The International Survey of Family Law 2013 Edition

Published on behalf of the International Society of Family Law

General Editor: Professor Bill Atkin

Family Law

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THE INTERNATIONAL SOCIETY OF FAMILY LAW – OVERVIEW

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 was 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'. In 2009 there were conferences in Tel Aviv (Israel), Porto (Portugal) and Sao Paolo (Brazil), and in 2010 Kansas City (USA), Tsukuba University (Japan), the University of Ulster (Northern Ireland) and the Caribbean. There has since been a world conference in Lyon (France) in July 2011 and regional conferences in Iowa City in June 2012, Israel in December 2012 and Brooklyn in New York in June 2013. The next world conference will be in Recife, Brazil from 6 to 9 August 2014.

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 cooperation in research on family law subjects of worldwide interest.
   (b) Periodic international conferences on family law subjects of worldwide 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) Cooperation 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 2012 the Society had approximately 630 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 €50 (or equivalent) for one year, €120 (or equivalent) for 3 years and €180 (or equivalent) for 5 years, plus €12.50 (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 have been published as *Family Law: Balancing Interests and Pursuing Priorities* (L Wardle and C Williams, eds, Wm S Hein & Co, 2007). The proceedings of the thirteenth world conference held in Vienna in 2008 have been published as *Family Finances* (B Verschraegen, ed, Jan Sramek

Verlag, 2009). *Les Solidarités entre Générations/Solidarity between Generations* (Hugues Fulchiron ed, Bruylant, 2013) contains proceedings of the world conference held in Lyon July 2011.

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 6140. The Survey is circulated to members or may be obtained on application to the Editor.

PREFACE

Family law is volatile. All around the world we see fresh challenges, moving landscapes and new solutions. Human nature, being what it is, does not allow us to settle back in our comfortable chairs and say that the law is now all sorted for the foreseeable future. Not all is progress: in my own country, the government is intent on stripping back access to the Family Court, denying children regular representation and even keeping lawyers out of the court, all counterintuitive moves. Yet, in many parts of the world, we see the advancement of children's rights, protection for the vulnerable, and the recognition of family law as an integral part of civil codes and constitutional provisions. We can all learn from one another as our quest for fairer and more equitable policies continues. For this reason the annual publication of the International Survey of Family Law is of such great value. We should recognise the inspiration of previous editors especially Michael Freeman in launching the idea of a Survey. Furthermore, from year to year we must be so very grateful for the authors who are willing to put the time and effort into writing for this book.

This year, we have the usual wide range of topics. Perhaps the one that is shaking most foundations is same-sex marriage, which we read about in the chapters on France, New Zealand, Denmark, Mexico, Australia (where it has been voted down) and in the chapter on International and European law. Other issues involving adult relationships emerge: unmarried cohabitants (Australia, Mexico with discussion of rights for concubines, South Africa with its complex system including developments on customary and Muslim marriages as well as civil unions); and divorce, a live issue especially in Poland and Mexico.

Several countries have seen the status of family law or children's rights raised, in some instances by references in a civil code (Hungary) or in the constitution (children's rights and the Irish constitution). Codification is promoted as assisting access to justice in a country such as Scotland. Many other children's issues are discussed: Angola where a new Children's Act harmonises with the United Nations Convention on the Rights of the Child and the African Children's Charter; religion in children's disputes (England and Wales; compare the issue of circumcision in Germany); adoption (France, Kazakhstan, Vanuatu – with its mixture of French, British and customary laws – and South Korea following revisions to its Civil Code); and parental responsibility (Denmark, Japan where new rules on stopping parental authority are in place, Germany with new laws on unmarried fathers, and Macedonia where an argument is made for joint exercise of parental authority after divorce). Issues to do with paternity and human reproduction crop up

frequently: the marital presumption (United States); sex change and intersex issues (Australia, France, Kazakhstan); surrogacy (India, New Zealand); child abduction (the chapter on International and European law); and a right to parenthood in the context of liberal reproduction laws in Israel.

In the context of protection of those who lack capacity, we have chapters on 'future' or 'durable' powers of attorney in Norway and Switzerland respectively, an area that is likely to be of even greater interest to family lawyers as populations age.

Thanks as ever go to our publishers Jordans, especially Cheryl Prophett their editor, our translators who produce the French résumés (Dominique Goubau, and Hugues Fulchiron with his team in Lyon) and also Angela Funnell, my secretary who helps to keep things remarkably on track.

I do hope you enjoy the 2013 edition.

Bill Atkin
General Editor
Wellington, New Zealand
June 2013

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[1] Or its *counter*value in US dollars.

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[1] Ou la *contre*valeur en US dollars.

CONTENTS

INTERNATIONAL AND EUROPEAN DEVELOPMENTS IN FAMILY LAW 2013

*Louise Crowley**

Résumé

Ce chapitre fait une revue de certains récents développements en droit de la famille dans le contexte du droit international et du droit de l'Union européenne. Les thèmes abordés incluent l'enlèvement international (en particulier la défense de risque grave de danger en cas de retour de l'enfant, ainsi que l'usage de la médiation dans des cas d'application de la Convention de La Haye), l'influence de 'Rome III' et de 'Bruxelles II bis' sur le droit de la famille (particulièrement la reconnaissance et l'exécution des jugements en matière de divorce, de séparation et d'obligation alimentaire), la reconnaissance de plus en plus étendue du caractère exécutoire des ententes conjugales, ainsi que les changements, sur le plan international, en matière de mariage entre personnes de même sexe. Finalement, il sera fait état de quelques récents développments dans la jurisprudence de la Cour européenne des droits de l'homme.

I CHILD ABDUCTION LAW – BEST INTERESTS OF THE CHILD AND THE ART 13(B) DEFENCE

In the context of an international dispute concerning alleged child abduction, the oft-unavoidable interaction of co-existing international agreements can give rise to interpretive challenges for the courts. One such instance arose in the 2010 ruling of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Neulinger and Shuruk v Switzerland*,[1] in respect of the interaction between the UN Convention on the Rights of the Child (UNCRC) and the Hague Convention on the Civil Aspects of Child Abduction ('the Hague Convention'). In particular, the ruling of the court raised questions as to the tests to be applied in respect of the protection of children and how to assess what is in the best interests of the child in such a dispute. The decision by the Grand Chamber to refuse to force the return of the child to his country of origin certainly had the potential to impact significantly upon the principles and objectives of the Hague Convention and represented a departure from the underlying principle of the Hague Convention that disputes over children are best resolved in the child's country of habitual residence. The disquiet arising

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1 *Neulinger and Shuruk v Switzerland* [2010] ECHR 1053.

from the position adopted by the Grand Chamber was fortunately addressed head-on by the United Kingdom Supreme Court (UKSC) in *Re E (Children)*,[2] which welcomed the opportunity to provide guidance to judges and practitioners in the United Kingdom, given the inevitability of the need to address the interrelationship of these two international instruments.

In an attempt to elevate the importance of the impact of an order to return the child on the mother, and consequently upon the child, it was argued in support of the position of the applicant mother in *Neulinger* that, whilst the preamble to the Hague Convention states that 'the interests of children are of paramount importance in matters relating to their custody'[3] this does not go as far as the unequivocal statement of the UNCRC that the child's welfare is 'a primary consideration'. However, this effort to distinguish the two instruments and suggest a stronger protection of the interests and thus welfare of children under the UNCRC was rejected by the Supreme Court in *Re (Children)* which noted that whilst 'the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, [this] does not mean that it is not at the forefront of the whole exercise'.[4] Although the articles of the Hague Convention might not expressly identify the best interests of the child as a governing principle, the preamble notes the universal desire on the part of all signatories to protect children, and the communal view amongst signatories that 'the interests of children are of paramount importance'.[5]

(a) Invoking the Art 13(b) defence to defeat an order for the return of a child

Article 13(b) of the Hague Convention provides that the judicial or administrative authority of the requested state is not bound to order the return of the child if the person who opposes the return can establish that 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'. The scope of this defence and the correct test to be applied has received significant attention in a number of recent high profile cases.

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2 *Re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144; [2011] Fam Law 919.

3 Article 3. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3, available at: www.unhcr.org/refworld/docid/3ae6b38f0.html (accessed June 2013).

4 Above n 2 at para 14.

5 Ibid. Stressing that the aim of the 1980 Hague Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted, the UK Supreme Court added that the Convention *also* aims to serve the best interests of the individual child. It quotes directly from the preamble to the Convention which declares that the signatory states are: 'Firmly convinced that the interests of children are of paramount importance in matters relating to custody [and are] . . . Desiring to protect children internationally from the harmful effects of their wrongful removal or retention.' Certainly the UKSC confidently asserts that nowhere in the Convention is it stated that this objective is to serve the best interests of the adult person, or other person/body whose custody rights have been infringed.

Much concern arose following the 2010 ruling of the Grand Chamber in *Neulinger* and the perceived lowering of the threshold for a successful Art 13(b) defence. The case concerned the removal of an Israeli boy from Israel by his mother, a Swiss national. Subsequent to their divorce in 2005, and following an application by the father, the Tel Aviv Family Court had confirmed that the child was habitually resident in Tel Aviv and that the parents had joint guardianship. As a result it found that the child's removal from Israel without the father's consent was wrongful within the meaning of Art 3 of the Hague Convention. Following his request for the return of the child, the mother invoked the Art 13(b) defence, claiming that to return the child to Israel would expose him to physical and psychological harm or otherwise place him in an intolerable situation. It was alleged on behalf of the applicants (mother and son) that, by ordering the return of the child to Israel, the Swiss Federal Court had breached their right to respect for their family life as guaranteed by Art 8 of the European Convention on Human Rights (ECHR). The Swiss Federal Court (Cantonal Court) had ordered the return of the child given that there was an absence of evidence that would objectively justify a refusal on the mother's part to return to Israel, thereby preventing her from invoking the Art 13(b) defence in respect of the alleged associated serious threats to the well-being of the child. The Swiss Court, with reference to Art 13(b), asserted that the defence is not even open to consideration 'unless the child's intellectual, physical, moral or social development is under serious threat'.[6] A Chamber of the ECtHR delivered its judgment in January 2009, declaring the complaint under Art 8 admissible and by a majority of 4:3 found that there had been no violation of Art 8. However, this ruling was overturned by the Grand Chamber of the ECtHR on the basis that the order to return the child to Israel constituted an infringement of the right to respect for the private and family lives of the mother and child, as protected by Art 8 of the ECHR.

In terms of implementing the aims and objectives of the Hague Convention, one of the main concerns arising from the *Neulinger* judgment was the apparent shift away from the primacy of the expeditious return of the child to his or her country of origin.[7] Given the perceived weight to be attached to Art 8 of the ECHR, the Grand Chamber asserted that a child's return 'cannot be ordered automatically or mechanically when the Hague Convention is applicable', notwithstanding the request from the domestic court. Rather, it identified an obligation on the part of the domestic court, prior to ordering the return of the child, to conduct 'an in-depth examination' to assess the best interests of the child in each individual case, such best interests being determined with reference to 'a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents

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6 With reference to and reliance upon Judgment 5P.65/2002 of 11 April 2002.

7 Above n 1. In the course of the judgment of the Grand Chamber, at para 39, a communication from the Israeli Central Authority was cited which had emphasised to its Swiss counterpart the presumption under the Hague Convention that the child ought to be returned to his father, reminding the Swiss Central Authority that it 'must be remembered that this is a Hague Convention proceeding, and not a custody case'.

and his environment and experiences'.[8] In carrying out this exercise, the Grand Chamber emphasised the importance of ensuring that the decision-making process of the domestic court was fair, which in the opinion of the Grand Chamber necessitated the provision of an opportunity for those concerned 'to present their case fully'.[9] According to the Grand Chamber, this included the requested court being satisfied that the domestic court had 'conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person',[10] in order to determine if the return of the child to his country of origin would be the best solution in the circumstances. This obvious departure from the priority of ensuring the speedy return of the child to the country of origin, regarded as the court best placed to determine the substantive dispute, would place a very heavy burden on the domestic court to conduct a thorough investigation at a very preliminary application stage and appeared to ignore the summary nature of Hague proceedings.

In order to properly assess this perceived shift in approach, it is important to contextualise the case, as it is perhaps distinguishable on its own facts, given that the boy was 2 when leaving Israel and it had been 5 years since he had so departed. Although the father contacted authorities in Tel Aviv in the same month as the child had been removed, it was a year before the child could be located and the following 4 years were taken up with a series of applications, judicial decisions and appeals, before the matter came before the Grand Chamber of the ECtHR. This lengthy period of time unavoidably meant that evidence was available as to the very settled life he now had in Switzerland and the extent to which an enforced return to Israel would negatively impact upon him, and in the circumstances the mother was in a position to demonstrate this very well. In the course of the judgment of the Grand Chamber, it is obvious that the established nature of the boy's life in Switzerland, and the significant passing of time greatly influenced the decision of the court:[11]

> 'As regards Noam, the Court notes that he has Swiss nationality and that he arrived in the country in June 2005 at the age of two. He has been living there continuously ever since. In the applicant's submission he has settled well and in 2006 started attending a municipal secular day nursery and a State-approved private Jewish day nursery. He now goes to school in Switzerland and speaks French. Even though he is at an age where he still had a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him, especially if he returns on his own, as indicated in the medical reports. His return to Israel cannot therefore be regarded as beneficial.'

As regards the contentious issue of the abducting parent benefiting from the act of wrongdoing and the delays typically encountered in the process, the

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8 Above n 1 at paras 138–139.
9 Ibid.
10 Ibid.
11 Above n 1 at para 147.

Swiss Government in *Neulinger* relied upon the position previously adopted by the ECtHR in *Maumousseau and Washington v France*[12] when defending the orders made by the Federal Court:[13]

> '. . . the aim of the Hague Convention was to prevent the "abducting" parent from succeeding in legitimating, by the passage of time operating in his or her favour, a de facto situation which he or she had created unilaterally.'

Whilst the Grand Chamber did not comment directly on the benefits, if any, secured by the applicant mother given the significant passing of time before the preliminary matter was concluded, it was evidently influenced by the extent to which the child had settled in Switzerland and by what it perceived as the 'serious consequences' for the child if he was 'uprooted again from his habitual environment'.[14]

Fears that the decision in *Neulinger* might signal a sea-change in the jurisprudence of the European Court of Human Rights and a lowering of the threshold when invoking the Art 13(b) defence were comprehensively addressed by the UK Supreme Court in *Re E (Children)*. Most helpfully the decision of the UK Supreme Court presents a welcome assessment of the interface between the tripartite of international conventions, namely the European Convention on Human Rights, the UN Convention on the Rights of the Child and the Hague Convention on the Civil Aspects of International Child Abduction.

In *Re E (Children)*, both parties accepted that the removal of the two children from Norway, their country of origin, was wrongful within the meaning of the Hague Convention. The children aged 4 and 7 were born in Norway to a Norwegian father and English mother and had lived there since birth. In September 2010 their mother brought them to England without the consent of their father. In accordance with the provisions of the Hague Convention, the father successfully requested the return of the two children through the Norwegian authorities. The matter was heard in the English/Welsh courts by Pauffley J at first instance. Having considered the arrangements and undertakings proposed by the father the judge rejected the mother's argument that the risk to her mental health – in the context of alleged violence on the part of the father, she was diagnosed as suffering from an adjustment disorder that could deteriorate into self-harm and suicidality if she had to return to Norway[15] – constituted a grave risk of psychological or physical harm to the children and concluded that it was 'overwhelmingly' in the best interests of the

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12 No 39388/05, ECHR 2007 XIII.

13 Above n 1 at para 119. In the earlier case of *Maumousseau and Washington v France*, above n 12, relied upon by the Swiss government in *Neulinger*, it was noted that the mother was in a position to accompany her child to the state in which he had his habitual residence in order to assert her rights there. The mother's unrestricted access to that territory and her capacity to bring proceedings before the courts of that state was regarded as a decisive factor in ordering the return of the child.

14 Above n 1 at para 147.

15 Above n 2 at para 10.

children to be returned to Norway where the domestic court could determine the substantive issues relating to their welfare needs and future arrangements. The subsequent appeal by the mother was rejected; the Court of Appeal[16] refused to accept that the decision in *Neulinger* should precipitate a change in the approach of domestic courts to the application of Art 13(b) and the interpretation of the 'best interests of the child'.

At the Supreme Court hearing, the mother in *Re E (Children)* attempted, as in the lower court hearings, to rely upon the purportedly more generous approach to the scope of the Art 13(b) defence, evidenced in *Neulinger*. The Supreme Court was quick to note the limited capacity for a court to apply the Art 13(b) defence, noting that the circumstances awaiting the return of the child would need to be 'so inimical to the interests of the particular child that it would also be contrary to the object of the [Hague] Convention to require it', but equally noting that such narrow application does not prevent a literal interpretation. The court confirmed that a plain reading of the wording of Art 13(b), and in particular the 'grave risk [of] . . . physical or psychological harm' requirement, does not require further elaboration or gloss and thus there is no need for such an evidentiary burden to be 'narrowly construed'. Rejecting the more restrictive views of the lower court, the Supreme Court accepted that what constitutes a 'grave' risk to the child *can* include exposure to the harmful effects of the abuse of a parent, irrespective of whether it is fact or a mere perception of abuse on the part of that parent:[17]

> ' . . . the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation" . . . Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent . . . the source of it is irrelevant: eg where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.'

However in considering the case before the court, the UKSC, whilst acknowledging the very real risk to the mother's mental health if the children were returned to Norway and the detrimental impact of such suffering upon the children, it was satisfied that the ordering of protective measures would sufficiently minimise any risk of psychological harm to the children on their return to Norway.

Ultimately the UKSC noted the limitations of the court's capacity to protect a child from the identified risk and/or to implement the necessary protective measures. Given the starting point presumption that the child should be returned to the country of origin, and the challenges faced by courts beyond

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16 *E Children FC* [2011] EWCA Civ 361.

17 Above n 2 at para 34. Emphasis in the original.

ordering that protective measures are taken, the UKSC noted the usefulness of international cooperation between judges in these applications, and further the effectiveness of introducing international machinery to oversee the protective measures agreed. This idea was reiterated by the Special Commission on the practical operation of the Hague Convention when it considered the merits of a proposal for the establishment of a group of experts to develop principles and associated practice guides to assist in the cross-jurisdictional management of allegations of domestic violence in cases where an application has been made for the return of a child under the provisions of the Hague Convention.[18] Concerns undoubtedly remain where the child is returned to the country of habitual residence on the basis that protective measures will be put in place, yet the capacity to supervise and/or enforce those protective measures effectively remains outside the remit or jurisdiction of the court ordering the return of the child. Clearly this can affect the existing and future welfare of the child and the current lack of cross-jurisdictional cooperative structures arguably provides support for the position asserted in *Neulinger*.

