supported by human rights instruments, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,[42] which define 'sexually transmitted infections' to include HIV/AIDS.[43] It may be noted, however, that exercising the right to petition on this ground may be difficult for spouses who have no information about their health status or the health status of the other party. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa overcomes this problem by requiring states parties to promote 'the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices'.[44] Spouses would therefore benefit from an appropriate additional provision in the 2007 Act on information on the health status of the parties.

With regard to the effect of a voidable marriage, the Act maintains the English law position since 1971[45] that a decree of nullity does not operate retrospectively but only from the date of the decree.[46] Thus a voidable marriage is valid until it has been nullified by a competent court. The Act also confirms that a decree of nullity of a voidable marriage 'does not render illegitimate a child of the parties born since, or legitimated during, the marriage'.[47]

(b) Divorce and judicial separation

Civil marriages are dissolved automatically by the death of either spouse or by divorce. The marriage may furthermore be dissolved where there is no positive proof of the death of a spouse having occurred, by following the statutory procedure for presumption of death prescribed by s 24(1) of the Act. This section simply restates s 19(1) of the Matrimonial Causes Act 1973, in the following terms:

> 'Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the Court to have it presumed that the other party is dead and to have the marriage dissolved, and

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40 See s 12(e) of the Matrimonial Causes Act 1973.

41 See s 29(e) of the Act.

42 Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003. The Protocol entered into force on 25 November 2005, and Zambia has ratified it.

43 See, eg, Art 14(1)(c) and (d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

44 See Art 14(1)(e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

45 See s 16 of the English Matrimonial Causes Act 1973.

46 See s 33(1) of the Act.

47 See s 33(2) of the Act.

> the Court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and dissolution of the marriage.'

A spouse who has been missing for 7 years or more is rebuttably presumed to be dead, provided that the petitioner has no reason to believe that he or she has been living within that time.[48]

The provisions of the Act on divorce are also similar to the previous law,[49] the English Matrimonial Causes Act 1973. The sole ground for divorce is that the marriage has broken down irretrievably, and s 9(1) lists the facts, one or more of which the petitioner must prove to establish the irretrievability of the breakdown, as follows: that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; that the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition; that the parties to the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or that the parties to the marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition.

As in English law, these facts merely provide the court with guidelines, which means that, despite the proof of one or more of the guidelines by the petitioner, the court may still decide that the marriage has not broken down irretrievably[50] or, as one judge put it that 'the marriage can still limp along'.[51]

The court will entertain an application for divorce if either party to the marriage is domiciled in Zambia at the date of the commencement of the proceedings, or has been ordinarily resident for a period of not less than 12 months immediately preceding the date of the commencement of the proceedings.[52] However, if the only basis on which the wife can bring a petition is the husband's domicile in Zambia, she may petition for divorce notwithstanding that her husband is not domiciled in Zambia if: (a) he has deserted her at the time of the proceedings; (b) he has been deported from Zambia but was immediately before the desertion or deportation domiciled in Zambia; or (c) the wife has been ordinarily resident in Zambia for a period of 3 years immediately preceding the commencement of the proceedings.[53]

The ability of the wife to petition for divorce notwithstanding that her husband is not domiciled in Zambia addresses the problem of the 'run-away husband',

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48 See s 24(2) of the Act.
49 Section 1 of the English Matrimonial Causes Act 1973.
50 See s 9(3) of the Act.
51 See *Somanje v Somanje* (1972) ZR 301.
52 See s 4(3) of the Act.
53 See s 74(1) of the Act. The last condition also applies to proceedings brought by the wife for a decree for nullity of marriage.

who changes his domicile to avoid his deserted wife's anticipated application for divorce. The husband is otherwise able to do this, because the wife has his domicile of dependence at common law, and this appears to still be the legal position in Zambia.[54]

The ground for judicial separation is the same as that of divorce. The only difference is that in the case of judicial separation, the court is not required to consider whether the marriage has broken down irretrievably.[55] The decree of judicial separation has the effect of relieving the petitioner of the obligation to cohabit with the respondent while the decree remains in operation.

An interesting feature of judicial separation regarding the protection of women's financial interests is that, if a husband who is ordered to pay maintenance to his wife upon the grant of the decree or in consequence thereof defaults, he is liable for the cost of household necessaries supplied to her by third parties.[56] Presumably, his liability is not discharged until he has made the payment in accordance with the conditions or terms stipulated by the maintenance order.

The decree of separation may be discharged upon application by either party to the marriage on the ground that the parties have voluntarily resumed cohabitation.[57]

(c) Maintenance of spouses and children

The 2007 Act adds to the existing body of statutory matrimonial causes law contained in ss 20(1)(d) and 21 of the Subordinate Courts Act[58] and in the Affiliation and Maintenance of Children Act.[59]

In addition to its maintenance jurisdiction under the Affiliation and Maintenance of Children Act, the High Court has jurisdiction to make orders for spousal and child maintenance in terms of s 58 of the 2007 Act. This section has replaced s 27 of the previous legislation.[60] The latter gave the High Court power to hear applications for maintenance for spouses during a period of breakdown of marriage which was temporary, in the sense that the parties had not commenced proceedings for judicial separation, divorce or nullity of marriage.[61] It is submitted that this is also the exact scope of s 58.