The ECtHR in *Maumousseau and Washington v France* had previously refused to find in favour of the mother who had taken the child to France for holidays but refused to return her to the United States afterwards. In the circumstances, it did not allow the Art 8 based arguments made by the mother to override the positive obligation arising from the Hague Convention of reuniting parents with their children, identifying the need to strike 'a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order'.[19] In ordering the return of the child to the United States, the ECtHR was clearly swayed by what it regarded as the 'in-depth examination' conducted by the French courts. With reference to this earlier decision, the Supreme Court in *Re E (Children)* highlighted the more detailed examinations being conducted by national courts in child abduction cases, referring, for example, to the 'in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature' as evidenced by the ECtHR in *Maumousseau.*[20] However, the UKSC critically noted that the manner in which this approach was endorsed by the Grand Chamber in *Neulinger* appeared to elevate what could be regarded as good practice in *Maumousseau* to a 'legal requirement', a development not supported by the UKSC. Conversely, it was of the view that doing so 'gives the appearance of turning the swift, summary decision-making process which is envisaged by the Hague Convention into the full-blown examination of the child's future in the requested state which it was the very object of the Hague Convention to avoid'.[21] Whereas on the one hand the Hague Convention mandates a swift summary decision-making process, the

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[18] Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 1–10 June 2011 available at www.hcch.net/upload/newsletter/nl2012tome18e_p02.pdf (accessed June 2013).

[19] Above n 12 at para 62.

[20] Above n 2 at para 20, quoting from para 74 of the judgment in *Maumousseau*.

[21] Ibid at para 22.

ECtHR in *Neulinger* envisaged an in-depth examination of the entire family situation and of a whole series of related factors (as mentioned above). This obligatory course of action on the part of the domestic court giving rise to a 'balanced and reasonable assessment of the respective interest of each person', was defended in the course of the *Neulinger* judgment as necessitated in order to ensure a fair decision-making process. However, the UKSC advocated the assessment of the best interests of the child on the basis of two key aspects, namely 'to be reunited with their parents as soon as possible, so that one does not gain unfair advantage over the other through the passage of time; and to be brought up in a 'sound environment' in which they are not at risk of any harm'. If correctly applied, the UKSC regarded it as 'most unlikely' that there would be any breach of Art 8 of the ECHR. Thus in striking this fair balance under the competing provisions of the Hague Convention, the rights under Art 8 and other relevant provisions of the ECHR should equally remain protected.

Difficulty has evidently arisen in the course of these judgments where the ECtHR was called on to determine disputes arising in Hague Convention cases. In this regard it was noted by Wallace and Janeczko that 'the ECtHR tends to accord national courts with a wide margin of appreciation in assessing the facts of the case'.[22] It appears that in terms of the co-existence of these three Conventions and the interplay of the relevant provisions, the Supreme Court has now confirmed that the guarantees to respect family and private life under Art 8 must be interpreted and applied in light of both the Hague Convention and the UNCRC. It appears that so long as the court in receipt of the request to return the child does not accede to this request mechanically but rather 'examines the case in accordance with the Hague Convention' that decision is unlikely to violate the requirements of the ECHR. However equally, the UKSC was at pains to emphasise that Art 8 of the ECHR must not be regarded as trumping the Hague Convention. The independent importance of the provisions of the Hague Convention is evident from the extra-judicial comments made by the President of the ECtHR, and quoted favourably by the UKSC. With reference to the decision of the ECtHR in *Neulinger*, the President rejected any suggestion that the decision should be regarded as signalling a change in direction in the area of child abduction, emphasising that 'the logic of the Hague Convention is that a child who has been abducted should be returned to the jurisdiction best-placed to protect his interest and welfare, and it is only there that his situation should be reviewed in full'.[23] Thus it is apparent that the starting point is one of return but this is now subject to a more detailed scrutiny of the circumstances prior to ordering the return of the child.

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[22] R Wallace and F Janeczko 'E (Children) (FC): the UK Supreme Court Sets the Record Straight' [2012] IJFL 11–17 at 16.

[23] Paper given at the Franco-British-Irish Colloque on Family Law 14 May 2011, cited by Lady Hale and Lord Wilson, above n 2 at para 25.

(b) Mediation – 2012 Guide to Good Practice under the Hague Convention

Between 2011 and 2013 significant progress has been made in relation to the development of agreed guidelines for the promotion of mediation as a means of resolving cross-border disputes in international family law. In April 2006, the Permanent Bureau of the Hague Conference was mandated by its member states to 'prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject'.[24] Following on from the existing Guides to Good Practice in respect of the workings of the Hague Convention on Civil Aspects of International Child Abduction,[25] the Feasibility Study on Cross-Border Mediation in Family Law Matters, which explored areas for consideration in the context of mediation and other methods of bringing about agreed solutions in international family law, was presented to the Council on General Affairs and Policy at the 2007 Conference. Upon receipt of comments from Hague Conference members on this feasibility study, the Permanent Bureau commenced work in 2009 on a Guide to Good Practice in Mediation, assisted by a group of invited independent experts from different contracting states. Following the publication and distribution of a number of draft guides, the revised version was circulated in early 2012 to members and contracting states for final consultation and the Guide to Good Practice under the Hague Convention on the Civil Aspects of International Child Abduction was published in 2012.[26]

The aim of the Guide is expressly stated as follows:[27]

> 'The Guide promotes good practices in mediation and other processes to bring about the agreed resolution of international family disputes concerning children which fall within the scope of the Hague Convention'.

This emphasis upon the importance of mediation is regarded as a continuation of the position adopted in other modern Hague Conventions which have encouraged the amicable resolution of family law disputes and expressly mentioned the use of mediation, reconciliation and other alternative dispute resolution methods.[28] The Guide has been developed as a means of providing 'assistance to State Parties to the 1980 Convention, but also to State Parties to

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[24] Conclusions of the Special Commission of 3–5 April 2006 on General Affairs and Policy of the Conference, Recommendation No 3.

[25] Four Guides to Good Practice had previously been published; Part I – Central Authority Practice (2003); Part II – Implementing Measures (2003); Part III – Preventive measures (2005); Part IV – Enforcement (2010).

[26] See www.hcch.net/upload/guide28mediation_en.pdf (accessed June 2013).

[27] Ibid at p 12.

[28] Article 31(b) of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children; Art 31 of the Hague Convention of 13 January 2000 on the International Protection of Adults; and Arts 6(2)(d), 34(2)(i) of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance.

other Hague Conventions that promote the use of mediation, conciliation or similar means to facilitate agreed solutions in international family disputes'.[29]

In emphasising the general importance of promoting inter parte agreements in cross-border family disputes over custody and contact, the Guide notes the increasing use of mediation and similar processes to facilitate the amicable resolution of disputes in family law in many countries, and more broadly, points to the increased number of states that now encourage more party autonomy in resolving disputes, whilst safeguarding the rights of third parties, especially children.[30] Given the ongoing need for parents to continue to maintain cooperative relations with each other irrespective of the terms of the arrangements made for the care and custody of the child, a dispute that is to some or all extent negotiated between them is a far more positive approach to resolution and much more likely to be adhered to in an amicable manner. The removal of a judicial dictate and the lessening of inter parte conflict lends itself to a more workable relationship between the parents, of undoubted benefit to the child at the centre of the dispute. Thus the Guide points to the communication facilitated between the parties, the structure that nonetheless incorporates flexibility and subjective arrangements, the possibility for early intervention, the avoidance of cumbersome legal proceedings and the associated cost-effectiveness brought about by mediation.[31]

Given the challenges and complexities of international family mediation, the Guide has emphasised the importance of mediators having relevant additional training.[32] It points expressly to the difficulties in mediation arising from the 'interplay of two different legal systems different cultures and languages' and the importance of properly understanding and taking into account the impact in different jurisdictions of the legal effect of mediated agreements and the long-term consequences of the arrangements made. Thus given the involvement of more than one legal system, parties need to have access to the legal information relevant to these jurisdictions and a means of understanding the applicable international legal framework.[33] The Guide also addresses the issues of cost, access, scope and models of mediation, the importance of the involvement of the child and the possible involvement of third persons in the mediation process. In light of the nature of mediation and the manner in which the process and outcomes are effectively 'owned' by the parties involved, the Guide does not seek to place any particular onus on central authorities in developing the mediation processes in international child abduction disputes. However, with reference to Art 7 of the 1980 Convention which states that

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[29] Above n 26 at p 12. The Guide declares itself to be addressed to governments and central authorities appointed under the 1980 Convention and under other relevant Hague Conventions, as well as judges, lawyers, mediators, parties to cross-border family disputes and other interested individuals.

[30] Ibid at p 21, para 31.

[31] Ibid at pp 21–22.

[32] Ibid. At section 3, paras 90–110, the Guide sets out the detail relating to the need for specialised training for mediation in international child abduction cases in order to safeguard the quality of the mediation provided.

[33] Ibid at p 30, paras 66–70.

central authorities 'shall take all appropriate measures . . . to secure the voluntary return of the child or to bring about an amicable resolution of the issues', s 9.2 expressly encourages central authorities 'to take a pro-active and hands-on approach in carrying out their respective functions in international access/contact cases'.[34] The Guide points to the 'considerable assistance' that central authorities can provide in arranging for interim contact between the left-behind parent and the abducted child. Additionally the Guide emphasises the important role that the central authorities can play in arranging the necessary protective measures.[35]

In 2012 at the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 and 1996 Conventions (Part II),[36] mediation was identified as a key topic for further consideration, and its potential for broader use in family law was highlighted. The Permanent Bureau noted, notwithstanding the long history and work of the Hague Conference in the field of cross-border mediation, the 'significant practical challenges' identified by the discussion of the 2011 Special Commission (Part I) concerning the enforceability of mediated agreements which, given the multiplicity of issues they might cover, could cause practical challenges, arising especially in the context of the multiple jurisdictions necessarily involved. Additionally, notwithstanding the fact of an agreement, achieved through mediation, the recognition and enforcement of the terms of that agreement can themselves give rise to a 'lengthy, cumbersome and expensive' process.

However, the Permanent Bureau, whilst noting the reservations of a number of experts present at the April 2012 Commission relating to the possible impact of further work on mediation and its capacity to divert attention and resources away from the original purpose of the Hague Convention, namely the expeditious return of the child and the need to allow the 1996 Convention the opportunity to prove its effectiveness before deciding on a new binding instrument, has recommended the establishment of an exploratory expert group on mediated agreements. To progress the issue and establish an environment conducive to the creation and enforcement of mediated agreements, the 2012 Council mandated the Hague Conference to 'establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention', calling on this group to identify 'the nature and extent of the legal and practical problems, including jurisdictional issues' in this area.[37] The importance and value of a

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[34] Ibid at p 72, para 260, with reference to the Conclusions and Recommendation of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

[35] Ibid.

[36] Held in The Hague on 25–31 January 2012.

[37] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17–20 April 2012); recommendation no 37.

'global instrument' on mediated agreements was emphasised given the international context and the assistance such an instrument would provide.

The potential for a free-standing instrument on mediated agreements, a consideration of related alternative dispute mechanisms and the ongoing challenges relating to the recognition and enforcement of mediated agreements remain key issues for consideration, but it is apparent that mediation as an effective means of resolving international family disputes remains a priority in the context of the Hague Convention on International Child Abduction. Ultimately these developments are to be both welcomed and encouraged, it is commendable that there is a growing awareness of the practical difficulties that habitually arise and the capacity for mediation to develop more conciliatory and nuanced approaches to the resolution of these cases.

II EUROPEAN INFLUENCES ON FAMILY LAW – THE IMPACT OF ROME III

Rome III represents the most recent development in ongoing attempts by the law and policy-makers of the European Union to move towards a more harmonised system of family law in a European context. Whilst it remains generally accepted that the EU has no competence under the EC Treaty to enact legislation governing substantive national family law provisions, it does and has for some time exercised jurisdiction in respect of the enforcement of existing domestic orders. The importance placed upon cross-European judicial cooperation in civil law matters formed the basis of the Judicial Cooperation in Civil Matters (Treaty of Amsterdam) (1998) and this has created the gateway through which the general area of international family law has been introduced into the EC Treaty.[38]

More broadly, the EU has had competence in respect of the recognition and enforcement of judgments since Brussels I, but given the traditional reluctance to impose regulations on member states in this area of social policy, Brussels I did not apply to judgments affecting matrimonial property, save in respect of maintenance orders. Subsequently, family law judgments were included within the remit and effect of Brussels II, and its successor Brussels II *bis*.[39] The general objective of the European Union to 'create an area of freedom, security and justice, in which the free movement of persons is ensured' mandated the

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[38] A Fiorini 'Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?' (2008) 22 IJLP&F 178. Fiorini explains at 179, 180 the aims of the Vienna Action Plan of December 1998 as being 'to make life simpler for European citizens by improving and simplifying the rules and procedures on cooperation and communication between authorities and on enforcing decisions, by promoting the compatibility of conflict of law rules and on jurisdiction and by eliminating obstacles to the good functioning of civil proceedings in a European judicial area'.

[39] Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000.

adoption of measures 'in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market'[40] and this was extended to family law matters by Brussels II *bis* which concerns the issues of jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. However, whilst its provisions apply to the dissolution of matrimonial ties, it does not address issues such as the grounds for divorce, property consequences of the marriage or any other ancillary matters.[41] Evidently European governance in this area has taken very small steps, avoiding the imposition of cross-member-state standards, preferring to create structures for the recognition and enforcement of those orders determined exclusively by domestic legal systems. Additionally the provisions of Brussels II *bis* do not apply to maintenance arrangements,[42] as they were (then) separately covered by Council Regulation 44/2001. The most recent developments have seen the maintenance element of Brussels I being replaced by the Maintenance Regulation, Council Regulation 4/2009[43] which has had direct effect on all member states since 18 June 2011 and Brussels II *bis*, insofar as it relates to family law judgments, being replaced in those member states opting in, by Rome III.[44]

Rome III was initially drafted with a view to addressing the shortcomings of Brussels II *bis* namely, to tackle the difficult issue of where to best file proceedings upon marital breakdown. Whilst the rules are relatively well settled in respect of the recognition and enforcement of family law judgments, there remained an ongoing lack of clarity as to uniform choice of law rules. The European Commission cited the growing mobility of citizens within the EU, and thus the increasing number of international couples, together with the high divorce rates as the general context within which the Proposal for the amendment of Brussels II *bis* was made.[45] What is most obvious from the proposals which grounded Rome III is the desire on the part of European law-makers to create a system of rules on applicable law, which had been absent from Brussels I,[46] Brussels II and Brussels II *bis*.[47] Thus at proposal stage, the

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40 Ibid, recital 1.

41 Ibid, recital 8.

42 Ibid, recital 11 – Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Council Regulation No 44/2001.

43 [2008] OJ L7/1.

44 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

45 Proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (17/7/2006 COM (2006) 399 Final).

46 The first Community instrument in the area of family law, Council Regulation (EC) No 1347/2000 set out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters as well as judgments on parental responsibility for children of both spouses given in the context of a matrimonial proceeding. It did not include rules on applicable law.

47 Neither Brussels II nor Brussels II *bis* addressed the issue of applicable law, carrying over for the most part, the provisions on matrimonial matters from Brussels I. Brussels II *bis* did allow

primary objectives of Rome III were stated by the Commission as being 'to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court'.[48] Consequently, Rome III, reflects the international trend favouring private ordering and the development of regimes which facilitate the exercise of private autonomy by couples in the context of relationship breakdown, and sought to create a body of rules on the law applicable on separation or divorce, either based on the agreed election by the parties or with reference to a hierarchy of rules to determine the applicable law. Thus whilst falling well short of creating or harmonising the laws of member states, it does seek to impose a structure for the law to be applied in each instance. However, in light of the failure by all member states to agree to the introduction of Rome III and its necessary introduction by way of enhanced cooperation, Brussels II *bis* continues to act as a key regulatory measure, and remains the governing EU cooperation and recognition mechanism for the 12 EU member states not signatories to the Rome III Regulation.[49]

(a) Shortcomings of Brussels II *bis*

Article 3 of the Brussels II *bis* addresses the jurisdiction of the courts of the member states but in so doing does not create any hierarchy of rules or principles. This is what is regarded as one of the key weaknesses of the structures imposed by Brussels II *bis*, the priority accorded to the laws of the jurisdiction where proceedings are first issued and ultimately was one of the key motivators in drafting Rome III. Thus in matters relating to divorce, legal separation or marriage annulment, Art 3 provides that jurisdiction shall lie with the courts of the member state in whose territory one of the seven, identified grounds can be proven.[50]

Brussels II *bis* identifies seven possible, unranked grounds on the basis of which jurisdiction can be asserted, the extensive scope of which permits the legitimate

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spouses to choose between alternative grounds of jurisdiction. Once proceedings issued, the decision regarding the applicable law is determined by the court with seising of those proceedings based upon the national conflict of law rules of that state, and unhelpfully varying approaches to this issue co-existed in member states.

48 Above n 38 at 180, 181, quoting from para 5 of the proposal for a Council Regulation amending Regulation (EC) No 2201/2203 as regards jurisdiction and introducing rules applicable law in matrimonial matters, SEC (2006) 949, 23.

49 The 12 member states not party to the enhanced cooperation procedure are; Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, the Netherlands, Poland, Slovakia, Sweden and the United Kingdom.

50 Article 3(1)(a)–(b). Further, Art 5 of the Regulation provides that without prejudice to these provisions, a court of a member state that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that member state so provides.

issuing of proceedings in a number of member states.[51] The lack of hierarchy amongst these stated grounds accords the power to choose the jurisdiction to one or other of the parties and fails to impose any principle-based identification of appropriate jurisdiction. The obvious consequence of this approach is to encourage a party to issue proceedings without delay in order to lay claim upon the jurisdiction whose rules promote the most favourable outcome for that party. From a policy viewpoint this has a very negative impact upon the possibility of a more conciliatory approach through inter parte negotiations or mediation, arising from an entirely reasonable fear of being 'beaten' to the choice of jurisdiction. Very obviously this can give rise to a number of problems, namely: an underlying lack of certainty and predictability inherent in the process, an associated incentive for parties to rush to litigation and shun more conciliatory approaches as well as a real possibility of outcomes that do not reflect the original and legitimate expectations of the parties to the marriage.[52]

Additionally Brussels II *bis* removed the safeguard of the capacity to invoke the principle forum non conveniens by the courts which had permitted the staying of proceedings, premised upon the notion that a jurisdiction other than place of issue might be better suited to hear the suit, the fact and identity of that better placed jurisdiction to be determined by the court.[53] However the retention of the lex fori principle, which requires the application of the laws of the jurisdiction where proceedings have issued, merely serves to strengthen the capacity and practice for forum shopping, crudely imposing without question the laws of the jurisdiction first seised of the action. The associated obligation on the court second seised of proceedings relating to divorce, legal separation or marriage annulment, to stay its proceedings until such time as the jurisdiction of the court first seised is established strongly favours the rights of the person who has filed first and engenders a practice of 'race to issue', in order for one party to successfully claim a favourable jurisdiction.[54]

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[51] Under Art 3 proceedings could legitimately issue in the member state where:
'– the spouses are habitually resident, or
– the spouses were last habitually resident, insofar as one of them still resides there, or
– the respondent is habitually resident, or
– in the event of a joint application, either of the spouses is habitually resident, or
– the applicant is habitually resident if he or she is resided there for at least a year immediately before the application was made, or
– the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there.'

[52] See further the original Commission proposal to amend Brussels II, above n 45 at pp 3–4.

[53] The European Court of Justice confirmed the removal of the doctrine of forum non conveniens as a valid basis for refusing to hear proceedings in C-281/02 – *Owusu v NB Jackson and Others* [2005] ECR I-1383. The overriding aims of the EU appear to have been the creation of harmonised jurisdictional rules across the EU and to eliminate the discretion previously exercisable by individual courts.