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54 See Himonga, above n 10, paras 90–92.
55 See s 34 of the Act.
56 See s 36(2) of the Act.
57 See s 39 of the Act.
58 Chapter 28 of the Laws of Zambia.
59 For a detailed discussion of these provisions, see Himonga, above n 10, paras 120–126, 133–135.
60 The Matrimonial Causes Act 1973, as amended in England by s 63 of the Domestic Proceedings and Magistrates' Courts Act 1978. See B Passingham and C Harmer *Law and Practice in Matrimonial Causes* (Butterworths, London, 4th edn, 1985) 135.
61 See ibid, Passingham and Harmer.

In terms of this section, either spouse is entitled to apply for maintenance, and there is only one ground for obtaining the order, namely, that the respondent has wilfully neglected to maintain the applicant.[62] Whether the respondent has failed to make reasonable maintenance is a question of fact. It is also noteworthy that only the respondent, and not the applicant, may be ordered to pay maintenance, and that the court has no power to adjust the property rights of the parties under this section.

Interestingly, the section has retained some elements of the common law on the husband's and wife's maintenance obligations.[63] For example, it places different maintenance obligations on husbands and wives. In the case of the husband, there is no condition attached to his duty to maintain,[64] while the wife has a duty to maintain her husband only if his earning capacity is impaired 'through age, illness or disability of mind or body'.[65] In making the order against the wife, the court should have regard to two further conditions, namely, any resources of the husband and wife, which are, or should properly be made available for the husband's maintenance, and whether it is reasonable in all the circumstances to expect the wife so to provide or contribute to the maintenance of the husband.[66] In the Zambian context, this discrimination between wives and husbands in the provisions for maintenance may be justified by the general inequality between the sexes, in which men often occupy a superior social and economic position to women.

The factors the court is required to take into account when exercising its power under s 58 in respect of any application for maintenance are contained in s 56(1) of the Act, as follows: the income, earning capacity, and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; the financial needs, obligations and responsibilities which each of the parties to the marriage is likely to have in the foreseeable future; the standard of living enjoyed by the family before the breakdown of the marriage; the age of each party to the marriage and the duration of the marriage; any physical or mental disability of either of the parties to the marriage; and the contributions made by each of the parties to the welfare of the family, including any contribution by looking after the home or caring for the family.

Section 56 also incorporates the principle that a maintenance order should seek to place the parties (or the child to whom the order relates), so far as it is practicable and just to do so, in the financial position in which they (or the child) would have been if the marriage had not broken down and each of them had properly discharged his or her financial obligations and responsibilities towards the other (or the child).[67] When applying this principle, the court is

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62 See s 58(1) of the Act.
63 For detailed discussion see Himonga, above n 10, para 132.
64 See s 58(1) (a) of the Act.
65 See s 58(1)(b) of the Act.
66 Ibid.
67 See s 56(2) and (4) of the Act.

required to take into account the conduct of the parties to the marriage,[68] if that conduct is such that it would be inequitable to disregard it.[69]

Upon a successful application for reasonable maintenance for either the spouse or child of the family, the court may make one or more of the following orders, as stated by s 58(6) of the Act: an order directing the respondent to make such unsecured periodical payments to the applicant for such period as the court may specify in the order; (b) an order directing the respondent to secure[70] the payment of periodical payments for maintenance; (c) an order directing the respondent to pay to the applicant such lump sum as the court may specify in the order; (d) an order directing the respondent to make to any specified person periodical payments for the benefit of a child to whom the application relates, or to the child himself or herself; (e) an order that the respondent secure the payment of the periodical payments mentioned in (d); and (f) an order that the respondent pay a specified lump sum to a specified person for the benefit of a child or to the child himself or herself.

The court may also make an order for a lump sum payment to meet any liability or expenses incurred in the reasonable maintenance of the applicant or the child of the family to whom the application relates before the application for maintenance was made.[71] This provision is particularly valuable to spouses, especially women, where the other spouse who has the means has defaulted in discharging his or her duty to maintain him or her and/or the children of the family during the period preceding the application for maintenance. The defaulter may be made to pay sums to discharge liabilities, such as bank overdrafts, loans from relatives or friends and credit from tradesmen that the other spouse entered into to make ends meet.[72]

Section 58 furthermore provides for interim orders of maintenance. If it appears to the court that the applicant or any child of the family to whom the application relates needs immediate financial assistance, but it is not yet possible to determine what order should be made on the application, the court may order the respondent 'to make to the applicant until the determination of the application such periodical payment as the court thinks reasonable'.[73] The

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68 Ibid.

69 The inequitable aspect of this condition is not included in the section, but it is clearly implied from the wording of s 25(2)(g) of the English Matrimonial Causes Act 1973 that guided the court's powers under s 27.

70 This means that the person against whom the order is made has to transfer property or investments to trustees, or to execute a deed of security over specific assets. This device is security for the payment of maintenance as ordered by the court. See Passingham and Harmer, above n 60, 83. See further s 59 of the Act on the duration of periodic payments orders for the party to the marriage.

71 See s 58(7)(a) of the Act.

72 See Passingham and Harmer, above n 60, 137, where he makes this comment on a provision of the English Matrimonial Causes Act 1973 similar to s 58 of the Act.