[54] Article 19 of Brussels II *bis*. Once the jurisdiction of the court first seised is established the court second seised is obliged under Art 19(3) to decline jurisdiction in favour of that court.

(b) Rome III – Council Regulation 1259/2010 implementing enhanced cooperation in the area of law applicable to divorce and legal separation

Following the grant of authorisation by the Council for the implementation of the Council Regulation in the area of the law applicable to divorce and legal separation through the enhanced cooperation process,[55] Council Regulation 1259/2010 was published. Although multifaceted, the essence of the Regulation was the creation of uniform rules on the law applicable to divorce and legal separation, regulating the manner in which parties can agree to collectively elect the applicable law[56] or, in the absence of such agreement, the creation of a hierarchy of rules which will dictate the applicable law.[57]

Article 5 outlines the manner in which the spouses can collectively elect the law to apply to the determination of their separation or divorce. Spouses can agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

> '(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
> (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
> (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or
> (d) the law of the forum.'[58]

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[55] An added interesting dimension to these attempts to develop some element of EU-wide governance in family law is the manner in which the provisions of Rome III have been introduced. Given the lack of consensus between member states and the fact that only 14 member states have agreed to be bound by these provisions, the enactment of these provisions in the form of a Council Regulation has required reliance upon the enhanced cooperation mechanism. This process allows a minimum of nine EU member states to establish advanced integration or cooperation in an area within EU structures where not all member states are in agreement.

[56] Above n 44.

[57] Ibid, Art 8. Following the publication by the Commission in 2006 of the proposed Regulation, the lack of unanimity on the proposal was confirmed by the Council in 2008. In order to be able to progress the proposal further the 15 jurisdictions in support of the proposal sought to establish an enhanced cooperation between them with a view to creating provisions binding upon participating member states. This process of enhanced cooperation in the area of applicable law on divorce and legal separation received Council approval in July 2010, leading to the publication of the Council Regulation (Rome III) in December 2010, with effect in the acceding member states since June 2012. The 15 participating states were identified in recital 6 of Council Regulation 1259/2010 as Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia; Greece withdrew its support in March 2010. Lithuania subsequently joined the enhanced cooperation process, its participation was approved by the Council in November 2012, and the laws will have effect in Lithuania from May 2014.

[58] If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum – Art 5(3). Without prejudice to this provision, an agreement designating the applicable law can be concluded and modified at any time, but no later than the time the court is seised – Art 5(2).

Article 8 provides a co-existing structure to govern circumstances where the parties have not or cannot agree to the applicable law to govern their divorce or legal separation. In the absence of a choice of applicable law under Art 5 of the Regulation, the divorce or legal separation will be subject to the law of the state:

> '(a) where the spouses are habitually resident at the time the court is seized; or, failing that
> (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or failing that
> (c) of which both spouses are nationals at the time the court is seized; or failing that
> (d) where the court is seized.'

Certainly, the legislative policy behind the enactment of Rome III is more evident than that underlying the previous Brussels regulations, given its development of a predictable and considered system of applicable law and the creation in the abstract, of a system of governance in the context of cross-jurisdictional disputes. However, shortcomings remain, most especially in respect of the common law/civil law divide which it amplifies, the perception being that the EU is both driven and dominated by civil law European jurisdictions. Whilst it is not a novel matter for civil law countries to apply the law of a country where parties to a dispute have a particular connection, common law jurisdictions are very opposed to the notion of determining a dispute with reference to the laws of another jurisdiction, placing the aims of Rome III quite beyond the comfort zone of those presiding in common law jurisdictions. Interestingly however, the decision of the UK Supreme Court in *Radmacher v Granatino*[59] untypically saw the marked influence of the laws of Germany in the determination of the divorce hearing and the effective implementation of the prenuptial agreement between the parties. It demonstrated a significant willingness to look to the substantive provisions of another jurisdiction and a notable shift away from the absolute application of the principle of lex fori and arguably represents a tentative approval of applicable law choices.

Of course from a practice viewpoint, a key challenge arising from the provisions of Rome III is the capacity of a domestic court to correctly understand and apply the laws of another member state. This challenge is further compounded by Art 4 which provides that the law designated by virtue of the application of the provisions of Rome III shall apply, whether or not it is the law of a participating state. This universal application provision makes it possible that in appropriate circumstances the law of any international jurisdiction might apply. Given the reliance in family law proceedings upon perceived values of fairness, equality and equity, as well as the influences of domestic cultures and social policies, significant challenges exist in relation to

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[59] *Radmacher v Granatino* [2011] AC 534.

interpretations and understanding. Whilst this predetermination of the rules of applicable law creates certainty as well as principle-based resolution where inter parte agreement cannot be reached, the outcomes of a case decided in a country applying its own laws as distinct from the outcomes in another country applying those same rules can differ dramatically. It is certainly arguable that a more effective approach, giving rise to a greater purity of application, would be to give the parties the capacity to elect the applicable jurisdiction and then apply the lex fori. Such an arrangement would allow the parties to elect the applicable law, which in turn would be applied by informed and experienced judges. These perceived shortcomings are only added to by the fact that 12 EU member states remain outside the provisions of Rome III, and thus continue to be governed by the structures and rules of Brussels II *bis*. The impact of this fragmented approach to governance is difficult to predict but seems far from the outcome originally anticipated by those seeking to harmonise the recognition and enforcement of domestic orders within member states.

(c) Maintenance – Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

Commonly known as the Maintenance Regulation, Council Regulation 4/2009 addresses issues of maintenance in a cross-border context and is directly applicable in all EU member states from 18 June 2011. In essence the aim of the Maintenance Regulation is to provide a set of common rules relating to jurisdiction, applicable law, recognition, enforcement, cooperation and standardised documents to facilitate the effective recovery of maintenance within the European Union. The Regulation forms part of a concerted effort in relation to civil law matters generally, but also within family law to develop insofar as is possible, a suite of legislative enactments to further bring about mutuality of recognition and enforcement of orders, and reflects the shift towards agreeing rules on applicable laws.[60] The Maintenance Regulation is a dedicated family law measure and replaces the related provisions of Brussels I,

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[60] Recital 3 recognises the multiple EU enactments that seek to collectively address these long-standing issues in order to better achieve the aims of cross-border freedom and a better functioning of the internal market. In this respect, the Community has among other measures already adopted Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, and Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

which covered civil litigation more broadly. Although the Regulation certainly covers the traditional concept of maintenance, ie inter spousal or parent-child financial support through lump sum or periodical payments, it also has the potential to apply to transfers of property where the aim of such a transfer is to provide for the needs, including accommodation needs of the spouse and/or child(ren).[61] The scope of what is covered by the Regulations is also not certain, recital 11 requires that the term 'maintenance obligation' be interpreted autonomously, and the ruling of the ECJ in *Van den Boogard v Laumen*[62] demonstrates the latitude likely to be given to the concept of maintenance. In that decision, the ECJ confirmed that where 'provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance'.[63] It further confirmed that the classification of the provision ordered as maintenance is not affected by whether payment is provided for in the form of a lump sum or periodical payments. A lump sum payment remained within the remit of Brussels I (in this case) given that the capital sum was designed to ensure a predetermined level of income.[64]

In 1999, the European Council invited the Council and the Commission to establish special common procedural rules to simplify and accelerate the settlement of cross-border disputes concerning, inter alia, maintenance claims. Additionally it also sought the abolition of the existing intermediate measures required for the recognition and enforcement in the requested state of a decision given in another member state, particularly a decision relating to a maintenance claim.[65] In November 2004, the European Council adopted a new programme entitled 'The Hague Programme: strengthening freedom, security and justice in the European Union' and in 2005, the Council adopted an action plan to implement the Hague Programme including specific reference to the need for proposals concerning maintenance obligations. The important issue of jurisdiction is governed by Arts 3 and 4; Art 4 permits the parties to agree to elect the jurisdiction to govern the issue of maintenance providing that they do so in writing, choosing from one of the options identified in Art 4:[66]

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61 The Regulation does not define 'maintenance obligations', stating only that the scope of the Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity; see recital 11 and Art 1 of the Regulation.

62 (1997) ECR I-1147.

63 Ibid at para 22. Conversely the court noted that 'where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship' and therefore be enforceable as a maintenance payment (under Brussels I in that case).

64 Ibid at para 23. Consequently, it was concluded by the ECJ in *Van den Boogard v Laumen*, above n 62, at para 27 that 'a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance and therefore as falling within the scope of the Brussels Convention if its purpose is to ensure the former spouse's maintenance'.

65 Recitals 4–5; Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

66 Ibid. Furthermore Art 4 provides that the conditions relied upon to agree jurisdiction must

> '(a) a court or the courts of a Member State in which one of the parties is habitually resident;
> (b) a court or the courts of a Member State of which one of the parties has the nationality;
> (c) in the case of maintenance obligations between spouses or former spouses:
> (i) the court which has jurisdiction to settle their dispute in matrimonial matters; or
> (ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.'

Notably, although Art 4 permits the parties to agree to elect the jurisdiction to govern the issue of maintenance, Art 3 provides that in the absence of such agreement a member state will have valid jurisdiction to make a maintenance order where:

> '(a) the defendant is habitually resident there, or
> (b) the creditor is habitually resident there, or
> (c) according to its own laws, the court has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
> (d) according to its own laws, the court has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.'

Importantly, Art 4(3) expressly excludes the right of the parties to elect jurisdiction from applying in disputes concerning child maintenance.

Given that one of the primary aims of the Regulation is to ensure that a maintenance creditor can easily obtain in a member state a decision which will be automatically enforceable in another member state without further formalities,[67] the Maintenance Regulation includes measures relating to jurisdiction, conflict of laws, recognition and enforceability, enforcement and legal aid, and is designed to bring about cooperation between central authorities.[68] The obligation for the terms of the original order to be enforced without modification is very definite within the terms of the Regulation, and under no circumstances may a decision given in a member state be reviewed as to its substance in the member state in which recognition and enforcement is

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exist at the time the choice of court agreement is concluded or at the time the court is seised. Additionally, the jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise.

67 Ibid, recital 9.

68 Ibid, recital 10.

sought.[69] Thus the net effect of the Regulations is to bar the ability of the court of a member state not seised of the action from making new or associated orders.[70]

The breadth of the potential scope of the Maintenance Regulation has caused concern given the obligation on a member state to give effect to orders from other jurisdictions where maintenance obligations arise from family relationships, parentage, marriage or affinity, where such legal obligations, for example in the case of obligations rising from affinity, may not exist in the jurisdiction where enforcement is sought (but now guaranteed under the terms of the Regulation). However, the impact of this imposition of standards and entitlements arising in other jurisdictions is tempered by recitals 21 and 25; the former confirms that the rules 'determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based'[71] and the latter limits the recognition on the part of the enforcing state to the entitlement to recover the maintenance debt owed, confirming that such enforcement does 'not imply the recognition by that Member State of the family relationship, parentage, marriage or affinity underlying the maintenance obligations which gave rise to the decision'. However, the inability to query or amend the existing order does mean that a member state court will now be obliged to automatically give effect to the maintenance entitlements, even if the relationship upon which those rights are based is not one that is legally recognised in the enforcing jurisdiction.

The broader objective of harmonised family law provisions across the European Union still appears beyond reach. The dramatically varying perceptions of maintenance and property entitlements across Europe mean that the attempts to regularise and harmonise the position necessarily stops at the capacity to identify the most appropriate forum. Any movement towards a harmonisation of the substantive provisions would fail to overcome the fundamentally distinctive approaches of the individual member states. Boele-Woelki has noted this lack of significant capacity to harmonise the substantive provisions of family law across European member states given 'there is neither the political will nor any legislative competence for the EU to do this'.[72] The cultural constraints arising from the distinctly varying approaches of individual member states is likely to prevent the development of a 'pan-European culture' at any time soon.

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69 Ibid, Art 42.

70 For a broad overview of the Maintenance Regulation, see D Eames 'The New EU Maintenance Regulation: A Different Outcome in *Radmacher v Granatino*?' [2011] Fam Law 389–393.

71 Rather, Art 21 states that the establishment of family relationships continues to be covered by the national law of the member states, including their rules of private international law.

72 K Boele-Woelki 'The European Agenda: an Overview of the Current Situation in the Field of Private International Law and Substantive Law' [2006] IFL 148.

III PRIVATE ORDERING – A CONTINUAL SHIFT IN FAVOUR OF ENFORCEABLE MARITAL AGREEMENTS

When examined across multiple jurisdictions, it is evident that distinct regulatory approaches exist in respect of the governance of asset distribution on marital breakdown. The substance of these approaches varies significantly, and they are impacted by numerous issues, including the concept of marital property, perceptions of need and spousal entitlements, expectations regarding the financial rehabilitation of dependent spouses and the capacity for a clean financial break. The issue of private ordering and the support for the creation of regulatory structures which facilitate and give effect to the autonomous decision-making powers of couples on relationship breakdown is another factor, and one which is very much growing in significance. However, the extent to which a married couple can elect to sidestep the governing rules of their jurisdiction and self-determine the details of their marriage dissolution in respect of asset distribution and ongoing financial ties is very much dependent upon the laws in individual jurisdictions.[73] Certainly, some jurisdictions, including the common law jurisdictions of Ireland and England and Wales, adopt strict policy positions in respect of the importance of state retention of residual control over the interspousal obligation to make proper financial provision for the dependent spouse and any children of the marriage and thus the capacity to entirely avoid the governing regulatory structure is not possible. Conversely the approach of many European civil law jurisdictions includes a respect for the parties' autonomous arrangements, representing an interesting contrast to the common law jurisdictions where reliance upon judicial discretion remains dominant. In most civil law jurisdictions, giving effect to a properly executed agreement by two consenting, informed parties does not receive any special treatment under the principles of contract law. Whilst the resolution by parties of the terms of their dissolution *after* breakdown has long been endorsed by many jurisdictions, there is now an increased tendency to address the issues prior to even the solemnisation of the marriage by way of prenuptial agreement.[74]

The growing importance of private ordering and the creation of regulatory structures which facilitate the private autonomy of individual couples were evident in the 2012 publication of *Marital Agreements and Private Autonomy in Comparative Perspective* which presents a comparative statement of the relevant laws of 14 jurisdictions, setting out the different matrimonial property regimes and related rules on marital agreements.[75] The project, the brainchild of

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[73] The possibility of parties executing a matrimonial agreement is envisaged by most jurisdictions, but not all forms of agreement are necessarily recognised or indeed expressly enforceable.

[74] The collective concept of marital property agreements includes prenuptial agreements, post-nuptial agreements and separation agreements, which ultimately can form the basis and in some jurisdictions, the terms of the marital dissolution. The growth in importance of these agreements is reflected in the significant attention given to them by academics and law-makers as well as their increased use in practice.

[75] JM Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart

Dr Jens Scherpe, which was launched at a 2-day conference in June 2010 at Gonville and Caius College, Cambridge, provides a very useful overview of existing approaches, outlining the regulatory framework in each jurisdiction including the default rules applied by the courts, in respect of the distribution of marital and other relevant assets. The status and impact of marital agreements in each of the jurisdictions are outlined, and for the most part the work demonstrates a favourable approach to private ordering and a discernible regulatory preference for the use of marital agreements. The distinctions in treatment across the jurisdictions considered arise typically in relation to the extent to which the agreements are enforceable as drafted, and the co-existing right, if any, of state supervision and intervention. Additionally, where the law in a jurisdiction is in transition or indeed in need of reform, the relevant chapters explore the recommendations for change.

(a) Current developments in England and Wales

Perhaps the jurisdiction currently most engaged with the issue of private ordering and the reform of existing regulatory structures to govern the recognition and enforcement of marital agreements is England and Wales, and for two distinct reasons. The English Law Commission is currently nearing the end of a 3-year project on marital property agreements, which seeks to determine the extent to which the financial consequences of divorce or dissolution can be resolved by agreement in advance, before a separation is finalised.[76] This necessitated an examination of the law relating to prenuptial agreements, post-nuptial agreements and separation agreements and it is noted in the Consultation Paper that this project was undertaken in the context of a number of recent high profile cases where the resolution of the ancillary relief issues in the context of a marriage dissolution was 'determined, or heavily influenced, by a pre-nuptial or post-nuptial agreement'.[77]

Secondly, the restatement by the Supreme Court in *Radmacher v Granatino*[78] of the law relating to prenuptial agreements in England and Wales has brought the matter even more to the fore and demonstrates a very definite policy shift in support of the autonomy of individuals and the significant weight that can be

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Publishing, 2012). The book examines the relevant laws of 14 jurisdictions; England and Wales, Australia, Austria, Belgium, France, Germany, Ireland, the Netherlands, New Zealand, Scotland, Singapore, Spain, Sweden and the United States.

[76] The terms of reference for the project were set out formally in the *Tenth Programme of Law Reform* as follows: 'The project will examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances. Such agreements might regulate the couple's financial affairs during the course of their relationship; equally they might seek to determine how the parties would divide their property in the event of divorce, dissolution or separation. They might be made before marriage (often called 'pre-nups') or during the course of the marriage or civil partnership. They need not be made in anticipation of impending separation; but they might constitute separation agreements reached at the point of relationship breakdown.' *Tenth Programme of Law Reform* (2007) Law Com No 311, paras 2.17 to 2.18.

[77] *Marital Property Agreements* Law Com Consultation Paper No 198 at para 1.4.

[78] *Radmacher v Granatino* [2011] AC 534; [2010] UKSC 42.

attached to private contracts, even in the context of marital breakdown. Although in *Radmacher v Granatino* the court did not go so far as to permit the parties to simply oust the jurisdiction of the court and enforce the terms of the prenuptial agreement, the Supreme Court did confirm its obligation to 'give appropriate weight to the agreement' which in this instance ultimately required the court to essentially give effect to the terms of the agreement. The majority decision (7:2) saw the appellant husband being denied his claim for a share in the vast wealth of the respondent, on the basis that this is what was dictated by the prenuptial agreement and the circumstances in which the agreement was entered into demonstrated that he 'had well understood the effect of the agreement, had had the opportunity to take independent advice, but had failed to do so . . . [and] the absence of negotiations merely reflected the fact that the background of the parties rendered the entry into such an agreement commonplace'.[79] Importantly when considering the merits of the appellant's claim, the majority discounted the relevance of need, compensation and sharing in the circumstances.[80]

More generally, a number of important statements were made by the Supreme Court; the majority of the court held that the traditional common law rule that public policy requirements defeat the validity of a prenuptial agreement, on the basis that such an agreement anticipates a future divorce, is 'obsolete'.[81] Additionally the court did not surrender its discretionary powers grounded in s 25 of the Matrimonial Causes Act 1973, which accord the court the sole power to determine the effect that an interspousal agreement is to have. The court is empowered to uphold such an agreement that has been freely entered into by the parties, unless the court determines that it would be unfair to do so:

> 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement.'

More broadly it was emphasised that there 'can be no question of this Court altering the principle that it is the Court, and not any prior agreement between the parties, that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in legislation'.[82] Notwithstanding this, the starting point adopted by the Supreme Court is one

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79 Ibid at paras 114–116.

80 Ibid at paras 118–123. For an examination of the impact of the SC decision, and the recent proposals of the Law Commission see further J Miles 'Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money' (2011) 74 MLR 430–444.