73 See s 58(5) of the Act.

court does not need to take any factors into account in making this order other than that the applicant is a party to the marriage or the child is the child of the family.[74]

As already evident from the foregoing paragraphs, s 58 also provides for the statutory jurisdiction of the High Court to make orders for maintenance of children. It states that either party to the marriage may apply to the High Court for reasonable maintenance for any child of the family on the ground that the respondent has wilfully neglected to provide reasonable maintenance for the child, or has failed to make a proper contribution towards his or her maintenance.[75] For the purposes of this section, a child does not include a child who has attained the age of 21 years unless the court is of the opinion that there are special circumstances that justify the making of the maintenance order in his or her favour.[76]

A child of the family means an adopted child of the couple, a child of the husband or wife born before the marriage whether legitimated or not;[77] a child of either of the parties, including a child born out of wedlock to either of them; an adopted child of either of them; and a child of a void marriage between the spouses.[78] It may be observed that this definition of a child who may be the beneficiary of a maintenance order under s 58 is narrower than the definition of a child in respect of whom a maintenance order could be made in similar circumstances under the previous law.[79] According to that law, a child of the family was a child of both of the parties to the marriage and any other child 'no matter who the parents may be' who had been treated by both parties as the child of the family.[80] This is a puzzling development as it does not reflect the reality of the extended family in Zambia or the fact that many spouses take on the children, especially of their deceased relatives, as members of their own families.

In making the orders for reasonable maintenance of children the court is required to take into account the same factors for making orders for spousal maintenance stated in s 56(1) above and three additional factors: (i) whether the respondent had assumed any responsibility for the child's maintenance and, if so, the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility; (ii) whether, in assuming and discharging such responsibility, the respondent did so knowing that the child was not his or her own; and (iii) the ability of any other person to maintain the child.[81]

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74 This was the interpretation given to a similar subsection of s 27 of the Matrimonial Causes Act. (See Passingham and Harmer, above n 60, 137).

75 See s 58(1)(a) and (b) of the Act.

76 See s 58(6), of the Act, read with, eg, s 54(2) of the Act.

77 For example, by the marriage of the child's parents to each other in a previous marriage.

78 See s 5 of the Act.

79 See s 27 of the Matrimonial Causes Act 1973.

80 Passingham and Harmer, above n 60, 280.

81 See s 58(4) of the Act, read with s 56(5) of the Act.

With regard to maintenance of children after the dissolution of the marriage, s 9 of the Affiliation and Maintenance of Children Act gives jurisdiction to the High Court to make orders for child maintenance 'on granting of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter'. It is submitted that this section has been wholly repealed (ie by implication) by the Matrimonial Causes Act 1973.[82] In respect of civil marriages the latter is the only relevant law on the maintenance of children and spouses connected with divorce, nullity of marriage and judicial separation (ie the principal decrees), as well as with maintenance pending suit.[83] If the section in question is relevant at all, its application is restricted to customary marriages, but even its whole tenor is not readily identifiable with customary law, insofar as it does not have concepts of nullity or judicial separation.[84]

The maintenance of spouses pending suit is regulated by s 52 of the Matrimonial Causes Act 1973, while spousal and child maintenance relating to divorce, judicial separation and nullity of marriage is governed by s 54.

Section 52 provides that, on a petition for a principal decree, the court may order either spouse to make such periodical payments for the maintenance of the other party pending suit as it thinks reasonable.[85] The payment may not commence sooner than the date of the presentation of the petition for the principal decree, and must end not later than the date of the determination of the principal petition.

It may be observed that, unless the spouses have entered into an agreement for the maintenance of the children pending suit, and such agreement has been approved by the court,[86] the court is not concerned with child maintenance at this stage; s 52 only provides for spousal maintenance. Furthermore, at this stage, the court has no power to make an order for the transfer of the matrimonial property to either spouse. The order for maintenance pending suit enables the petitioner to be maintained while the hearing for a principal decree proceeds.

The Act does not provide for guidelines as to how the court's discretion with respect to maintenance pending suit should be exercised at this stage, and those laid down for the guidance of the court in making orders for maintenance following the grant of the principal decree do not apply.[87] However, it seems obvious that the court would take into account all the circumstances of the case, especially the spouses' immediate financial needs and means.

The court's power to make orders for spousal and child maintenance upon the grant of a principal decree, and the type of orders that it may make, are

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82 See s 4(1) and (2) of the Act, read with the definition of 'matrimonial cause' in s 2 of the Act.
83 See s 4(1) of the Act.
84 As to how s 9 relates to customary marriages, see Himonga, above n 10, para 158.
85 See s 52 of the Act.
86 See s 53 of the Act.
87 See s 56(1) of the Act.

governed by s 54 of the Act. The latter are exactly the same as those relating to orders for maintenance before the breakdown of the marriage made under s 58 above.

The factors that the court is required to take into account in making maintenance orders under s 54 are those specified by s 56 of the Act, already discussed in relation to the orders made in terms of s 58. There are, however, additional factors that the court takes into account in respect, first, of proceedings connected with divorce or nullity, and, secondly, of proceedings for child maintenance.

In the first type of proceedings, the court will take into account the value to either of the parties to the marriage of any benefit, such as a pension, which the applicant will lose the chance of acquiring as a result of the dissolution of the marriage. With regard to proceedings for child maintenance, the court will in addition consider all the circumstances of the case, including:[88] the financial needs of the child; the income, earning capacity, if any, property and other financial resources of the child; any physical or mental disability of the child; the standard of living enjoyed by the family before the breakdown of the marriage; and the manner in which the child was being, and in which the parties to the marriage expected the child to be, educated and trained.