81 Above n 78 at para 52, the Court 'wholeheartedly' endorsed the views of the Board of the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64 at para 38 that the old rule that agreements providing for future separation are contrary to public policy is obsolete and should be swept away given that there is no longer an enforceable duty upon a husband and wife to live together, the husband's right to use self-help to keep his wife at home is gone, noting that such actions would now constitute the offences of kidnapping and false imprisonment.

82 Ibid at para 7.

of a presumption of enforceability, quite a leap from the pre-existing position where the discretion of the court trumped any such private arrangement:[83]

> 'Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be give to it.'

(b) Law Commission – marital property agreements

The Law Commission project on marital property agreements is ongoing, but the Consultation Paper published in January 2011 demonstrates the extent of the work carried out to date by Professor Elizabeth Cooke and her colleagues at the Law Commission. The 139 page Consultation Paper presents an in-depth examination of the law on ancillary relief, the consequences of the existing scope for judicial discretion[84] and the current treatment of marital agreements.[85] The paper is written very much in light of the current overarching supervisory powers of the judiciary in respect of the enforceability of marital agreements, as enunciated by the majority of the Supreme Court in *Radmacher v Granatino*:[86]

> 'Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between the parties is only one of the matters to which the court will have regard.'

Whilst expressly stating that the fact that the law in England and Wales on this issue is unusual does not *in itself* justify calls for its reform, the Consultation Paper reports that 'the vast majority of European countries operate marital property regimes' that 'all involve the facility for couples to opt for a change of regime, before or after marriage, by contract'.[87] Beyond Europe, the Consultation Paper sets out the varying approaches currently operating, noting first the community of property regimes which facilitate private election by couples,[88] and secondly regimes that derive from the common law and more

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[83] Ibid at para 70. It was noted that following this judgment a party could no longer claim to have believed that ante-nuptial agreements were void under English law and therefore likely to carry little or no weight. It should now be understood that this is no longer the case.

[84] Above n 77 part 2; entitled 'The Current Law of Ancillary Relief' explores ancillary relief law and the consequences of discretion, tracing the exercise of judicial discretion in the case law that has shaped the governance of ancillary relief issues on divorce.

[85] Ibid, part 3 entitled 'Marital Property Agreements: The Law and its Evolution' examines the law governing separation, prenuptial and post-nuptial agreements, and in particular the decision in *Radmacher v Granatino*, above n 78, and its implications for the law relating to marital agreements and the law on ancillary relief.

[86] Above n 78 at para 3, quoted in the Consultation Paper at p 37.

[87] Above n 77 at p 61, para 4.6. These European countries are regarded as sharing three features; they provide for systems of rules for the division of property on death, divorce or bankruptcy, namely equal division unless otherwise provided by contract between the parties; they are not typically concerned with maintenance or income provision for spouses and children after divorce and thirdly they all involve the facility for couples to opt for a change of regime, before or after marriage, by contract.

[88] Whilst noting that community of property regimes are found throughout the world, the

typically result in substantial redistribution as determined by the governing laws and obligations, rather than allowing separate ownership of property to remain unaffected. Somewhere at the median point, jurisdictions are also identified where inter parte contractual arrangements can be agreed, but do not in most instances extend to a capacity to avoid maintenance obligations.[89]

The project commenced by the Law Commission in October 2009 sought to consider the extent to which private marital agreements should dictate the resolution of financial issues on divorce. A range of provisional proposals together with consultation questions for further development was published in part 8 of the Consultation Paper. Whilst the 2011 paper asked more questions than it answered, some very definite positions were adopted by the Law Commission. It was proposed that agreements made between spouses, before or after marriage or civil partnership, should no longer be regarded as void or contrary to public policy, simply by virtue of the fact that an agreement provides for the financial consequences of a future separation, divorce or dissolution.[90] Emphasis was placed on the importance of the principles of contract law and the need for any qualifying nuptial agreement to be compliant with such principles including undue influence, disclosure, compliance with formalities, and the securing of independent legal advice. Additionally the Commission expressed strong preliminary views on issues of social policy, including the fundamental requirement that children of the union be adequately provided for and that no spouse should become dependent upon state benefits where this could be prevented through an order for the payment of ancillary relief.[91] It was also argued that scope to vary the terms of the agreement should be retained where enforcing it would produce significant injustice for one of the parties as well as in other limited circumstances.[92]

Following the publication of the Consultation Paper in 2011 and within the context of this project the Law Commission was additionally charged with conducting a targeted review of two aspects of the current ancillary relief law, regarded as causing confusion for separating parties and creating excessive potential for uncertainty and ultimately inconsistent outcomes. Specifically, the Law Commission was tasked with examining the extent to which one party should be required to meet the other party's needs after the relationship has ended and, secondly, to consider how 'non-matrimonial' property should be treated on divorce or dissolution.[93] Given the identification of these additional issues for consideration, the project was renamed Matrimonial Property, Needs and Agreements and a Supplementary Consultation Paper was published by

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Consultation Paper specifically identifies South Africa as a particularly interesting example, given that it has a system of immediate total community, derived largely from Dutch law, but notes equally that couples have the option of contracting into community of acquests or into separation of property; above n 77 at p 64, paras 4.16–4.17.

89 Ibid. These jurisdictions typically derive from the common law of England and Wales and thus this interspousal duty to maintain remains.

90 Ibid at p 57, para 3.84.

91 Ibid at p 117, para 7.16.

92 Ibid at p 127, para 7.65.

93 For the purpose of this review, non-matrimonial property is defined as property acquired by

the Law Commission in September 2012. As part of the background to this extension of the project, it is interesting to note one of the preliminary observations made by the Commission in its original Consultation Paper; that whilst the major question being considered is whether the law relating to marital property agreements ought to be changed to allow such agreements to oust the jurisdiction of the courts in ancillary relief, if the call for such change is to assist couples to avoid the uncertainty of the underlying property distribution regime, then perhaps the focus for reform should in fact be on the underlying law?[94] In essence if changing the law to facilitate reliance upon enforceable agreements is simply a means of sidestepping the undesirable regime in place, perhaps it is that regime that is in need of reform, thereby eliminating the need for such agreements and thus the related need for them to be regulated. This supplementary paper commences with the legal background to the extended scope of the project and an explanation of the manner in which the law needs to be developed, including an exploration as to why such reform is necessary. Possible approaches to the reform of the law surrounding spousal needs and related obligations are presented in part 4 of the paper, and limited legislative amendments being proposed for consideration are set out in part 5. Part 6 of this supplementary paper proposes that the concept of non-matrimonial property be defined and raises queries as to how this might best be approached. Ultimately both consultation papers seek the views of consultees to contribute to the formulation and publication of the final recommendations, expected in Autumn 2013.

(c) Conclusion

The Consultation Paper of the Law Commission regards the judgment of the UKSC in *Radmacher v Granatino* as a 'restatement of the law' which has taken the governing law in England and Wales 'as far towards an enforceable status for marital property agreements as is possible within the current statutory framework'.[95] Clearly one of the key issues for determination now by the Law Commission is the extent to which statutory intervention remains necessary, in order to remove or at least minimise the scope of judicial discretion currently necessitated to determine the extent to which a marital property agreement should be given effect. Notwithstanding the presumption of enforcement asserted by the Supreme Court, the extent of the discretion exercisable by the courts in order to determine the 'fairness' of the agreement is still likely to require statutory intervention. Certainly in the course of its judgment the majority of the Supreme Court rejected as not desirable the creation of rules 'that would fetter the flexibility that the court requires to reach a fair result'.[96] Rather what is fair 'will necessarily depend upon the facts of the particular

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either party prior to the marriage or civil partnership, or received by gift or inheritance: Law Commission press release 'Clarifying the law on financial provision for couples when relationships end' 6 February 2012.

94 Above n 77 at p 82, paras 5.62–5.63.

95 Ibid at p 3, para 1.11.

96 Above n 78 at para 76.

case'.[97] By engaging in this wide-scale consultation process, it is anticipated that the Law Commission will be in a position to trigger the necessary reforms to address the deficiencies in the current system, ultimately formulating a considered legal response in England and Wales to the complicated issue of asset distribution on marital breakdown and the regulation of inter parte marital agreements.

IV SAME-SEX MARRIAGE – SOME CURRENT INTERNATIONAL DEVELOPMENTS

Marriage equality is an issue of significant social and legal importance, yet quite differing approaches remain evident in many developed countries. Although there is a distinct absence of international consensus on the issue, these are very much changing times and the legal recognition of what might be regarded as a non-traditional union is slowly becoming more typical of the regulation of opposite-sex unions. This part will present an insight into the current legal standing of same-sex marriage, as distinct from civil partnership, with reference to a number of selected jurisdictions where there have been recent legal developments.

(a) Europe

Nine European countries recognise same-sex marriage as lawful, namely Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden.[98] Although lawful in Spain since July 2005, the first 8 years of same-sex marriage in Spain has evidenced much legal challenge in light of significant political disagreement. Law 13/2005 reformed Spanish law governing marriage and established that 'a marriage will have the same requirements and effect whether the contracting parties have the same or different sex'.[99] Consequently the law draws no distinction between heterosexual and homosexual marriage. Upon its enactment, the constitutionality of the law was challenged by the Peoples Party, which was in opposition at the time of the reform, but subsequently came to power in 2011. The judgment of the Constitutional Court was delivered in late 2012, with a majority ruling (8:3), upholding the constitutionality of the provisions.[100] The court rejected

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97 Ibid.

98 The Netherlands was the first European country to legally recognise same-sex marriage in 2001, followed by Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Iceland (2010), Portugal (2010) and Denmark (2012). An additional 14 have a legally recognised form of civil union or unregistered cohabitation.

99 Amending and adding a second paragraph to s 44 of the Spanish Civil Code. See M Ahumada-Ruiz 'Spain: Constitutional Tribunal rejects challenge to same-sex marriage – law 13/2005 that modified the Civil Code, constitutional' [2013] *Public Law* 428.

100 Judgment 198/2012, unreported 6 November 2012 (Trib Const (Sp)). The matter came before the Constitutional Court when 71 deputies in the Lower House signed the brief challenging the constitutionality of the Law and the Constitutional court admitted the application. See further Ahumada-Ruiz, n 99 at 428–429.

the argument that the provisions conflicted with the constitutional limitations of the right to marry being that of heterosexual couples, confirming that, whilst marriage as an institution is to be protected, its scope is subject to evolution in light of public perceptions and social norms, as noted by Ahumada-Ruiz: 'the marriage protected by the Constitution is the one recognised and identified as such by the law and the society at a given time, not a static or immutable form fixed at the time of adopting the Constitution'.[101] Despite the strong Catholic tradition in Spain and the vehement opposition voiced by the Church, the Spanish regulatory provisions do not expressly include an opt-out clause for religious bodies, which appears an important aspect of the current debates in the United Kingdom, discussed below. Rather, the Spanish law, regarded as particularly liberal, merely provides that pre-2005 laws relating to marriage now apply equally, and have the same requirements and effect when the two people entering into the contract are of the same sex or of different sexes.

A number of European jurisdictions are in a state of legal change at present; England and Wales and Scotland are at the cusp of fundamental law reform on the issue of same-sex marriage, with draft laws before each of their respective Parliaments. In England and Wales marriage has always been defined as the permanent union of one man and one woman, to the exclusion of all others.[102] Reflecting this long-standing position, s 11(c) of the Matrimonial Causes Act 1973 declares that a marriage is void if the parties are not respectively male and female. Since 2005 by virtue of the Civil Partnership Act 2004 same-sex couples can validly enter into a civil partnership which although providing the legal consequences of marriage is not classified as marriage. The legality of this distinction between opposite-sex and same-sex couples was challenged in the English High Court in *Wilkinson v Kitzinger*.[103] The parties, a lesbian couple, had married in Canada in 2003, where same-sex marriages are permitted. Although their union attained the status of civil partnership under English law following the enactment of the Civil Partnership Act 2004, they sought recognition of their union as a marriage, under English law. They argued that, given that their marriage was legal in the country in which it was solemnised and met the requirements for recognition of overseas marriages, it should thus be treated in the same way under English law as one between opposite-sex couples. The High Court ruled against them, refusing to grant their union marital status. The President of the Family Division, Sir Mark Potter, whilst accepting the fact of the discriminatory treatment of their union in classifying it as a civil partnership but not marriage, regarded this distinction as justified given that 'such discrimination has a legitimate aim, is reasonable and proportionate, and falls within the margin of appreciation accorded to Convention States'.[104] Additionally, in light of the protections afforded to the couple by the 2004 Act he stated that 'abiding single sex relationships are in no way inferior, nor does English Law suggests that they are by according them recognition under the name of civil partnership' but are, as a matter of nature

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[101] Above n 99 at 429.
[102] *Hyde v Hyde and Woodmansee* (1866) LR 1 PD 130.
[103] *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) (31 July 2006).
[104] Ibid at para 122.

and common understanding different.[105] In support of this difference, he approved of the statement of Lord Nicholls in *Bellinger v Bellinger*[106] regarding the distinct traditional categorisation of marriage: 'Marriage is an institution or a relationship deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex.'[107]

However, given the ever-evolving nature of the law and shifting social perceptions in this area, this decision is one that is likely to be revisited. Whilst another case is awaited to challenge this position, it may be overtaken by change in the legislative context. Following a consultation process,[108] in January 2013 the UK Conservative Government introduced the Marriage (Same Sex Couples) Bill to permit and regulate same-sex marriage. Section 1(1) of the Bill provides, very simply, that marriage of same-sex couples is lawful.[109] The aims of the Bill are (inter alia) to make provision for the marriage of same-sex couples in England and Wales and to address the issue of gender change by married persons and civil partners.[110] Additionally it would enable religious organisations to opt-in to conduct same-sex marriages if they wished to do so, thereby deliberately protecting religious organisations and individuals from being forced to conduct same-sex marriages. Reflecting the controversial nature of the measures being introduced, religious protection forms a very prominent aspect of the Bill, including provision to ensure that there can be no compulsion upon religious orders or members of a religious order to solemnise a marriage between a same-sex couple.[111] Finally, of note, the Bill also enables civil partners to convert their civil partnership to a marriage and married

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105 Ibid at para 113; see further J Herring *Family Law* (Longman Law Series, 5th edn, 2011) at 79.

106 *Bellinger v Bellinger* [2003] 2 AC 467.

107 Ibid at para 46.

108 In March 2012 the Government launched a consultation 'Equal Civil Marriage: A Consultation' which looked at how to enable same-sex couples to get married. The consultation ran for 13 weeks, closing on 14 June 2012. Just over 228,000 responses were submitted, together with 19 petitions, the largest response ever received to a Government consultation. See www.gov.uk/government/uploads/system/uploads/attachment_data/file/133258/consultation-document_1_.pdf (accessed June 2013).

109 Section 1(2) provides that '[t]he marriage of a same sex couple may only be solemnized in accordance with—
(a) Part 3 of the Marriage Act 1949,
(b) Part 5 of the Marriage Act 1949,
(c) the Marriage (Registrar General's Licence) Act 1970, or
(d) an Order in Council made under Part 1 or 3 of Schedule 6'.

110 Available at www.publications.parliament.uk/pa/bills/lbill/2013-2014/0034/14034.pdf (accessed June 2013).

111 Section 2 (1): 'A person may not be compelled to—
(a) undertake an opt-in activity, or
(b) refrain from undertaking an opt-out activity'.
Section 2(2) 'A person may not be compelled—
(a) to conduct a relevant marriage,
(b) to be present at, carry out, or otherwise participate in, a relevant marriage, or
(c) to consent to a relevant marriage being conducted,
where the reason for the person not doing that thing is that the relevant marriage concerns a same sex couple.'

transgender people to gain legal recognition in their acquired gender without having to end their marriage. Section 9 provides that the parties to a civil partnership previously conducted in England and Wales may convert their civil partnership into a marriage under a procedure established by regulations made by the Registrar General. Further where a civil partnership is converted into a marriage, the civil partnership ends on the conversion, and the resulting marriage is to be treated as having subsisted since the date the civil partnership was formed. Any attempts to retain a distinction is defeated by s 11 which provides that: 'In the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples.'[112]

In February 2013, the Bill was passed by the members of the House of Commons, 400 votes to 175 following the second reading, and then considered by the Public Bill Committee. The committee considered many amendments and several new clauses, but ultimately none of these was agreed to and the Bill was reported to the House of Commons on 12 March 2013 without amendment.[113] The Bill is due to have its report stage and third reading on a date to be announced. The controversial nature of the Bill is reflected in the views expressed by the four dissenting members of the Public Bill Committee who voted against the Bill at second reading and provided the main opposition to the Bill at committee stage, as is evident in the committee stage report. The amendments tabled (but all ultimately withdrawn) related, inter alia, to a proposed definition of the purpose of marriage,[114] a confirmation of the capacity of the Church of England to make provision about marriage,[115] a statement that premises owned by listed bodies could not be licensed for same-sex marriage[116] and a provision regarding the protection of teachers who expressed dissenting views regarding same-sex marriage.[117] In this context, the committee stage report noted the 'highly controversial' nature of the proposals in the Bill and the 'strong opinions' expressed by interested parties, both for and against same-sex marriage.[118]

Similar legislative developments have begun in Scotland; the Scottish government published its Consultation Paper in 2011, *The Registration of Civil Partnerships Same Sex Marriage, A Consultation* which had proposed the opening of marriage to same-sex couples, whilst equally providing protection for religious bodies with objections to such developments. Of note, however, is that the Consultation Paper provided that religious groups willing to become involved in the creation of civil partnerships through civil *and* religious

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112 Section 11(1).

113 Marriage (Same Sex Couples) Bill Committee stage report. Bill no 126 of 2012–2013 Research Paper 13/22 14 March 2013 at 2, para 5. Available at www.parliament.uk/briefing-papers/RP13-22 (accessed June 2013).

114 Ibid at para 6.2.

115 Ibid at para 6.3.

116 Ibid at para 6.6.

117 Ibid at para 6.10.

118 Ibid at 1. At the Public Bill Committee Stage four dissenters voted against the Bill, named in the Report as David Burrowes, Tim Loughton, Jim Shannon and Kwasi Kwarteng.

ceremonies should be permitted to do so.[119] As regards marriage however, Norrie notes that, if the right to marry is to apply equally to all couples, difficulties might arise should discriminatory approaches be applied by religious bodies.[120] As in England and Wales, these legislative proposals take place in the context of the relatively recent regulation of civil partnerships, introduced by the Civil Partnership Act 2004. The draft Marriage and Civil Partnership Bill was published in December 2012 and the Scottish Government's consultation on its contents ran until 20 March 2013. Interestingly the draft Bill has cross-party support, reflecting a general mood for change, but is opposed by the Church of Scotland and the Roman Catholic Church. It will be put before the Scottish Parliament upon completion of the consultation process. It is envisaged that the enactment of the right to same-sex marriage will be provided for by way of amendment to the existing Marriage (Scotland) Act 1977, incorporating an amendment of the s 2(1A) definitions of spouses to include the parties to a marriage between persons of the same sex. Additionally, s 5(4)(e) of the 1977 Act will be repealed, and s 5(4)(f) modified as necessary in light of the repeal of s 5(4).[121]

France has become the ninth European member state to legalise same-sex marriage having very recently passed Bill 344[122] to extend the right to marry and adopt to same-sex couples. Although the National Assembly voted against the legalisation of same-sex marriage in 2011, it became a key election issue in 2012 with the now President François Hollande making an electoral pledge to extend the right to marry and adopt to same-sex couples. Draft legislation to permit same-sex marriage was introduced by the Cabinet in November 2012 and completed its passage in the National Assembly on 12 February 2013.[123] Bill 344 was approved by the National Assembly on 12 February 2013 in a 329:229 vote. It passed through committee stage and was adopted by the French National Assembly on 23 April 2013 in a 331:225 final vote. Of note, these political and legal developments have taken place against a background of diverse public opinion and vocal opposition, with repeated public protests involving tens of thousands of French citizens who oppose the equalisation of the right to marry. This is reflected in the challenge to the law by the opposition UMP Party filed with the Constitutional Council, which has one month to rule.