It is worthy of note that the Act confers upon the court the power to prevent a spouse from entering into any transaction that is aimed at defeating or frustrating the rights of the other spouse or children of the family to maintenance, or to any other financial reliefs, such as the distribution of matrimonial assets discussed in the next section, to which they might otherwise be entitled. In this respect, s 68 provides that, where proceedings for financial relief are brought by one person against another, the court has the power, upon application by the petitioner, to make an order restraining the respondent from disposing of his or her property, or transferring it out of the jurisdiction, with the intention of defeating the claim for financial relief.[89]

Private agreements may also be utilized by the spouses to provide for maintenance for each other and/or for the children of the family following the breakdown of the marriage.[90]

(d) Distribution of matrimonial assets

The Act provides for the transfer and settlement of property for the benefit of the spouses or the children of the family following the grant of a principal decree, and the law on this subject is exactly the same as it was under the previous law under the English Matrimonial Causes Act 1973, except for one

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88 See s 56(3) of the Act.
89 See s 68(1) and (2)(a) and (c) of the Act.
90 See s 65 of the Act. For detailed discussion see, Himonga, above n 10, para 164.

difference.[91] The difference is that the relevant provision of the Act[92] does not give the court the power it had under the previous law (ie under s 24A of the English Matrimonial Causes Act 1973) to make an order for the sale of property belonging to either or both of the spouses. This is an interesting omission, since the omitted provision was considered essential in English law to clarify the law on redistribution of matrimonial property upon the termination of marriage,[93] including some of the law that Zambia has retained, such as the Married Women Property Act 1882. Presumably, the omission was made inadvertently, and the court may still make the order in question in exercise of its power under the Act.

The court's power to redistribute the matrimonial assets may be used, among other things, to transfer to spouses and to the children of the family important items of real or personal property, such as the matrimonial home and its contents, or a tenancy of a house which carries no covenant against assignment, or with the consent of the landlord.[94] This provision is particularly important to women who ordinarily have little or no property of their own to claim after the dissolution of marriage, and most of whom are left with the responsibility of caring for young children.

In exercising these powers the court is required to take into account exactly the same factors as those it takes into account when making the orders of maintenance for spouses and children discussed above.[95]

(e) Custody of children

The 2007 Act provides that the court may not make absolute a principal decree unless it is satisfied that proper arrangements have been made for the welfare of the minor children of the family,[96] or that it is impracticable for the parties to make such arrangements.[97] The only exception to this rule is that there are circumstances making it desirable that the decree should be made absolute or granted, as the case may be, without delay.[98] The welfare of the child includes the custody and education of the child and financial provision for him or her.[99]

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91 See s 55 of the Act.
92 See s 55 of the Act.
93 See Passingham and Harmer, above n 60, 91.
94 See *Thompson v Thompson* [1975] 2 All ER 208.
95 For a detailed discussion of the kind of orders the court may make for the distribution of the matrimonial assets, see Himonga, above n 10, paras 165–167.
96 A child above the age of 21 years but under the age of 25 may also be included if he or she is receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he or she is also in gainful employment (see s 71(5)(a) of the Act). See also s 72 of the Act concerning custody orders that may be made in respect of such a child.
97 See s 71(1)(b) of the Act.
98 See s 71(1)(c) of the Act.
99 See s 71(6) of the Act.

The court is required to have regard to the interest of children as the paramount consideration in all proceedings concerning the custody, guardianship, welfare, advancement or education of children of the marriage,[100] but the Act does not give any guidance on how the best interests of the child may be determined in these contexts. However, it is likely that the court will continue to use the guidelines it developed under the old matrimonial causes law based on the English Matrimonial Causes Act 1973.[101]

The 2007 Act goes further to empower the court hearing an application in respect of custody to make an order placing the children, 'or such of them as it thinks fit, in the custody of a person other than a party to the marriage'.[102]

Although the statutory entrenchment of the best interests of the child and other statutory developments[103] have almost completely eroded the superior position of the father at common law with regard to guardianship, there are still significant areas in which legislation that codified the superior position of the father under the common law concept of parental authority is still in force. An example is the Marriage Act which requires primarily only the consent of the father to the marriage of a minor.[104]

There is, therefore, clearly still a need for legislation in Zambia to place the parents of a legitimate child in equal positions with respect to parental authority, and to move away from the common law idea of parental power to the modern concept of parental responsibilities and rights in respect of all children, regardless of their birth status. This would be consistent with both the UN Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which seek to eliminate discrimination against women and to promote equality between men and women with respect to the care for their children.

(f) Recognition of foreign decrees

Decrees for the annulment or dissolution of marriages in accordance with the law of a foreign country are recognised in Zambia under the conditions stipulated by s 86 of the Matrimonial Causes Act. The section prescribes three principal rules for the recognition of these decrees.

The first is that the foreign decree will be recognised if, in the case of the dissolution of a marriage or annulment of a voidable marriage, the petitioner was domiciled in the country in which the decree was granted at the date of the

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[100] See s 75(1)(a) of the Act.
[101] For a discussion of these guidelines, see Himonga, above n 10, para 169.
[102] See s 75(3) of the Act.
[103] See generally, Himonga, above n 10, paras 176–180.
[104] See Himonga, above n 10, paras 100, 184.

institution of the proceedings for divorce or nullity. If the decree was granted at the instance of both parties, the fact that either of them was domiciled in that country at the time of the proceedings is sufficient for the recognition.[105] In the case of a decree for the annulment of a void marriage, it is sufficient that the party to the proceedings for nullity (or either of them if they were joint applicants) was resident in the foreign country that granted the decree at the time of the proceedings for nullity.[106]

Two presumptions operate in favour of deserted wives with regard to the proof of domicile in the foreign country for the purposes of this rule. The first is that, if the proceedings for divorce were instituted at the instance of a deserted wife who was domiciled in the foreign country that granted the decree either immediately before her marriage or immediately before the desertion, the wife is deemed to have been domiciled in that foreign country at the date of the institution of the proceedings for divorce.[107] The second presumption is that, if the wife was resident in the foreign country that granted the decree for a period of not less than 3 years immediately preceding the date of the institution of the proceedings for divorce or annulment of marriage, she is deemed to have been domiciled in that country.[108]

The second rule is that a foreign decree for the dissolution or annulment of the marriage is recognised:[109]

> '. . . if its validity would have been recognised under the law of the foreign country in which, in the case of a dissolution, the parties were domiciled at the date of the dissolution or in which, in the case of annulment, either party was domiciled at the date of the annulment.'

The third rule provides for the recognition of foreign decrees of divorce and annulment that are recognised by the common law rules of private international law.[110] It must be noted that this rule also places a limitation on the power of the court to recognise foreign decrees under the first two rules. In this respect, it states that a foreign decree of divorce or annulment of marriage 'shall not be recognised as valid [under the two rules], where under the common law rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice'.[111]

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[105] See s 86(1)(a) of the Act.
[106] See s 86(1)(b) of the Act.
[107] See s 86(2)(a) of the Act.
[108] See s 86(2)(b) of the Act.
[109] See s 86(3) of the Act.
[110] See s 86(4) of the Act. For a discussion of these rules, see Passingham and Harmer, above n 60, 70–71.
[111] See s 86(6) of the Act.

(g) The exclusion of customary marriages

Section 3 of the Act excludes its application to customary law, thereby leaving intact the dualism that typifies the Zambian family law. Without venturing into the merits or demerits of legal dualism or pluralism in African contexts, I submit that the exclusion of customary marriages from the ambit of the Act is another lost opportunity for an important reform of the family law with respect to two main related areas.

The first area concerns the removal of the uncertainty that currently exists in customary matrimonial causes law regarding the sharing of matrimonial property and maintenance of spouses. The courts make contradictory decisions in disputes involving the sharing of matrimonial assets and spousal maintenance following divorce, resulting in a great deal of uncertainty in the law.[112] In this respect, some courts hold that spouses are not entitled to share each other's property after divorce.[113] Others make orders entitling the individual spouses to an equal share in the property acquired during his marriage unconditionally. In the latter cases, the property acquired during the marriage is sometimes considered to belong to both spouses notwithstanding that only one party holds title to it or purchased the property.[114]

Similar contradictions exist in decisions on spousal maintenance. Some courts, including the High Court, have categorically held that a spouse is not entitled to maintenance from the other spouse after divorce.[115] In other cases, the courts have held that a wife is entitled to compensation by the husband after divorce, and that this payment takes the place of payment for maintenance.[116]

Thus, the legal position on the effects of divorce on the property rights of the divorcing spouses may depend on the individual justice, magistrate or judge who hears the case.

The contradictions with respect to spousal maintenance have, hopefully, subsided with the amendment of the Local Courts Act in 1991.[117] This amendment empowered the local courts to make orders for the maintenance of spouses following divorce.[118] However, this provision does not go far enough in resolving issues of legal uncertainty in the area of maintenance. This is so

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[112] For detailed discussion of this issue, see C N Himonga *Family and Succession Laws in Zambia: Developments Since Independence* (Lit Verlag, Munster, 1995) 179 ff.

[113] See, eg, *Banda v Mwanza* 407/83 (LC Ch), *Tiki v Mbuzi* 248/83 (LC Ch). For other examples, see Himonga, above n 10, para 157.

[114] See, eg, *Lombanya v Lombanya* 73/2000 decided by the Subordinate Court on 25 May 2000 in Lusaka (unreported).

[115] See ,eg, *Mwiya v Mwiya* (1977) ZR 113.

[116] See, eg, *Nkwabilo v Sithole* LCA/16/85 (Sub Ct Lsk Chikwa), *Banda v Jere* LCA/29/85 (Sub Ct Lsk Chikwa). For other examples, see Himonga, above n 10, para 157.

[117] As amended by the Local Courts (Amendment) Act 8 of 1991.

[118] See s 35(1)(d) of the Local Courts Act.

because it only applies to spouses who divorce in the local courts; it does not affect extra-judicial divorces that take place in traditional institutions in accordance with customary law.[119]

The second area that would have benefited from the application of the Act to customary marriages is that of customary law that currently denies spouses the right to a share in the matrimonial assets and to maintenance after divorce. It is submitted that this part of customary law is anachronistic and unjustifiable in modern socio-economic conditions, in which spouses often contribute directly or indirectly to the acquisition of the matrimonial assets, and in conditions where both the state and extended family support systems are either absent or inadequate to maintain individual family members after the dissolution of the marriage. Indeed, these considerations motivated the reform of the customary law of succession in 1989, which for the first time afforded surviving spouses a right to share in the deceased spouse's estate.