Finally, 14 European states, including those set out above, currently legally recognise civil partnerships or unregistered cohabiting arrangements between same-sex couples but do not extend their laws to an equal right to marriage.[124]

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[119] Under the relevant governing legislative provisions, opposite-sex couples can choose religious or civil solemnisation whereas same-sex couples are limited to civil registration. See further K Norrie 'Religion and same-sex unions: the Scottish Government's consultation on registration of civil partnerships and same-sex marriage' [2012] Edin LR 95 at 96.

[120] Ibid at 97.

[121] Section 5(4)(e) currently provides that there is a legal impediment to a marriage where both parties are of the same sex.

[122] *Projet de loi ouvrant le mariage aux couples de personnes de même sexe*, no 344. See also the chapter on France in this *Survey*.

[123] Available at www.assemblee-nationale.fr/14/ta/ta0084.asp (accessed June 2013).

[124] France (1999), Germany (2001), Finland (2002), Croatia (2003), Luxembourg (2004), Andorra

However, opinion polls across Europe indicate a ground swell in favour of the extension of the right to marry to same-sex couples and it is expected that in time, further legislative and judicial developments will see the gradual growth in the number of states that legislate to equalise the right to marry. Ireland is currently in the throes of political and social debate concerning the possible recognition of an equal right to marriage; the Irish Constitutional Convention, established to review the written Constitution of Ireland,[125] debated the issue of same-sex marriage in April 2013 and overwhelmingly voted in favour of putting the matter before the Irish people by way of referendum.[126] Of note is that the Convention has received 50 times the average number of submissions received in respect of all other issues debated to date.[127]

(b) United States of America

In the United States of America, the Defense of Marriage Act (DOMA), enacted in 1996,[128] is a federal law which limits the definition of marriage to a legal union between one man and one woman as husband and wife, and provides that the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife.[129] This limited definition of marriage in turn prevents parties other than married heterosexual couples from accessing all federal benefits, including insurance benefits for government employees, social security survivors' benefits, immigration, and the right to file joint tax returns or receive spousal tax exemptions and benefits. More broadly the federal government is prevented from recognising any marriage between same-sex couples, even where those couples are considered to be validly married in their own state.

The political view of DOMA has dramatically altered since its enactment in 1996, and this is reflected in changes introduced by an increasing number of states in respect of the legality of same-sex marriages. At present, 10 individual states and the District of Columbia have legalised same-sex marriages[130] but 38 states still expressly prohibit same-sex marriage either through legislative or constitutional provisions. President Obama has long endorsed the repeal of

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(2005), United Kingdom (2005), Czech Republic (2006), Slovenia (2006), Switzerland (2007), Hungary (2009), Austria (2010), Ireland (2011) and Liechtenstein (2011).

125 See further www.constitution.ie/ (accessed June 2013). The Convention is tasked with considering certain aspects of the Constitution and to make recommendations to the Irish Parliament on future amendments to be put to the people in referenda. The Convention comprises 100 people; 66 randomly selected citizens; 33 parliamentarians and an independent Chairman.

126 See www.irishtimes.com/news/social-affairs/constitutional-convention-backs-extension-of-marriage-rights-to-same-sex-couples-1.1359910 (accessed June 2013).

127 1029 submissions were received by the Constitutional Convention on this issue.

128 1 USC § 7 and 28 USC § 1738C.

129 DOMA, s 3.

130 The States of Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia allow marriages between persons of the same sex.

DOMA and in 2011, Attorney-General Eric Holder, on behalf of the President announced a radical shift in approach to the defence of DOMA:[131]

> 'After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases.'

In addition to this stance being adopted by the President, legislative and judicial developments in relation to same-sex marriage have also occurred. First, from a legislative viewpoint, a draft Bill, the Respect of Marriage Act,[132] to repeal DOMA has been presented to both Congress and the Senate and is supported by President Obama.[133] Secondly, numerous judgments have been delivered by federal courts, pronouncing the definition under s 3 of DOMA to be unconstitutional and the opportunity has now been presented to the US Supreme Court to take a definitive stand on the issue.

In March and April 2013 arguments were made in two such high profile cases before the US Supreme Court: *Windsor v United States* and *Hollingsworth v Perry*. The impact of the limited definition of marriage upon the tax liabilities of a surviving same-sex spouse was demonstrated in *Windsor v United States*, and formed the basis for a challenge to the constitutionality of s 3 of DOMA. Windsor had succeeded in her action before the New York Circuit and presiding Judge Barbara Jones ordered a tax refund to be made to Ms Windsor. The decision was confirmed by the Second Circuit Court of Appeals in late 2012 and oral arguments were presented to the US Supreme Court in March 2013, with judgment expected in June 2013. Whilst it is difficult to predict the outcome, the growing public support to end discrimination and permit same-sex marriage suggests that the Supreme Court might very well strike down the federal law on the basis of unconstitutionality but may stop at imposing any new standard on individual states. It is more likely that a stance will be taken in respect of the constitutionality of s 3 but states will be permitted to develop their laws in line with their individual social policies.[134] The second case currently being considered by the Supreme Court relates to California's Proposition 8, which bans same-sex marriage. Although California

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[131] See www.justice.gov/opa/pr/2011/February/11-ag-222.html (accessed June 2013). The statement followed two lawsuits, *Pedersen v OPM* 10 CV 1750 and *Windsor v United States* 833 F Supp 2d 394 (SDNY 2012), affirmed in 699 F 3d 169 (2d Cir 2012), where s 3 of DOMA had been challenged. As a result of this new stance the Attorney-General confirmed that the Department would not defend the constitutionality of s 3 as applied to same-sex married couples in these two cases before the Second Circuit.

[132] Bill HR – 1116.

[133] There are now 159 co-sponsors of the Bill (April 2013).

[134] Section 3 of DOMA has been found unconstitutional in eight federal courts, including the First and Second Circuit Court of Appeals, on issues including bankruptcy, public employee benefits, estate taxes, and immigration.

sanctioned same-sex marriages in 2008, it subsequently imposed Proposition 8, a ban on the performance of same-sex marriages in California, although it does continue to recognise the legality of same-sex marriages performed in other jurisdictions. In March 2013 in *Hollingsworth v Perry* the Supreme Court was asked to consider whether the guarantee of equal protection for all citizens under the law, as provided for in the 14th Amendment to the Constitution ought, to prevent states from defining marriage in a limited manner. The US Supreme Court is being challenged to rule upon a key social and familial issue in the context of two high profile cases; time will tell if they lead to a radical change to the legal landscape.[135]

(c) Recent developments at the European Court of Human Rights

The capacity for parties to a same-sex partnership to secure protection under Art 8 of the ECHR, guarantee of respect for private and family life, was recently considered by the First Section Chamber of the ECtHR. Additionally the Chamber considered the extent, if at all, to which the guarantees under Art 12 (right to marry) and Art 14 (right to non-discrimination) can be relied upon by parties to same-sex relationships where they seek to vindicate their rights to equal treatment. First, in the context of a claim to assert the right to marry, the ECtHR accepted in *Schalk and Kopf v Austria*[136] that same-sex partnerships may come within the 'protection of family life' element of Art 8, an extension of the previously limited application of the right to protection of the parties' 'private life' under Art 8. However, this judgment is equally significant given the willingness of the ECtHR to allow individual states a significant 'margin of appreciation' in respect of the equalisation of the right to marry, thereby limiting the impact of the extension of the application of Art 8. Interestingly, in *Schalk and Kopf v Austria* whilst it was the identified consensus on the right to legal recognition of same-sex partnerships which led the Chamber to recognise the right to respect for both private and family life for parties to a same-sex relationship, it was the *lack* of consensus amongst signatory states on the extension of the right to marry to same-sex couples that resulted in a reliance upon the 'margin of appreciation' of individual states rather than identify any actionable breach of the rights recognised by the ECHR under Art 12.

The challenge before the First Section Chamber of the ECtHR in *Schalk and Kopf v Austria* was made by a male same-sex couple in respect of the limitation of the right to marry to two persons of the opposite sex under art 44 of the

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135 For detailed commentary see WN Eskridge Jr 'The California Proposition 8 Case: What Is a Constitution For?' (2010) 98 Cal L Rev 1235; JA Garver 'The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality' (2012) 64 Stan L Rev Online 93.

136 *Schalk and Kopf v Austria* [2010] ECHR 995. For an excellent commentary on the significance of this case and the subsequent case of *PB and JS v Austria* [2010] ECHR 1146 see N Bamforth 'Families but not (yet) marriages? Same-sex partners and the developing European Convention "margin of appreciation"' [2011] 23 CFLQ 128–143.

Austrian Civil code.[137] As per cases in other jurisdictions, including *Wilkinson v Kitzinger* in England and Wales, since the commencement of their domestic action challenging this exclusion from the right to marry, Austrian law had enacted the Registered Partnership Act which since 2010 permits same-sex couples to register as partners. Notwithstanding this domestic development, the applicants argued that Austrian law remained in breach of their Art 14 right to non-discriminatory treatment, the discrimination not being objectively justifiable in the circumstances. They claimed that the limited definition of marriage under Austrian law was a breach of their Art 12 right to marry, arguing inter alia that, as the Convention must be regarded as a living document, their right to marry should be interpreted to reflect the current international acceptance of the right of same-sex couples to have their relationships recognised by law. Whilst the Chamber did not deny the capacity of the ECHR to evolve so that its provisions reflect modern norms, in this context it did not accept the fact of a cross-jurisdictional consensus on the issue of same-sex marriage, noting that 'at present no more than six out of 47 Convention states allow same-sex marriage'.[138] Thus any argument that the interpretation of the Convention provisions reflect modern consensus was swiftly defeated by the lack of that very consensus amongst signatory states in respect of a right to same-sex marriage. In further defence of the position adopted, the Chamber of the ECtHR, in exploring the nature of the right to marry both under the ECHR and EU human rights laws, relied upon Art 9 of the Charter of Fundamental Rights of the European Union which expressly refers to the determination of the scope of the right by individual national states:[139]

> 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.'

This delegation of the determination of the nature and extent of the right to marry to individual signatory states and the corresponding lack of compulsion upon those states to provide an absolute right to marry was regarded as preventing the Chamber from rushing 'to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society'.[140] This combination of the lack of a consensus amongst signatory states on the issue of same-sex marriage and the express deference to the national laws governing the exercise of the right to marry and found a family in the Charter of Fundamental Rights thus permitted the Chamber to rely upon the 'margin of appreciation' exercisable by individual states.[141]

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[137] Article 44 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides: 'The marriage contract shall form the basis for family relationships. Under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other.'

[138] Above n 136 at para 57.

[139] See www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed June 2013).

[140] Above n 136 at para 62.

[141] For a critical examination of the 'margin of appreciation' doctrine see further F Hamilton 'Why the margin of appreciation is not the answer to the gay marriage debate' [2013] EHRLR 47–55.

However, Hamilton is critical of this approach, suggesting reliance upon the margin of appreciation leads to a lack of certainty, giving rise to confusion and a distinct lack of clarity in such a crucial aspect of human rights protection. Additionally she notes the unwelcome capacity for ECHR contracting states 'to introduce their own legislation . . . and decide on judicial supervision of such legislation, without the reasons behind their decisions having to be examined by the Court'.[142]

In *Schalk and Kopf v Austria* the acceptance by the Chamber of a shift in societal attitude to a recognition of same-sex partnerships, albeit not marriages, formed the basis of its willingness to apply the respect of private *and* family life under Art 8 to the claimants' circumstances. However, this development is limited in its impact. Whilst the Chamber willingly recognised the right of same-sex couples to respect for their private and family life, that recognition did not translate into a right to marry, as exists for opposite-sex couples. The Chamber relied upon the margin of appreciation in assessing what discriminatory treatment is proportionate and justifiable, concluding that Art 12 does not impose a positive obligation upon the governments of signatory states to provide a right to marry to all citizens and further that Art 14 could not be invoked to create such a right on the basis of non-discrimination notwithstanding its acceptance of the application of both aspects of Art 8 protection to same-sex couples. Thus it is evident that the notion of equal rights for same-sex couples is very much dependent upon the eventual (if at all) development of a consensus between signatory states, which notwithstanding the evolving nature of the rights of same-sex couples, will remain unaffected by the rulings of the ECtHR for some time to come. As with the current developments in the United States of America, it is likely that this issue of social and political importance will remain within the remit of domestic/state law-makers for the foreseeable future.

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[142] Ibid at 50.

Angola

A PRELIMINARY APPRAISAL OF THE NORMATIVE GAINS FOR CHILDREN'S RIGHTS IN THE ANGOLAN CHILDREN'S ACT (ACT 25/12 OF 22 AUGUST 2012)

Julia Sloth-Nielsen and Aquinaldo Mandlate[*]

Résumé

Cet article traite de la loi angolaise de 2012 sur la protection et le développement holistique de l'enfant (Loi no 25/2012). Au départ, le projet de loi ne visait que les enfants de moins de 7 ans mais, telle qu'adoptée, la loi concerne finalement tous les enfants de moins de 18 ans. Il s'agit d'un texte don't l'objet est d'harmoniser le droit interne avec le droit international, notamment la *Convention internationale des droits de l'enfant* et la *Charte africaine des droits et du bien-être de l'enfant*. Le présent exposé s'intéresse particulièrement aux nombreuses dispositions de la nouvelle loi qui concernent la place de l'enfant dans la famille et les responsabilités de la famille à l'égard des enfants.

I INTRODUCTION

The United Nations Convention on the Rights of the Child (UNCRC)[1] represents the most significant step towards the advancement of children's rights globally. Article 4 of the UNCRC requires states to take concrete measures to ensure the harmonisation of laws relating to children with the Convention's substantive provisions, including legislative and administrative measures. A similar duty prevails under the regional treaty, the African Charter on the Rights and Welfare of the Child (ACRWC).[2] Angola is the most recent example of an African country which has enacted a children's statute to bring

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1 United Nation Convention on the Rights of the Child (UNCRC), adopted in 1989, and entered into force in 1990, UN Doc A/RES/44/25 (1989) (hereinafter referred to as the UNCRC or UN Children's Convention).

2 See art 1 of the African Charter on the Rights and Welfare of the Child (African Children's Charter or ACRWC), adopted in 1990 and entered into force in 1999, OUA Doc CAB/LEG/24.9/49 (1990).

domestic law in line with international law requirements.[3] The traditional link between children's rights and family law is evident in many UNCRC and ACRWC requirements. These include: the child's right to know and be cared for by both parents who shall bear responsibility for the upbringing and development of the child (UNCRC, art 18(1) and ACRWC, arts 19 and 20); the child's right not to be separated from his or her parents against their will unless so determined by competent authorities (UNCRC, art 9(1); ACRWC, art 19(2)); the right of a child who is separated to maintain personal relations and direct contact with both parents (UNCRC, art 9(2); ACRWC, art 19(3)), and the child's right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, whilst in the care of parents, legal guardians or any other person who has the care of the child (UNCRC, art 19(1); ACRWC, art 16(1)).

This chapter considers the recent legislative efforts to advance children's rights in Angola, with a special focus on those dimensions relevant to family law practitioners.

After this introduction, a brief overview of the current context in which children grow up in Angola is provided in Part II. Thereafter, an overall description of the Angola Children's Act[4] is given, highlighting the origins, scope and thrust of the Act (Part III). This will be followed, in Part IV, by an examination of some of the composite elements of the treatment of children's rights in the Act from a family law perspective. In that respect, the discussions explore topics such as the child's right to family life, violence against children in the home, the duties of the child and the obligations of parents, and the children's participation rights as regulated in the Angolan children's statute. The subsequent section, Part V, maps some of the weaknesses evident in the Act, and points out some of the gaps obstructing the implementation of international children's rights treaties in Angola. Possible avenues which can be utilised to improve the situation on the ground are proposed. Part VI assesses some of the benefits and gains that the Act may bring. The conclusion reiterates that despite some weak aspects in the Act which could be strengthened in order to advance the domestication of the UNCRC and the ACRWC, significant gains have indeed been made.[5]

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3 Amongst others examples, African countries which have undertaken legislative reform to advance the children's rights protected in the UNCRC include Uganda (1996), South Africa (2005), Botswana and Tanzania (2009), Lesotho and Malawi (2011).

4 Angolan Act for the Protection and Holistic Development of the Child (Act No 25/12 of 22 August 2012).

5 Note that the Act is available in Portuguese only and therefore all translations provided in this chapter are unofficial and have been effected by the authors.

II BRIEF OVERVIEW OF THE ANGOLAN CONTEXT

Angola is a relatively small country lying on the western side of the Southern African coastal region. The population of Angola is 18 million people,[6] and Portuguese is the official language inherited from the former Portuguese colonial administration.[7] About half of the country's population comprises children between 0 and 14 years.[8] Like other African countries, the majority of the population lives in rural areas. The country is affected by a myriad of diverse cultural and traditional beliefs, such as: early marriage; matrilineal and patrilineal customary family structures; and initiation rituals understood to mark the transition from childhood to adult life.[9] As it will be explained below, poverty and HIV/AIDS are also causes of concern in the country, although the oil deposits that provide the basis for considerable foreign investment also mean that the GDP of Angola is not low in comparison to other African countries.[10]

The diverse cultural practices and traditional norms affecting Angolan communities are important to understand the family role and its dynamics in the upbringing of children. They also help to explain the strengths and weaknesses in the current legislative framework for the promotion and protection of children's rights. This is mainly so in respect of children's rights which traverse family law matters. For example, the Act could have addressed certain Angolan customs like female genital mutilation which are practised in some communities. Such provision would have been in compliance with the ACRWC directive in art 21 to prohibit harmful social and cultural practices prejudicial to the health of the child and those that are discriminatory on the grounds of sex or other status.[11] Furthermore, as Angola has both patrilineal and matrilineal customary family systems, the law must ideally provide for specific standards which protect children raised in either family setting.

A bitter civil war that lasted almost two decades, ending only in 2002,[12] and the rapid spread of diseases such as HIV/AIDS in the past two decades, among

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6 Information available at www.indexmundi.com/angola/population.html (accessed 10 April 2013).

7 Karl Gadelli *Languages in Mozambique*, Africa and Asia, Goteborg working papers on Asian and African languages and literature (2001), No 1, p 1.

8 Information available at www.indexmundi.com/angola/population.html (accessed 10 April 2013).

9 See generally Aquinaldo Mandlate *Assessing the implementation of the Convention on the Rights of the Child in Lusophone Africa (Angola and Mozambique)* (unpublished LLD thesis, University of the Western Cape, 2012) 18–45.