Furthermore, it is submitted that the denial of the spouses' rights to share in the matrimonial assets and to maintenance adversely affects women more than men and is contrary to women's human rights.[120] The economic position of women is usually less favourable than that of men. In any case women are often charged with the care of the family at home during the subsistence of the marriage while men go out to work and acquire property with their earnings.

It may, however, be observed that a call for the reform of the customary matrimonial causes law to remove uncertainties and ensure compliance with the human rights of family members, especially women, is not necessarily a call for the unification of the law that completely does away with legal dualism. Models exist on the African continent in which the reforms of the various aspects of the law of marriage with a view to the protection of women and children were attempted without totally abolishing the plurality of marriage laws in the country. A classical example is the Tanzanian Law of Marriage Act 1971.[121]

It may be observed, in conclusion, that except for the adverse effects of the exclusion of customary marriages from the application of the Act, in a number of respects, the Act bends the rules towards the protection of women in matters of divorce, nullity and judicial separation and the financial and proprietary

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[119] See note 9 above.

[120] See, eg, Art 16 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and Art 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. For a detailed discussion of these rights, see Himonga, above n 10, paras 42–47.

[121] See also the South African Recognition of Customary Marriages Act 120 of 1998, although it has been criticised as a model of law reform that has 'killed' customary law and replaced it with the common law. (See, eg, M Pieterse 'Killing it softly: Customary law in the new constitutional order' (2000) 33 De Jure 51; C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of African customary law of marriage and succession' (2005) Acta Juridica 82.)

consequences of these events. This is a welcome feature of the Act in view of the disparities in the status and material conditions of men and women in family law and society generally.

V THE CASE FOR CONSOLIDATION AND RATIONALISATION

Despite the significant changes to the law brought about by the 2007 Act, fragmentation and complicated interfaces between various enactments regulating matrimonial causes continue to typify the family law landscape. This suggests the need for the consolidation and rationalisation of the law, in order to simplify it. However, it is beyond the scope of this chapter to deal adequately with all the gaps in the marriage law that the 2007 Act has left open in relation to the issue of consolidation and rationalisation of the law. For the present purposes, this issue is demonstrated by a discussion of the interfaces between the various laws on maintenance and the jurisdiction of the courts in maintenance proceedings at two levels. The first level concerns the application of the 1995 Act and its interface with the Local Courts Act, as amended by the 1991 Act.[122] The second level is about the interfaces between the Subordinate Courts Act, the 1995 Act and the 2007 Act.

(a) The Interfaces between the Affiliation and Maintenance Act and the Local Courts Act

The point of departure in the analysis at this level is the application of the 1995 Act. There is no certainty as to whether the 1995 Act applies only to children born of civil marriages or to children of customary marriages as well. Elsewhere, we have argued that the Act applies to all children regardless of their birth status, or the type of marriage in which they were born.[123] If this is accepted, then the local courts have lost the jurisdiction they had to entertain child maintenance claims before the 1995 Act. It is necessary to briefly discuss the history to this change.

Before 1991, the local courts heard maintenance claims under customary law only. The Local Courts Act was amended in 1991 to enable the local courts to entertain maintenance claims. As amended, s 35 of the Local Courts Act empowered local courts to 'make an order for the maintenance of any child below the age of 18 years whether born in or out of marriage'. This provision removed any doubt that might have existed previously about the jurisdiction of the local courts to make orders for child maintenance.[124] However, since there

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[122] See the Local Courts (Amendment) Act 8 of 1991.

[123] See Himonga, above n 10, para 120.

[124] While some courts awarded maintenance for children upon the dissolution of their parents' marriage, others refused to make such orders on the ground that children were to be maintained by the natal family of the one parent to whom they were affiliated in accordance with customary law.

was no indication as to how the local courts were to exercise their new statutory maintenance jurisdiction, it seemed that they were to continue to apply customary maintenance law as they had done previously; the change in the law therefore only pertained to the jurisdiction of the courts to make maintenance orders for both marital and extra-marital children.[125] However, since the 1995 Act applies to all children, as submitted above, it took away the jurisdiction of the local courts under s 35, and, therefore repealed this section by implication. This Act provides for the child maintenance jurisdiction of the subordinate courts and the High Court in respect of both marital and non-marital children.