10 For a comparison of GDP in Sub-Saharan African countries see the World Bank statistics at http://data.worldbank.org/region/sub-saharan-africa (accessed 15 April 2013).

11 Article 21 also requires states parties to outlaw child marriage, which too is not included in the Act under review.

12 The Angolan civil war followed stages. The first stage went from the time of independence in 1975 until 1991 when the Bicesse Peace Accords were signed between the ruling MPLA and the UNITA rebels. However, in the following year the Bicesse Accords failed and the war broke out again for another ten years ending in 2002. See Fortna for details on the Bicesse Accords

other factors, account for the vast poverty that affects many Angolan families.[13] In this regard, the effects of the political crisis and the HIV/AIDS pandemic have forced families to involve children in economic activities. For example, in rural areas children work on small family farms and in urban settings they sell trinkets and food on the streets.[14] Notably, some of the children on the streets undertake these activities for the benefit of their family. Clearly, this leaves a wide margin to argue that there is need to align children's rights with existing family values and vice versa. The next section provides some overarching insights into the Angola Children's Act.

III OVERVIEW OF THE ANGOLAN CHILDREN'S ACT

A noticeable aspect in the Angolan Children's Act is its explicit attempt to uphold the principles of the UNCRC and the ACRWC.[15] In this regard, the Act purports to be the primary instrument[16] in the Angolan domestic normative framework setting out standards for the promotion and protection of children's rights.[17] It provides clear obligations binding the Angolan state, parents, as well as society as a whole, to promote the implementation of these rights.

Generally, the Act contains a comprehensive list of civil and political rights protected in the UNCRC and the ACRWC and it includes a definition of the best interest standard as embedded in the former and the latter treaties.[18] However, the best interests standard is not elevated to a 'primary' (UNCRC) or 'paramount' (ACRWC) position, but 'shall be taken into account in the interpretation and development of the law and in the adjudication of disputes involving children'.[19]

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and the Angolan civil war in general, in Virginia Fortna 'A lost chance for peace: The Bicesse Accords in Angola' (2003) 4(1) *Georgetown Journal of International Affairs* 73–79.

13 Mandlate n 9 above, 40–44.

14 Line Eldring, Sabata Nakanyane, Malehoko Tshoaedi *Child labour in the tobacco growing sector in Africa* (report for the IUF/ITGA/BAT Conference on the Elimination of Child Labour, Fafo Institute for Applied Social Sciences, Nairobi, 8–9 October 2000) p 48; copy on file with the authors.

15 See Julia Sloth-Nielsen *Report on the analysis of the Angolan Act on the Promotion and Holistic Development of the Child (Act no 25/12 of 22 August 2012)*, Community Law Centre, University of the Western Cape, 4 March 2013 (unpublished). See art 1 (aims and objectives) of the Act which refers expressly to the UNCRC, the ACRWC and the Angolan Constitution (art 80), the most recent version of which is dated 2010.

16 It is understood that there is a Family Code as well as a Penal Code which probably traverse some terrain covered in the Angolan Children's Act of 2012; however, the authors were not able to access these proclamations. Reference to the Juvenile Justice Act which also subsists alongside this new statute, is made below.

17 See further details in art 1(3) of Act no 25/12 of 22 August 2012.

18 See art 3 of the UNCRC and art 4 of the African Children's Charter.

19 See art 3 of the UNCRC, art 4 of the African Children's Charter. Thus, art 6 of Act no 25/12 of 22 August 2012 (entitled 'the best interests of the child') provides that: '(1) the best interests of the child as well as the social values that the child represents and the child's special situation as a person in development shall be taken into account in the interpretation of the law and in the resolution of disputes involving children; (2) in the case of conflict between two norms, the

The Act contains 11 chapters in addition to a brief preamble capturing the aspirations and intentions of the Act as a whole. Besides setting out the inspirational base underlying the foundations of the law, the preamble also places emphasis on the obligation of the state and everyone in relation to the realisation of children's rights.[20] In addition, the preamble refers to the foundational framework of the '11 commitments for children', the role of which are discussed more fully below in this section.[21]

Chapter 1 (arts 1–9) define the objectives and key principles underlying the Act. The main principles of the UNCRC,[22] including non-discrimination,[23] the principle of the right to life, survival and development,[24] and the already mentioned 'best interest of the child' principle are incorporated in the Act.[25] Noticeably absent is an elaborate provision for the child's right to participate or to express views. This is a significant weakness that prevails throughout the Act.[26] Further, the child's right to dignity receives specific protection in art 8 which protects children from 'inhuman, cruel, violent, exploitative, humiliating, compromising or discriminatory treatment or other treatment which violates the dignity and physical integrity of the child'. The final provision (art 9) in chapter 1 of the Angolan children's statute outlines the general duties of parents (discussed more fully in Part IV of this chapter).

Chapter 2 (arts 10–37) regulates the rights and duties of the child, according to its heading. It is divided into five discrete sections, namely the general rights of the child,[27] the right to life and the right to health,[28] the right to live in a family and community environment,[29] special rights of the child,[30] and the duties of

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norm that best protects the interests of the child as provided in the subsection above shall take precedence; (3) for the purposes of the Act, the best interests of the child shall be understood as being everything required to defend and safeguard the child's integrity, identity, and for the development and maintenance of his or her wellbeing.'

20 See para 1 of the preamble to the Angolan Children's statute.

21 See para 2 of the preamble to the Angolan Children's statute.

22 In this regard see para 12 of the Committee on the Rights of the Child (CRC Committee) General Comment No 5 on the General Measures for the Implementation of the Convention on the Rights of the Child, UN Doc CRC/CG/2003/5 (General Comment No 5).

23 Article 2 of the UNCRC, art 3 of the ACRWC and art 4 of the Angolan Act. A noteworthy addition in the Angolan provision is the requirement that the state criminalise discriminatory practices and adopt measures to minimise the effects of discriminatory practices through its mechanisms (art 4(2)). Further, the last mentioned provision emphasises the particular vulnerability of children between the ages of 0 and 5 years, and also makes specific reference to the applicability of the non-discrimination provisions to refugee children who find themselves on Angolan territory.

24 Article 6 of the UNCRC and art 5 of the ACRWC. The Angolan Act contains numerous provisions aimed at securing the right to life survival and development but for the purposes of this overview the entire Part 2 of chapter 2 of the Act (entitled 'Right to Life and Right to Health') is relevant to the elaboration of the right to survival and development.

25 Article 3(1) of the UNCRC and art 4 of the ACRWC; see n 19 above for the text encapsulating the best interest standard in the Angolan law.

26 Sloth-Nielsen n 15 above, 14–15.

27 Articles 10–13.

28 Articles 14–20.

29 Articles 21–25.

the child.[31] Some of the prominent rights covered in the Act include the rights to education (arts 11–13), with special reference to the right to education of children who live nomadic lifestyles and the fact that (without prejudice to the general contents of education programmes), education for the nomadic child must 'privilege the transmission of knowledge related to the daily activities of children in the communities envisaged, including knowledge related to natural resources and animals available in the areas where these communities reside and their sustainable usage'; the right to health (arts 14–20), which perhaps unusually in an Act dedicated to children, includes an article dedicated to the health of pregnant women and enshrines the guarantee of free prenatal services, as well as a provision on services for newborn children; the right to a name (and reference to the child's right to use the surname of his or her parents (art 21)), and rights relating to children's access (or non-access) to places of night entertainment (art 28) as well as an article dedicated to the protection of children in the context of the internet (art 30). The duties of the child outlined (arts 35–37) in the Act tie closely to the related provisions in the African Children's Charter (art 30 of the ACRWC),[32] and embrace an African conception of children's rights as being mirrored by corresponding duties to the family and the community. Although duties are commonly provided for in African children's statutes, the Angolan text stands out insofar as it provides that the child has a duty to 'behave well', which is uncommon in other children's statutes. Thus, art 37, which is the provision that elaborates this duty, states that:

> 'Depending on his or her age and maturity, the child has the duty to learn and to respect the principles of good education, positive social conduct and he or she must cultivate cultural and patriotic values of the nation and respect its institutions and participate in the realization of the activities that make him or her an active agent of the community.'

Chapter 3 (arts 38–42) deals with child protection and child assistance for children placed in care institutions, for children who are at risk or find themselves in families needing assistance. The 2009 UN Guidelines on Children in Alternative Care[33] have clearly informed some of the text, as it is spelt out that institutional placements are to be as short as possible, and the focus must be on strengthening families. A clear preference for family type placement is articulated (art 41). However, the UN Guidelines are but partially assimilated, as insufficient elaboration of forms of alternative care and how they are to be regulated are provided, nor is it spelt out how children might end up in alternative care.[34]

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30 Articles 26–33.

31 Articles 34–37.

32 This article is the subject matter of Julia Sloth-Nielsen and Benyam Mezmur 'A dutiful Child: The implications of article 31 of the African Children's Charter' (2008) 52(2) *Journal of African Law* 159–189.

33 United Nations Guidelines for the Alternative Care of Children, UN Doc A/HRC/11/L.13.

34 Sloth-Nielsen n 15 above, 15 and 19.

Chapter 4 (arts 43–48) addresses jurisdictional measures relating to children in conflict with the law, a subject which obviously traverses the Juvenile Justice Act (*Lei do Julgado de Menores*) – in force since 1996 – and which is referred to in the text of art 43.[35] This article explains that the object of these jurisdictional measures is to strengthen mechanisms of implementation of that Act insofar as it concerns the application and enforcement of social protection, prevention and educational measures. The latter additionally enjoy articles (47 and 48) dedicated to their theme, viz, the prevention of juvenile delinquency and social reintegration and re-education. The principle of deprivation of liberty as a last resort is expressly confirmed (art 46). It has been noted, however, that the Angolan provisions in this section are copied directly from Mozambican legislation of 2008, which is probably inappropriate given the existence of an overarching statute concerned with juvenile justice in Angola.[36]

Chapter 5 (arts 49–51) incorporates the previously mentioned 11 commitments regarding the advancement of children's interests as defined by the government and its social partners.[37] These 11 commitments, adopted in 2011 by a Council of Minister's Resolution (Resolution no 5/08), are given 'force of law' via art 49(2) which provides that they constitute an integral part of the children's statute. The commitments apply across all areas of children's rights, civil and political, social and economic and include application in the family environment. They have to be implemented as a priority in government planning (see art 51, and the Regulation on the National Planning System Act no 1/11 of 14 January, referred to specifically in this article of the Angolan Children's Act). The 11 commitments feature in art 50(2) of the Act: life expectancy; food and nutritional security; birth registration; early childhood education;[38] primary education and professional training;[39] juvenile justice;[40] prevention of HIV/Aids and reduction of its impact on children and families;[41] prevention and mitigation of violence against children;[42] social protection and strengthening family capacities;[43] children and the media, culture and sport;[44] and finally children in the National Plan and in the Budget of the state.[45]

Even within the context of the 11 commitments, priority is required to be given to early childhood development (0–5 years of age), which harks to the genesis

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35 See generally the Angolan Juvenile Justice Act (Act no 9/96 of 19 April 1996).
36 Mandlate n 9 above, 143.
37 Including the United Nations Children's Fund (UNICEF).
38 Commitments No 1–4.
39 Commitment No 5.
40 Commitment No 6.
41 Commitment No 7.
42 Commitment No 8.
43 Commitment No 9.
44 Commitment No 10.
45 Commitment No 11.

of the Angolan Act: it was initially framed as an Act related to early childhood development and was only at the final hurdle expanded to apply to all children.[46]

From a broader perspective, the significance of the 11 commitments cannot be overstated in the quest to promote children's rights given that they identify clear goals, actors bearing responsibility for their implementation, coordination of the child protection system, coordination of the implementation of the Act more broadly, priorities, and timeframes for achievement.[47] A fuller discussion of these dimensions of the Act lies, however, beyond the scope of this chapter.

Chapter 6 (arts 52–59) and chapter 7 (arts 60–77) contain provisions setting out the system for the holistic protection and integral development of Angolan children and the respective guiding principles. Chapter 6, art 55, is relevant for the present purposes as it expounds the role of families in the envisaged system as discussed in the next section. Chapter 7 comprises a number of detailed articles which focus on early childhood development, on children with special needs,[48] on compulsory minimum health and water and sanitation services,[49] on nutrition,[50] early childhood education[51] and on birth registration.[52] Again, bearing the hallmarks of its initial conception as a law that would focus on children aged 0–5 years, these sections spell out in considerable detail the scope, nature and content of the duty (mainly upon state authorities) for the fulfilment of these provisions; again, however, a detailed consideration lies beyond the scope of this work although some are referred to in the conclusion.

Chapter 8 (arts 78–81) contains provisions regarding the support structures for the implementation of children's rights: these include legislative provision for a helpline,[53] the establishment of a national children's fund to receive and spend funding on activities and programmes to further children's rights and, notably, to promote activities which enhance the exercise of the right of the child to participate.[54]

Chapter 9 (arts 82–85) and chapter 10 (arts 86–88) make provision for budgeting as well as assessment of the implementation of the rights under consideration (monitoring and evaluation). This duty falls to a coordinating body called the *Conselho Nacional da Criança* (CNAC), which was established

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46 See Terms of Reference developed by UNICEF Angola for an expert report on the Angolan Children's Act and the implementation of the UNCRC and the ACRWC, copy on file with the authors.

47 For instance, by 2015 the Angolan government must increase the level of literacy among children to as much as 90% and reduce gender disparities in schools to 80%. See generally Commitment No 6.

48 Article 67.

49 Articles 70 and 71, respectively.

50 Article 72.

51 Article 74.

52 Article 73.

53 Article 78.

54 Articles 80 and 81, respectively.

in 2007. Generally, the CNAC was tasked with the responsibility to coordinate actions regarding the implementation of all policies and initiatives affecting children, and to that extent, it will oversee the fulfilment of the provisions of the children's statute as well.[55] The CNAC is also tasked with advisory functions in relation to matters pertaining to children. To this end, it assists the Angolan government with opinions or advice on matters concerning the subject under consideration.[56] Moreover, the mandates of the CNAC have a national dimension and their wide extent makes it a key body to exercise the coordination of children's rights and the implementation function across all levels of government, from top to bottom and vice versa.

The last part of the statute, chapter 11 (arts 89–93), contains transitional provisions about the entering into force of the Act, provides for the promulgation of Regulations in conformity with the Act, and it repeals instruments which are inconsistent with the new provisions embraced under this law.

Thus, it can be concluded that the Angolan children's statute covers many of the key aspects which form part and parcel of the international law normative framework regulating the subject at hand. The inclusion of the 11 commitments in the text of the law brings concrete advantages to the possibilities of furthering children's rights through budgetary actions in Angola. Of significant importance for this discussion is the fact that some issues covered in the statute under analysis relate to family law and the responsibilities of parents and caregivers, although there is nevertheless a dedicated Family Code still in existence. The next section provides a detailed discussion of some of the family law dimensions of the new Act in an endeavour to identify the gains made thus far in this specific area of child law reform.

IV SOME ELEMENTS OF THE ANGOLAN CHILDREN'S LAW IMPACTING ON FAMILY LAW

(a) Overarching role of the family in fulfilling children's rights

A starting point for the discussion on this section relating children's rights to family law under the Angolan statute is the fact that the family is an important societal institution which forms the basis of the community within which children's rights are supposed to be enjoyed.[57] To this end, children's rights can only be understood by gauging them within the environment within which they are exercised, and in particular, the family setting is viewed as the basic unit of

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[55] See Decree No 20/07 of 20 April 2007 on the establishment of the Angolan National Council for Children and the specific regulations (Decree No 20/07).

[56] See generally art 3 of Decree No 20/07.

[57] See Danwood Chirwa 'The merits and the demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 167.

society.[58] This is well established in Angolan law via (especially) art 55 which provides that the duty to educate and ensure the development of the child rests primarily upon the family, with parents being the first bearers of this duty.[59] This same section enjoins caregivers, including parents, to ensure fulfilment of children's best interests as their primary concern (art 55(3)); to ensure adequate guidance and direction for the child in the exercise of his or her rights, in an atmosphere of trust and affection (art 55(3)); and a duty is imposed at all levels and in all sectors of the state to provide support to families parents and caregivers to assist them to fulfil their child rearing duties (art 55(5)).

Further guidance is provided by art 9, which falls in the first chapter of the Act dealing with general provisions. The provisions states that:[60]

> '(1) Without prejudice to what is provided in the law, parents have the duty to provide for the maintenance, custody and education of their children.
>
> (2) In the best interests of their children, parents have the duty to guide them through the educational process and promote their wellbeing and development, as well as the duty to comply with and ensure compliance with judicial decisions.
>
> (3) Parents are also required to meet the expenses relating to the safety, health, education and full development of the child until such a time that the child becomes legally capable of providing for him or herself.'

Further to the above is art 21, which falls in section II of chapter 2(this section is entitled 'right to live in a family and community environment'). Article 21(1) provides for the right of every child to have a family, to know and to relate with his or her parents and other family members in a healthy and harmonious manner. The concluding paragraph of art 21 further requires the state to ensure within the terms of the law that the child preserves his or her identity, including nationality, family name and family relations. Again a broader (African) concept of family is provided for, and the article envisages in rather strong terms the preservation of ties with this kinship circle.[61]

That there is some overlap between art 9, art 55 and arts 21, 22, 25 and 26 is patent, and it is not clear why the role of parents and families needed to be addressed in three separate places in the Act. It is likely that this came about when the shift from a specialised Act devoted to early childhood changed to a

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58 See Binh for the role of the family in educating and socialising children, in Nguyen Binh 'The role of the family in educating–socialising children: The case of Vietnam' (2012) 4(2) *Current Research Journal of Biological Sciences* 173–181.

59 This is clear exposition of the broader concept of kinship and wider family circle as having duties towards children, which is prevalent in African custom and society.

60 See generally, art 9 of Act no 25/12 of 22 August 2012.

61 The Act does not provide for adoption: however, this may feature in the Family Code. Removal of children by reason of abuse or neglect, and possible termination of parental responsibilities and rights are not clearly spelt out in the Act and it has been concluded that the provisions on child protection remain weak in the overall schema of the Act (Sloth-Nielsen n 15 above, pp 14 and 26). Article 24(4) does, however, note that 'the prohibition or exercise of parental power shall only be declared pursuant to a judicial decision in a court of law'.

more generally applicable one, and that this issue was overlooked.[62] However, art 55 does bear the additional significance that it enshrines the duty upon the state to support parents and families in the fulfilment of their parental responsibilities, as required by both the UNCRC and the ACRWC.[63]

Additionally, it may be significant that reference is made to the need for parents to fulfil their responsibilities in 'an environment of trust and affection, based on respect and understanding',[64] which epitomises a rights-based approach cognisant of the child as an individual bearer of human rights and his or her own dignity. It turns on its head the often expressed view that in African culture, children are not perceived as bearers of rights and are rather seen as property of the family and clan.[65]

Importantly, art 24 grants men and women equal rights and responsibilities in respect of their children, which is an important advance in a patriarchal society based on customary law. Such equality in respect of the fulfilment of parental responsibilities and rights is also required by the African Women's Protocol.[66] No distinction is drawn on the basis of the marital status of the parents;[67] it is not known whether or not this provision in any way alters the provisions of the Family Code. However, it clearly overcomes the potential for discrimination based on whether children are born into patrilineal or matrilineal customary law systems. No provisions outline how these equal rights and responsibilities are to be exercised, nor what is to occur should disputes in the exercise of parental powers arise.

In keeping with international best practice, including the UN Guidelines on Children in Alternative Care, art 24(2) provides that in the best interest of the child, the lack of or limited availability of resources (ie poverty) is not a sufficient reason to determine the loss of or suspension of the right to exercise parental powers. Rather the child must remain within the natural family and

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62 As mentioned, it is also not clear the extent to which the sections described here alter, amend or confirm the provisions of the Family Code since the authors were not able to get access to this.

63 See art 18(2) of the UNCRC and art 18(1) of the ACRWC. This commitment from the state to support parents is reiterated in art 25 of the Act in a different language.

64 Article 55(4). See further art 26 which grants the child the 'right to grow up surrounded with love, care and understanding and in an environment of happiness, peace and security'. The child furthermore has the right to live in a family 'based in respect for its members, particularly the elders, and where the Angolan identity, traditions and socio-cultural values are strengthened' (art 26(2)).

65 Thoko Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (University of Pretoria Law Press (PULP), 2009) 116.

66 Article 6(c) and 6(i) of the protocol to the African Charter on the Rights of Women in Africa (African Women's protocol), adopted in the 2nd Ordinary Session of the General Assembly of the African Union, Maputo 2003. Angola ratified the African Women's Protocol in 2007.

67 See Julia Sloth-Nielsen, Nkatha Murungi and Lorenzo Wakefield 'Does the differential criterion for vesting parental rights and responsibilities of unmarried parents violate international law? A legislative and social study of three African countries' (2011) 55(2) *Journal of African Law* 203–229, for a study of disparate treatment of unmarried parents in three recent children's rights statutes, viz, Kenya, South Africa and Namibia.

child assistance programmes must be mandatorily developed (art 24(3)). Article 55 repeats this injunction, requiring the state at all levels to provide support to families, parents and caregivers to assist them to carry out the responsibility of upbringing their children fully. This is to be achieved, according to that article, through the establishment of child support institutions, facilities and services.

There is no express reference in the Act to the provision of financial support in the form of cash transfers to poor families, though expanding cash transfer schemes are being implemented for the most vulnerable families in many countries in the region, including Namibia, Tanzania, Kenya and South Africa. Even where the Angolan Act provides for the most vulnerable children, such as in art 77(2) providing for compulsory minimum services for the most vulnerable children, including emergency services, and with a focus on the first years of a child's life, social assistance in the form of direct transfers is not mentioned. However, art 76(2)(c) refers to the establishment of 'social reference centres' to prevent and follow up on situations of children at risk.[68]

(b) Violence against children in the family

The problem of violence against children in the home (parental corporal chastisement) is yet another area of children's rights which interfaces with family law. The link between the two can be discerned from the text of art 19 of the UNCRC, and obliquely in art 20(1)(c) of the ACRWC as well as more directly from the call made by the Committee on the Rights of the Child to the effect that states parties to the Convention must include in their respective family statutes in their domestic jurisdictions provisions which prohibit any form of violence committed against children.[69] To this effect, the prohibitions envisaged by the Committee include, but are not limited to, the need to address the problem of parental corporal punishment and other forms of cruel and inhuman and degrading treatment or punishment committed against children by their caregivers.[70]

In deference to recent studies on violence against children, and the calls in international and regional children's rights standards for violence against children to be prohibited, the Angolan child law unequivocally outlaws (in art 7 of the statute) any form of cruel treatment or violence committed against

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[68] These are not defined. There are no definitions included in the Act.

[69] See generally para 35 of Committee on the Rights of the Child General Comment No 8 on the Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, UN Doc CRC/GC/8 (General Comment No 8), UN Doc CRC/C/GC/8.

[70] In this regard see for example, para 1 of the Report of the Independent Expert for the United Nations study on violence against children, UN Doc A/61/299.

children.[71] However, contrasting to this clear statement, art 10 (guidance and discipline) muddies the water somewhat, it is submitted. Article 10 commences as follows:

> '… in safeguarding the right to respect of the dignity and physical, mental or moral integrity, he or she has the right to be guided and to be disciplined in accordance with his or her age, and his or her physical and mental condition.'

The next part of art 10 continues that 'no corrective measure applied to a child can be justified if by virtue of his or her tender age or any other reason the child is unable to understand the purpose intended by the measure'. Unless the translation from Portuguese is faulty, it is suggested that this provision (using the words 'corrective measure') could be used to justify the imposition of corporal punishment by parents provided the child understands the purposes of the measure. The subclause clearly permits corrective measures but does not detail what these may – or may not – comprise. Arguably, this is even weaker than the reasonable chastisement defence available in Anglophone jurisdictions, as at least proportionality in some degree is required for a defence of reasonable chastisement to succeed.[72] The formulation of the second part of art 10 provides no such limitation on the form or intensity or proportionality of the 'corrective measure'. Further, it is arguably confusing to use words such as 'discipline' and 'corrective measure' in the same chapter of the Act.

The Committee on the Rights of the Child's General Comments No 8 (on corporal punishment)[73] and No 13 (on violence against children)[74] refer, and constitute the acceptable international standard in this area: corporal punishment in all settings should be prohibited. There is also no reference to the setting(s) in which the overall prohibition in art 10 applies, since it does not single out guidance and discipline by parents, guardians or caregivers. As it falls in a general section headed 'General rights of the child', it could be concluded that it applies in all settings. This leaves too much uncertainty and vagueness and opens the door to diminishing the protection accorded to a child.

Further to the above, though, art 8 of the 2012 Angolan Act requires all citizens to protect the child from 'inhuman, cruel, violent, exploitative, humiliating, compromising or discriminatory treatment or other forms of treatment against the dignity and physical integrity of the child'; the question

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71 Article 7 provides that 'the child shall not be treated in any negligent, discriminatory, violent or cruel manner, nor shall he or she be subjected to any form of exploitation or oppression. Any practices violating these prohibitions shall be punishable under law'.

72 See generally, Kleynhans for details on the concept of reasonable chastisement and the defences thereto as used in the South African context, in Deidre Kleynhans *Considering the constitutionality of the common law defence of 'reasonable and moderate chastisement'* (unpublished LLM thesis, University of Pretoria, 2011).

73 See generally, CRC Committee General Comment No 8.

74 Committee on the Rights of the Child General Comment No 13 on the Rights of the Child to Freedom from All Forms of Violence (CRC Committee General Comment No 13), UN Doc CRC/C/GC/13.

arises as to the relationship between art 8 and art 10, which is not clear. What if the corrective measures permitted by art 10 contravene the provisions of art 8?

Mention should also be made of the provisions of art 24, which poses potential problems in relation to parental discipline. Article 24(1) states that '[e]ither parents, the father or the mother, can exercise *parental powers* on equal conditions as provided under the terms of the law'.[75] The reference to parental powers (rather than the modern notion or parental responsibilities and rights) raises the spectre of a return to an old style conception of parental authority as including rights to physical chastisement.[76]

Article 76(2),[77] however, can be lauded as a fairly innovative and comprehensive response to the reports of the UN Secretary General's Special Representative on Violence against Children. This article contains a detailed elaboration of measures to be undertaken to combat violence against children generally, including: the dissemination and promotion of information in the media relating to violence prevention; the provision of services of protection and social assistance to strengthen family capacity and improve basic services and eliminate the impact of poverty upon children who are orphaned, those who are vulnerable and those with special needs; the identification of high-risk families on the basis of general health tests and in schools; ensuring broadly the protection of children against all forms of abandonment, discrimination, oppression, exploitation and abusive exercise of authority whether in the family or other institutions; monitoring the implementation of standards related to the functioning of child protection institutions; ensuring access to legal protection for children who are victimised or for those who witness crimes and acts of violence, as well as provision of psycho-social support for such children; and locating children who are separated from their families with the aim of reunification. The remainder of the provisions of this article spell out which government department bears primary responsibility for implementing each of the above duties.[78]

It cannot therefore be concluded that the Angolan Act has failed to pay attention to the issue of violence against children; despite some initial misgivings about the manner in which parental chastisement has been provided for (as highlighted above), the Act does comprehensively deal with the issue at a societal level.

(c) The duties of the child

The conceptualisation of duties for children is one of the prominent features of the African Children's Charter. It is unique in relation to other children's rights

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[75] Emphasis added.

[76] See www.endcorporalpunishment.org for a list of African countries which have or have reported to have prohibited corporal punishment in all its manifestations.

[77] This article falls in the part of a chapter dealing with compulsory minimum services and duties.

[78] See generally, art 76(3)–(7).

instruments, which are silent on the subject.[79] As Chirwa notes, the incorporation of duties for children under the African Children's Charter has the effect of giving implied recognition of the fact that like adults who have duties regarding the promotion and protection of rights and welfare of the child, children, too, have responsibilities depending on their evolving capacities.[80] In the family setting, the exercise by children of their duties contributes to the general well-being of family members. For example, if they respect elderly family members, it is more likely that the elders will also respect children's rights.

Importantly, like the African Children's Charter, the Angolan law incorporates duties for children. Relevant to this discussion are provisions in section V of chapter 2 (which chapter is titled 'Rights and Duties of the Child'). Article 34 incorporates the duty of the child to respect his or her parents, family members and elders;[81] art 35 alludes to the duty to participate in the life of the family and the community, in the preservation of the environment, and in the development of the country in accordance with the child's age and maturity; art 36 enshrines the duty to contribute towards the strengthening of the family and the cultural values. Furthermore, according to art 37, the child also has 'the duty to learn and to respect the principles of good education, positive social conduct, and to cultivate respect for the institutions of the nation so as to enable the child 'to become an active agent of the community'.[82] All of these duties contribute towards the creation of families based on respect for the views and the values of the collective group of its entire members.[83] To this end, it can be argued that considerable weight should be attributed to the children's statute of Angola for its attempt to develop stronger family ties based on enjoyment of rights, exercise of respect and responsibilities for all members, including adults and children alike.[84]

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79 See Chirwa n 57 above, 169.

80 As above. See also Sloth-Nielsen and Mezmur n 32 above, 159–189.

81 Teachers, educators, elderly persons, persons with disabilities are also referred to in this part of the text.

82 See arts 34–37 of Act no 25/12 of 22 August 2012.

83 It is laudable that the attribution of individual duties for the realisation of the common good of the community is one of the characteristics of the African tradition. For details see Sloth-Nielsen and Mezmur n 32 above, 160–162.

84 However, the deliberate placement of art 31 of the African Children's Charter at the end of the list of rights is done to emphasise that duties do not negate or override the rights of the child. Moreover, the Charter text subjects the duties it elaborates to adherence to all the previously articulated rights. Therefore the duty to contribute to the well-being of the family cannot be used to justify breaches of other provisions (e g protecting from child labour). The position of the articles dealing with duties in the Angolan statute is also a bit odd. It does not follow the customary position (as in other comparable legislation) of being placed after the section on rights, but is far removed from the section dealing with the rights of the child (which are in chapter 1, section 1: General Rights of the Child).

(d) Children's participation rights in the Angolan child law

Possibly as a result of its original conception as a policy or statute that would focus on early childhood development only, various dimensions of a children's right to express views and have them accorded due weight are absent from the current text. For instance, there are no provisions spelling out an age of consent to medical treatment or surgical operations, such as is the case with ss 129–134 of the South African Children's Act 38 of 2005.[85] The right to representation in judicial or administrative proceedings affecting the child (art 12(2) of the UNCRC) does not appear.[86] Even in the part of Act dealing with juvenile justice, as referred to above, express provision for legal assistance is not provided (though this may feature in the Juvenile Justice Act).[87]

Further, art 65 (which is entitled 'principle of the respect for the rights of the child') seeks to embody in legislative form a principle that guarantees a child the exercise of his or her rights (presumably, those laid out in art 1 of the Act which deals with the rights of the child, although this is by no means clear) and which has the objective of facilitating the child's development, his or her protection and *his or her participation in society*. Whilst not being wrong, this is not the same as providing for a right to participate in decisions on matters affecting the child, which may be taken at household, community, judicial or other level, as well as more broadly on a societal level.

Similarly, the child in institutional care has the right to participate in the life of the surrounding community (art 41(c)), but there is no reference to participation in the organisation of the institution itself where the child is of an age and maturity to participate, such as where children have their own representative body which can liaise with management.[88]

This can be seen as a gap in the overall scheme of the law insofar as it purports to domesticate international children's rights principles.

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85 See ss 129–134 of the South African Children's Act 38 of 2005.

86 The right to representation is an important part of the due process rights accorded to children in international law standards. Odongo highlighted the need to domesticate these standards in national legislation. See generally, Godfrey Odongo *The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context* (unpublished LLD thesis, University of the Western Cape, 2005).

87 *Lei do Julgado de Menores* or Angolan Juvenile Justice Act No 9/96 of 19 April 1996.

88 It is common in this regard to enhance the participation of children in child or youth parliament/council. This type of representative body is growing on the continent in countries like Nigeria and Mozambique, for example.

V SOME OF THE PRESSING GAPS IN THE ANGOLAN CHILDREN'S ACT

Despite the incorporation in the Angolan children's statute of multiple elements of children's rights as highlighted above, some issues have not been addressed sufficiently. A few of these are detailed next.

(a) Weaknesses relating to the African Children's Charter

The Children's Act makes no clear provision covering the specificities of the ACRWC in several instances. One is the general prohibition against harmful social and cultural practices; in addition, it has become customary for a Children's Act to identify locally specific harmful cultural and social practices and to ensure legal protection for children through prohibiting them by name, or by regulating them. Examples in point include legislation prohibiting female genital mutilation or cutting (where this prevails) and laws prohibiting or regulating virginity inspection and circumcision, by requiring consent by a child over a certain age.[89] Criminal sanctions for violations are often provided for in the body of the Act. This is a gap in the Angolan context, as no references to harmful cultural practices occur.

Another example of where the specificities of the ACRWC have not been explicitly incorporated relates to the introduction of a minimum age of marriage of 18 years; the Charter provides for no exception in this regard, including for marriages under customary law. Forced marriage of children can also be usefully addressed in an overarching children's statute, and a criminal offence created for anyone, including a parent or guardian, who gives a child in marriage or betroths a child below the age of 18 years.[90]

The prohibition of the use of children in begging is a primary response to the exploitation of children in the African Charter text.[91] Many African countries have (or are in the process of) domesticating this principle (eg Namibia and Kenya). The 2012 Angolan Act does not refer to this important provision and thus misses again the opportunity to adhere to Charter norms.[92]

(b) Weaknesses relating to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

There is evidence of partial domestication of some of the elements of the Optional Protocol[93] in the text of the 2012 Angolan Children's Act. For example, art 30 deals with protection of children regarding the internet, and

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89 See for example s 12(5) of the South African Children's Act 38 of 2005.

90 Sloth-Nielsen n 15 above, 2.

91 See art 29 (b) of the African Children's Charter.

92 Sloth-Nielsen n 15 above, 2–3.

93 Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, (Optional Protocol on the Sale of

art 32 concerns the protection of children against inappropriate materials. Moreover, art 33 addresses the protection of children against abduction and abuse, and the provisions of art 33(1) also refer to sale of and traffic in children. However, there are aspects that have not yet been fully covered. These include, for instance, concretely prohibiting the sale of children, since art 33 is not strongly worded and simply requires the state to adopt measures designed to avoid, punish and implement effective measures against the abduction, sale and traffic of children and does not expressly outlaw these. It should be observed that art 3 of the Optional Protocol requires express coverage of the listed behaviours in criminal or penal law. In the context of children's rights and family law, the incorporation of these standards can provide relief for the problem of children who are sold or trafficked by their own family members, as families are sometimes involved in such illicit practices.[94]

The Children's Act can be criticised for failing to make provision for the extraterritorial application of criminal laws relating to the sexual exploitation of children for offences committed by Angolans outside the borders of Angola, and for the prosecution in Angola of citizens who perpetrate sexual exploitation of children outside the borders of Angola. Once again, this is of some importance as relatives can also be involved in illicit acts of sexual exploitation of children.[95] The law also lacks detailed provisions dealing with trafficking to ensure that trafficked children are provided with legal protection; including extraterritorial application of anti-trafficking provisions for acts of trafficking committed outside Angola; and providing specific penalties for traffickers.

(c) Weaknesses relating to the Hague Convention on Civil Aspects of International Child Abduction

Angola has not ratified this treaty,[96] but it is a worthy addition to the child protection armoury as it provides for the establishment of mechanisms to ensure the prompt return of children wrongfully removed from their place of habitual residence by a person with rights of custody (usually a parent). The lead for this is to be found in art 22(2) of the Angolan Act which provides for the '[s]tate to undertake all measures to ensure that the child is not separated from his or her parents without their consent'. Therefore, the adoption of the International Child Abduction treaty would be an important measure to give life to art 22(2).

Children), GA Res 54//263, Annex II, 54 UN GAOR Supp (No 49) at 6, UN Doc A/54/49, Vol III (2000), entered into force on 15 January 2002. Angola ratified the Protocol in 2005.

94 See generally, International Programme on the Elimination of Child Labour (IPECL) *Child trafficking – The people involved: A synthesis of findings from Albania, Moldova, Romania, and Ukraine* (The International Labour Organisation (ILO) and IPEC, 2005).

95 There is currently a case being investigated in Namibia involving sexual exploitation committed in Angola by a citizen with joint Namibian and Angolan citizenship (personal information received from the Namibian Police, February 2013).

96 Hague Convention on Civil Aspects of International Child Abduction adopted on 25 October 1980 and entered in force in 1983.

Although there is separate Family Law Code[97] which governs aspects of the parent–child relationship, it cannot be left out of the equation that the 2012 Angolan Act also contains family law provisions, as highlighted above. Yet the interplay between the Family Code and this new law remains murky, and it is not clear how the two complement each other.[98] Although express reference is made in the body of the 2012 Act to the Juvenile Justice Act, no internal references to the Family Code could be found. This must be a subject for further research.

(d) Weakness regarding the Convention on the Worst Form of Child Labour

Possibly because the 2012 Act was originally conceptualised as a law dealing only with early childhood development,[99] it is silent on child labour, which is a significant gap. Measures to domesticate the above Convention need to be considered, such as outlawing bonded labour and slavery, prohibiting the involvement of children in hazardous work, prescribing the specific forms of work to be regarded as hazardous in the Angolan context including those that are implemented within the household and in family settings, and establishing the link between trafficking and exploitative forms of labour. Even if child labour is dealt with in labour legislation, there needs to be a proper link to this Act, and cross-references added. Moreover, labour legislation should be scrutinised carefully to ensure that child labour (including in its worst forms) is comprehensively covered.[100]

In the absence of a series of provisions dealing with child labour, the provisions of art 32 of the UNCRC and art 15 of the African Children's Charter remain under-domesticated (in addition to the ILO Convention referred to above). Moreover, the risk remains for children to be used in the family setting to provide labour or as means of support for elderly family members instead of going to school to obtain an education.

VI BENEFITS AND GAINS OBSERVED

The genesis of the Act as a statute focusing on early childhood development has resulted in several substantive provisions which can be regarded as groundbreaking. The focus on children under 5 remains evident from numerous sections, where services to this age group are stated to be the priority (see for example art 51(1) (on implementation of the 11 commitments); art 56(b) and (d) (allocation of budgets for early childhood); article 60 (strengthening the mechanisms for the exercise of children's rights especially in early childhood),

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97 Act No 1/88 of 20 February 1988 (Family Law Code of Angola).