One of the advantages of the 1995 Act[126] is that it provides for guidelines to the courts in the exercise of their maintenance jurisdiction. In this respect, it states that on the application of either party to a marriage the court may 'make a maintenance order on the ground that the other party to the marriage has failed to provide or to make a proper contribution towards reasonable maintenance for a marital child'.[127] It then gives a comprehensive list of factors to be considered in deciding what constitutes reasonable maintenance.[128]

The problem, however, is that there has been no rationalisation of the interface between the Local Courts Act regarding the dissolution of customary marriages and the 1995 Act regarding the maintenance jurisdiction of the courts. As already stated, proceedings for maintenance of children under the 1995 Act may now be brought in the subordinate courts or the High Court only, but the local courts continue to exercise jurisdiction to dissolve customary marriages in accordance with customary law. The practices of the subordinate courts and the High Court that require all matrimonial causes in customary law to commence in the local courts and only go to higher courts on appeal effectively prevent divorcing spouses from taking their divorce petitions to these courts at first instance. The result is that a divorcing spouse who wishes to claim child maintenance upon the dissolution of the marriage by the local court has to take the divorce claim and the maintenance claim to different courts – that is, the divorce claim to the local court and the maintenance claim to either the subordinate court or the High Court. This is not to mention the problems in relation to maintenance created by the fact that not all customary marriages are dissolved in courts.[129] As already stated, it is unclear how maintenance disputes are dealt with by traditional institutions that dissolve marriages extra-judicially, but it is unlikely that they place an obligation on both parents to provide maintenance to their children according to their respective means and ability to maintain.

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[125] Cf Munalula who, apparently, holds the view that s 35 of the Local Courts Act continues to regulate child maintenance in local courts after the 1995 Act (Munalula, above n 4, 519–520), even though at another place she seems to suggest that the 1995 Act applies to children under customary law as well (at 521).

[126] For the discussion of other advantages, see Himonga, above n 10, para 120.

[127] See s 8(1) of the Act.

[128] See s 8(3) of the Act.

[129] See note 9 above.

Thus, the country now has child maintenance law that not only requires divorcing parents to bring divorce and maintenance proceedings in different courts and, obviously, at different times, but also seriously reduces the chances of some children ever receiving maintenance upon the dissolution of their parents' marriages.

(b) The interfaces between the Subordinate Courts Act, the Affiliation and Maintenance of Children Act and the Matrimonial Causes Act and the jurisdiction of the courts

The child maintenance jurisdiction of the subordinate courts and the High Court under the 1995 Act is in addition to the maintenance jurisdiction of these courts in terms of ss 20 and 21 of the Subordinate Courts Act (in the case of subordinate courts) and the 2007 Act (in the case of the High Court). An examination of the matrimonial causes law in these statutory provisions and their interfaces with each other in relation to the jurisdiction of the relevant courts reveals a relatively complex maze that underlines the case for the consolidation and rationalisation of the law. Three aspects of the law and jurisdiction of the courts may be mentioned as an illustration.

First, until the coming into operation of the Affiliation and Maintenance of Children Act 1995, ss 20(1)(d) and 21 of the Subordinate Courts Act initially regulated both the maintenance of spouses and their children, as well as maintenance in respect of extra-marital children, under a body of English law imported by these provisions. The 1995 Act took away this jurisdiction in respect of child maintenance and substituted it with the jurisdiction of all classes of the subordinate courts and the High Court in accordance with its provisions. Thus maintenance under ss 20(1)(d) and 21 of the Subordinate Courts Act now relates to spousal maintenance only while the 1995 Act deals solely with the maintenance of children.

However, ss 20(1)(d) and 21 of the Subordinate Courts Act do not give subordinate courts jurisdiction in spousal maintenance matters connected with the dissolution or nullification of civil marriages.[130] This is the sole province of the High Court.[131] But these courts have concurrent jurisdiction with the High Court in spousal maintenance matters connected with judicial separation, although the law they apply is different from that applied by the High Court: the subordinate courts apply the English law imported by their constituent Act, while the High Court applies the Matrimonial Causes Act 2007.

Three main characteristics of the English matrimonial causes law applied by the subordinate courts are worthy of note. First, as a general rule, the wife is not under a duty to maintain her husband, but the husband is under a duty to

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[130] See note 16 above.

[131] See s 20(1)(d) and proviso (iv), and s 21 of the same Act, which extend the jurisdiction of the subordinate courts of the first class to that of the subordinate courts of the second class.

maintain her.[132] Secondly, the right to maintenance and the duty to maintain are founded on the idea of 'matrimonial offence'. According to this concept, a spouse may be refused a matrimonial relief due to him or her from the other spouse if he or she has committed a common law matrimonial offence, such as, for example, adultery or unjustified desertion of the matrimonial home. Thirdly, the order for maintenance can only be made in conjunction with an order for judicial separation, the grant of which depends on the proof of one or more specified matrimonial offences. Thus, a subordinate court can only make an order for maintenance where it has also made an order for judicial separation. On the other hand, the maintenance law applied by these courts in terms of the 1995 Act has abandoned the matrimonial offence concept, in addition to being gender neutral in its definition of maintenance rights and obligations parents have in respect of their children. The 2007 Act takes a similar approach in respect of both spousal and child maintenance proceedings in the High Court.

Thus, the country now has a body of matrimonial causes law applied by the subordinate courts and the High Court that is not only founded on different philosophies, but, also expects the judicial officers in these courts to sometimes address their minds to the different philosophies that underpin the different maintenance laws that they apply at the same time. For example, this happens when a subordinate court has to hear an application for judicial separation and maintenance of spouses under the Subordinate Courts Act and a claim for child maintenance in terms of the 1995 Act in the same case at the same time.

The second aspect is that the High Court shares original jurisdiction with subordinate courts in respect of judicial separation. The only difference is that they apply different laws. The subordinate courts apply the English law imported by the Subordinate Courts Act, while the High Court applies the 2007 Act. But in essence, this difference means that the subordinate courts grant orders for judicial separation upon proof by the applicant of one or more matrimonial offences under the imported English law, whereas the High Court grants the same order on the existence of facts that are used to prove the breakdown of marriage for the purposes of divorce.

Similarly, spousal maintenance upon the grant of the decree of judicial separation is awarded on different grounds in the subordinate courts and the High Court. Unlike the law of maintenance in ss 20 and 21 of the Subordinate Courts Act, the 2007 Act does not require the proof of a matrimonial offence for an application for maintenance to succeed; it gives the court power to order secured periodical maintenance payments, as well as power to order lump sum payments without limit, which a subordinate court does not have; and the applicant does not have to obtain an order for judicial separation in order to be awarded maintenance in the same way as his or her counterpart in the subordinate court has to do.

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[132] See V Hailsham *Halsbury's Laws of England*, Vol 16 (Butterworths, London, 2nd edn, 1932) 608–610.

Thus, while the subordinate courts and the High Court have concurrent jurisdiction to entertain judicial separation cases concerning civil marriages, the extent of their respective jurisdictions and the law they apply to these cases is different.

Thirdly, the law that the High Court applies to maintenance of children under s 58 of the 2007 Act during a period when their parents' marriage has suffered a temporary breakdown, but before an action for divorce or judicial separation is taken, is different in some respects from the law it is required to apply to maintenance under the Affiliation and Maintenance of Children Act. The major differences concern the factors that the court is required to take into account in making a maintenance order and the circumstances in which a maintenance order may not be made in respect of a child under the respective Acts.

With regard to the factors considered in making the order for maintenance, s 58 does not require the court to take into account the following matters, which it is required to consider when making a maintenance order under the Affiliation and Maintenance of Children Act:[133] all the circumstances of the child; the age of the child and of each of the parties interested in the maintenance order (ie ordinarily the parents of the child); any physical or mental disability of the child; the contribution which each person has made or is likely to make to the welfare of the child in the foreseeable future; the financial needs of the child; the income, earning capacity, property and other financial resources (if any) of the child; and the manner in which the child was being, and in which his or her parents expected him or her to be, educated or trained. It may be observed that according to s 56(3) of the Matrimonial Causes Act, the last three factors are considered by the court only in maintenance and property adjustment orders connected with orders for judicial separation, nullity or dissolution of the marriage.

With regard to a child in respect of whom a maintenance order may not be made, because of its definition of a child as a person below the age of 18 years, the Affiliation and Maintenance of Children Act restricts the child who may benefit from a maintenance order, without the court having to take into account exceptional circumstances, to the age of 18. But the relevant age in the case of an order under s 58 is 21 years.

It is clear from the foregoing that complicated interfaces between the various laws governing matrimonial causes and the jurisdiction of the courts have survived the 2007 Act. This is attributed to two major factors. The first is the subordinate courts' continued application of anachronistic legal provisions that have long been abandoned by the donor, the English law! The second factor is the effect of the piecemeal approach to the reform of family law in the context of legal dualism, an approach which is prevalent not only in Zambia but in

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[133] See s 11 of the Act.

many other African countries as well.[134] The solution to the negative effects of both these factors seems to be the consolidation and rationalisation of the law through a comprehensive family law reform strategy.

We submit that, unless the law is consolidated and rationalised, the same kind of uncertainty and confusion in the application of the law that existed before 2007 will reappear. For instance, until the replacement of the English matrimonial causes law that applied to Zambia by the Matrimonial Causes Act 2007, some judges applied the Matrimonial Causes Act 1958 or the Divorce Reform Act 1969 or any other English matrimonial causes legislation they could lay their hands on instead of the relevant law at the given point in time, such as the Matrimonial Causes Act 1973. Not surprisingly, some judges were apparently not aware that the various pieces of legislation on matrimonial causes they applied had been consolidated and replaced by the Matrimonial Causes Act 1973, for example. Thus, the uncertainty in the law at the time led not only to the application of the law best known to the individual judges, which was sometimes the wrong law, but also to the application by the various judges of different legal solutions to similar problems.

VI CONCLUSION

The foregoing discussion shows the that the Matrimonial Causes Act 2007 has made a significant contribution to the 'Zambianisation' of the matrimonial causes law by de-linking a considerable part of it from its colonial mother after a connection of nearly 44 years. However, the Act is not localised in its substance; rather it is the continued imposition of the English law previously in force in the country. Nor has the Act made any real headway in eliminating the complex interfaces between the various pieces of legislation that currently regulate matrimonial causes alongside the 2007 Act, on one hand, and the interfaces between the jurisdiction of the various courts on the other. Furthermore, the Act has not attempted to reform the dated English matrimonial causes law in the subordinate courts and customary law. It is therefore clear that a comprehensive and more satisfactory system of law governing matrimonial causes lies in the future, beyond the attempts embodied by the Matrimonial Causes Act 2007.

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[134] A recent example is South Africa, which has since the end of apartheid era in 1994 made piecemeal changes to the customary and civil laws of marriage and succession. See, eg, the Recognition of Customary Marriages Act, above n 122; the Children's Act 38 of 2005, which contains provisions on the marriage of minor children; the effect of the Constitutional Court decision in *Bhe v Magistrate Khayeltisha* 2005 (1) SA 580(CC), which invalidated the customary law of succession temporarily until legislation is enacted to deal with it, and in the meantime replaced it with the Intestate Succession Act 81 of 1987.

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