98 See Sloth-Nielsen n 15 above, 5.

99 See Aquinaldo Mandlate *Draft report on the analysis of the Angolan Child Act* (2012) pp 3–4, copy on file with the authors.

100 See Sloth-Nielsen n 15 above, 7.

etc. This focus also accords well with the 11 commitments of the Government of Angola, since commitments 1, 2, 3 and 4 relate to early childhood. The Act provides expressly for a national vision on focusing service delivery on early childhood (up to 5 years of age) in art 61, and for an integrated approach to service delivery and actions aimed at promoting the child's development in early childhood (art 51(2)).

Some further innovations include art 17 which provides for substantive services for pregnant women and newborns. These are some of the most direct obligations in the entire Act. For instance, the obligation upon public and private entities to ensure the provision of health care services for pregnant women and newborns, to keep records of all assistance in separate files, to undertake tests to diagnose any abnormalities, to provide information on health, nutrition, hygiene and the advantages of breastfeeding, to co-operate with the competent authorities to ensure registration of birth and to ensure that newborns are kept with their mother, all enshrine progressive and fairly key maternal health policy directives in legislative form.[101]

Similarly, the provisions of art 18 on breastfeeding, which applies to all public and private institutions, constitute an advance when compared to other children's statutes in the region. In the same vein, the provisions of art 20 of the Act on vaccinations and the obligation upon caregivers to vaccinate their children upon recommendation by national and international health bodes removes any parental discretion in accepting the utility of vaccinations as a preventive health measure.[102]

In a similar vein, art 63 provides for a right to education in early childhood. Whilst there are extensive provisions in the South African Children's Act related to early childhood and development (in fact a dedicated chapter is devoted to this),[103] the South African example does not go so far as establishing this as a *right* of the child. The Angolan Act therefore advances the legal framework in this respect. Further, this is to be provided free of charge, and is to be compulsory. Whilst much has been written about free and compulsory basic or primary education (see art 28 of the UNCRC, for instance), this is the first time that policy or legislation authorising free and compulsory early childhood education has been encountered in the African context. Obviously, if this is feasible for a country of the socio-economic and developmental status of Angola, it would be regarded as a hugely progressive advance in the African context, given that very few children would have access to early childhood education at their own expense. Note that art 63(1) mentions that the state 'must guarantee free and compulsory education in early childhood *from the very first days of a child's life*.'[104]

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[101] See generally art 17.
[102] See generally arts 18 and 20.
[103] See chapter 6 of the South African Children's Act 38 of 2005 which is dedicated to this theme.
[104] Sloth-Nielsen n 15 above, 25, emphasis added.

The Angolan Children's Act of 2012 contains commendable attention to detail as regards HIV/Aids: notably in art 75, entitled 'HIV/Aids'. These spell out specific duties for the health sector, and focus on the survival and development of the child. However, they are explicitly focused on the infant (art 1 refers to the first years of the child's life) and fail to take account of concerns regarding HIV/Aids and sexual and reproductive health in relation to teenagers (see too General Comment No 4: Adolescent Sexual Health and the Rights of the Child).[105] Hence, issues relating to consent to HIV testing of the competent child are not dealt with.

The early childhood development thrust of the Act is underscored by detailed sections on nutrition (art 72) and birth registration (art 73). These are amongst the longest sections of the entire Act, and are suitably specific, especially as regards the section on nutrition. The sections on birth registration are more detailed than in any other comparable (children's) statute, and most noticeably provide for free registration immediately after birth (art 73(2)(a)) and for all children up to 5 years of age. It would have been good to have free birth registration provided for children who have not yet been registered (late registration) to catch up on all those who remain outside the birth registration system, but as a start, free registration for all from 0 to 5 is a very positive development.[106] Compulsory minimum services for early childhood health services (art 70) and for water, sanitation and hygiene (art 71) also set new parameters in children's law and must therefore be welcomed.

VII CONCLUSIONS

The Angolan Children's Act of 2012 is an aspirational document. It aims to coordinate services (with a focus on early childhood development), to enshrine rights and to provide a platform for development. Containing many innovative provisions,[107] it clearly sets Angolan authorities at all levels on a path to the improved fulfilment of children's rights. Insofar as these rights are best realised in a family environment, the Act privileges the family as the site where services are to be concentrated, and ensures that separation of children from their families will be a last resort. It can in many respects serve as a benchmark for statutory developments in the region.

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[105] Committee on the Rights of the Child General Comment No 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child (CRC Committee General Comment No 4), UN Doc CRC/GC/2003/4.

[106] Sloth-Nielsen n 15 above, 26.

[107] Mandlate expressed a similar view in Aquinaldo Mandlate *Child law reform in Africa: What lessons can we learn from the Angolan experience?* (paper presented at the 16th Miller du Toit Annual Conference, 12 April 2013, Clocktower Hotel, Cape Town, South Africa).

Australia

NEW FRONTIERS FOR FAMILY LAW

Lisa Young[*]

Résumé

Ce texte s'intéresse à la manière dont les tribunaux australiens de la famille traitent de certaines questions juridiques qui sont parmi les plus difficiles auxquelles le monde moderne est confronté. Dans un premier temps, il propose un aperçu de l'évolution du mouvement en faveur du mariage entre personnes de même sexe et fait état des questions constitutionnelles que posent les législations étatiques et fédérale à ce sujet. Dans un deuxième temps, le texte traite de la législation fédérale de 2009 concernant les couples en union de fait et qui, en couvrant tant les relations homosexuelles que les relations multiples, va beaucoup plus loin que les législations étatiques. La question se pose des liens entre le mariage et l'union de fait et de l'impact de la jurisprudence émanant des différents tribunaux australiens concernant les conjoints de fait. La dernière partie fait état d'une question qui est sans doute spécifique à l'Australie et qui touche au traitement des troubles de l'identité sexuelle dont on se demande s'il exige, en raison de sa nature très particulière, une autorisation judiciaire. L'expérience enseigne que les contours des facteurs décisionnels en matière d'interventions médicales particulières, développés dans le cadre précis de la stérilisation de mineurs souffrant de troubles mentaux, sont difficiles à établir, ce qui incite les parents et les hôpitaux à solliciter des autorisations judiciaires dans de nombreuses circonstances. Alors que la chambre plénière de la Cour familiale de l'Australie est actuellement saisie de la question, l'auteur se demande si les critères originels devraient s'appliquer à ce type de dossiers très complexes.

I INTRODUCTION

The very nature of family law is such that it constantly throws up new and complex questions to be answered. Radical transformation in family life over recent decades has generated considerable public debate in many jurisdictions and much legislative reform, as parliaments seek to keep family laws relevant and appropriate in a modern context. Moreover, traditional areas of family law are having to be applied to new and complex issues. It is timely therefore to report on two taxing issues currently facing Australian family courts[1] as a result

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1 Australia has a system of specialist family courts, comprising the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia. Matters may also be heard in Magistrates' Courts.

of rapid and radical social change: what is a 'de facto relationship' under the new federal legislation and how does it differ from marriage; and whether family court approval is required for treatment of children with gender identity dysphoria.[2] However, an update on the slow move towards the legalisation of same-sex marriage is provided first.

II SAME-SEX MARRIAGE

At the end of the last chapter on Australia, it was said that same-sex marriage might well be something that was a reality by the time of the next edition of this publication. Certainly, it is generally accepted that the Australian community favours legalisation of same-sex marriage. While New Zealand and France have now both made this move, same-sex marriage has not been legalised in Australia as yet. As noted in last year's chapter, the minority Labor government has changed its platform in favour of same-sex marriage. However, in making it a conscience vote it is difficult to see how the minority federal government will pass any such law, as the Liberal opposition party remains opposed and persists in denying its members a conscience vote. The question now looming is whether the states of Australia can legislate to permit same-sex marriage.[3]

Australia's constitution gives the federal parliament the power to make laws with respect to 'marriage' (s 51(xxi)). This is a power held concurrently with the states. Thus, the states have some residual powers to legislate, provided the Commonwealth has not in effect legislated so as to preclude state legislative activity. In this case, the relevant federal legislation is the Marriage Act 1961 (Cth), which regulates marriage and provides in s 5(1) that 'marriage' means 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. This definition was inserted in 2004 and derives from English case-law.[4] There are two key constitutional issues that arise in this context. Is the word 'marriage' in the Constitution limited to heterosexual unions, in which case the power to legalise same-sex marriage lies with the states? Alternatively, if same-sex marriage is within the Commonwealth's legislative powers, does the current federal legislation preclude state legislation on this topic (i e is the federal legislation only choosing to regulate heterosexual marriage, thus leaving room for state legislation, or is it seeking to exclude the possibility of any Australian law permitting marriage which is not between a man and a woman)?

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2 At the recent 6th World Congress on Family Law and Children's Rights, held in Sydney, March 2013, quite a number of papers were devoted to this topic.

3 For a detailed discussion of this issue see L Taylor 'Getting over it: The future of same-sex marriage in Australia' (2013) 27 *Australian Journal of Family Law* 26. This article provides a useful and detailed discussion of the road to same-sex marriage in Australia and the constitutional issues involved.

4 *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 1t 133 (per Wilde JO, later Lord Penzance).

These are clearly live issues, given that in recent years we have seen both federal and state bills introduced aimed at legalising same-sex marriage. Four separate federal bills have been introduced, two of which have since been defeated.[5] However, so long as the Liberal opposition party refuses its members a conscience vote,[6] it seems unlikely either of the remaining Bills will be passed, though Australia's former Prime Minister, Kevin Rudd, has recently spoken out in support of legalising same-sex marriage. The Marriage Equality Amendment Bill 2012 (Cth) is expected to be considered by the House of Representatives in early June 2013. South Australia, Victoria, Tasmania, New South Wales and Western Australia have all seen legislative activity in this area, with Tasmania's Bill having already been defeated (there are also moves in the Australian Capital Territory). Again, passage of any Bill will depend on whether parties allow their members a conscience vote; this was not the case in Tasmania though will be in some jurisdictions.

The complex constitutional arguments as to where legislative power lies in this regard, and its limits,[7] are too complex to outline here. They may only be resolved by Australia's High Court and the passage of any of the state Bills will no doubt lead to a constitutional challenge. The High Court has had little to say on this issue to date and commentators' views differ on the likely outcome.[8]

The issue of same-sex marriage in Australia might be seen as primarily one of discrimination in terms of the right to marry, as Australian same-sex couples can access federal de facto relationship legislation which provides them with remedial relief (ie property settlement and 'spousal' maintenance) on the breakdown of their relationship.[9] In this regard, however, they suffer the same problems as de facto heterosexual couples, namely the difficulties of establishing whether theirs is a 'de facto' relationship (see further below). However, whereas a heterosexual couple can avoid such difficulties by marrying, same-sex couples may not. Nor is registration of a relationship in those states where that is possible conclusive of the existence of a de facto relationship; it is a just a relevant consideration.[10] Further, the rights to relief only arise on breakdown of the relationship for de factos, not during its subsistence as for married couples. Another difficulty is that with the move to equate remedies for de facto couples with married couples has come considerable uncertainty, primarily as to establishing when a de facto relationship begins and ends. This is an uncertainty that cannot be avoided by

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5 Marriage Equality Amendment Bill 2010 (Cth); Marriage Equality Amendment Bill 2012 (Cth); Marriage Amendment Bill 2012 (Cth) (this Bill was not passed); and Marriage Amendment Bill (No 2) 2012 (Cth) (this Bill was not passed).

6 The governing Labor party's permission for a conscience vote might be seen as little more than an attempt to have a foot in each camp: favouring same-sex marriage in its platform but ensuring it will not be enacted precisely because it is a conscience vote. There is a strong argument that a conscience vote should not be permitted on a matter involving discrimination.

7 See Taylor, n 3 above.

8 Ibid.

9 Family Law Act 1975 (Cth) (FLA), Pt VIIIAB.

10 For a discussion of relationship registration in Australia, see L Young, G Monahan, A Sifris and R Carroll *Family Law in Australia* (LexisNexis Butterworths, 8th edn, 2013) [5.11]–[5.12].

same-sex couples. Finally, same-sex couples may face problems beyond those that may be encountered by many heterosexual couples in establishing the existence of a de facto relationship, as the factors relevant to establishing a de facto relationship draw heavily on traditional notions of marriage.[11]

III DE FACTO LEGISLATION – THE DIFFERENCE BETWEEN MARRIAGE AND 'DE FACTO' MARRIAGE IN AUSTRALIAN LAW

Since 1 December 2009,[12] couples in a 'de facto relationship' in Australia have had access to the Family Court of Australia to have their property and maintenance disputes determined in the same way as married couples. Prior to this there was a variety of state-based legislation providing relief for separated de facto couples. Under the federal law, a de facto relationship is one where, 'having regard to all the circumstances of their relationship' two unrelated people 'have a relationship as a couple living together on a genuine domestic basis'.[13] There is then a list of what those 'circumstances' may include. The question of when a de facto relationship exists is now a much contested issue in Australian courts, as a threshold question to obtaining property or maintenance orders.[14]

It is not necessary to rehearse here the arguments that have been made over past decades, in many jurisdictions, in favour of such legislation. Equally, many have raised concerns about heading down this path.[15] At its core, concern about the economically vulnerable position of (more commonly) women in traditional de facto relationships has driven this reform. However, the legislative regime now in place in Australia goes much further. Partners in same-sex and multiple relationships can also access the de facto provisions.[16] That is, a person may be in a de facto relationship when they are married to someone else, and also when they are in another de facto relationship. The gender of the parties is not important. Perhaps it is not surprising, therefore, that there have been judicial statements to the effect that, in applying the new de facto legislation, 'it is inappropriate to draw parallels between the concept of

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11 Note for example the similarities between the relevant considerations in FLA, s 4AA(2) and the description of *consortium vitae* (ie the marital relationship) in cases such *as Marriage of Todd (No 2)* (1976) 1 Fam LR 11,186 at 11,188. However, there have been some encouraging statements highlighting these issues; see *Barry v Darymple* [2010] FamCA 1271 at [280].

12 The federal government obtained legislative power in this regard through a referral of powers that took place over a period of years. In South Australia, where the referral of power came later, the relevant date is 1 July 2010. Western Australia has its own state Family Court and did not refer its powers in this regard; it has legislation similar to that in the FLA (the Family Court Act 1997 (WA)), and the relevant date there is 1 December 2002.

13 FLA, s 4AA(1).

14 See L Young, G Monahan, A Sifris and R Carroll *Family Law in Australia* (LexisNexis Butterworths, 8th edn, 2013) [5.95]ff on the principles developed in this regard.

15 Indeed, it may well be that those who opposed this legislative trajectory are voicing their concerns today in relation to same-sex marriage.

16 FLA, s 4AA(5).

a de facto relationship and marriage'.[17] Moreover, there has been an expressed judicial position that not too much can be taken from interpretations of what 'de facto relationship' means, arising under the state legislation (which preceded federal legislation and still operates). However, the judiciary have not adopted a uniform approach on these matters.

These comments raise some interesting questions. As a matter of substance, what is the difference between a marriage and a de facto relationship and, for the purposes of family law, is a de facto relationship something different depending on the jurisdiction? To what extent should, or do, judges draw on notions of marriage in identifying a de facto relationship? What do the answers to these questions mean for de facto couples?

These questions are inextricably linked, as they depend on whether there is some common core to what we mean by marriage and the concept of a de facto relationship, or whether they are essentially different, as suggested by Mushin J in *Moby v Schulter*,[18] who cautioned against drawing parallels between marriage and de facto relationships. It is true that de facto couples do not go through a marriage ceremony, may be same-sex and will not commit an offence by having multiple relationships of this nature.[19] However, de facto couples may register their relationship in some jurisdictions and married couples can (legally) be both married and living in one or multiple de facto relationship, including with someone of the opposite sex. Nor is it accurate to say, as Mushin J suggests, that a mutual commitment to a shared life is *required* in marriage, but only a consideration relevant to the existence of a de facto relationship.[20] The cases upholding marriages entered into solely for immigration purposes establish that. It is true that there are some differences in the state de facto provisions and the federal provisions, including in the wording used to describe what is meant by a 'de facto relationship'. However, do those differences change the fundamental nature of what we mean by a de facto relationship in these different pieces of legislation? There is insufficient space to consider in depth the rules of statutory interpretation here. However, a fundamental principle is that interpretation of a phrase ('de facto relationship') with multiple meanings is most forcefully guided by the purpose of the legislation. While the terms of the legislation may differ slightly across time and jurisdiction in the way they try to convey the meaning of this phrase, it cannot be argued that there is any unambiguous understanding of what the phrase means in each, or any, Act. Thus, the purpose of the legislation *must* be instructive.

To a non-lawyer it would seem inevitable that, in applying the de facto relationship provisions, parallels with marriage will be drawn. From a legal point of view, this arises by virtue of the policy goal of de facto legislation

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17 *Moby v Schulter* (2010) FLC 93–447 at [163] per Mushin J.

18 (2010) FLC 93–447. This statement has been adopted in some later decisions, eg *Volen v Backstrom* [2013] FamCA 40 at [32].

19 Factors identified by Mushin J at [164] as distinguishing the two concepts.

20 Another of Mushin J's distinctions.

which has influenced the way the legislation is framed. The mischief sought to be remedied by this legislation was providing to couples in 'marriage-like' relationships a remedy on breakdown of that relationship to ensure they are not unfairly economically disadvantaged by the role divisions within those relationships.

The factors relevant to establishing the existence of a 'de facto relationship' are arguably an attempt to encapsulate the various common elements of marriage; they are the very hallmarks of a traditional marriage:

- common residence;
- a sexual relationship;
- financial interdependence and financial support;
- jointly owned property;
- mutual commitment;
- care and support of children; and
- public reputation as a couple.[21]

The more of the above markers in a relationship, the more likely a court will identify it as a 'de facto' relationship. After all, what does 'de facto' mean in this context, if not a 'de facto' marriage? Historically it was recognised that there was a difference between a marriage in fact (a 'de facto' marriage) and a (de jure) marriage at law. Thus, when the Attorney-General referred this issue to the New South Wales Law Reform Commission (leading to the first remedial legislation of this sort in Australia), the terms of reference were:[22]

> 'To inquire into and review the law relating to family and domestic relationships, with particular reference to the rights and obligations of a person living with another person *as the husband or wife de facto of that other person*, and including the rights and welfare of children of persons in such relationships.'

The early New South Wales legislation referred to living together 'as husband and wife on a bona fide domestic basis'. Thus, it was precisely because these couples found themselves in the same situation as separated married couples that the legislation was enacted. While the rights and remedies afforded de facto couples at that time may not have been precisely the same as married couples enjoyed under the FLA, over time it has been accepted that this should not be the case, hence the move to equivalent federal provisions. At the same

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[21] The other factors are the length of the relationship and whether the relationship is a registered one.

[22] NSW Law Reform Commission *De Facto Relationships*, Report 36 (1983) at [1.1] (available at www.lawlink.nsw.gov.au/lrc.nsf/pages/R36CHP1; emphasis added; accessed 10 May 2013).

time we have accepted that same-sex couples should be afforded these remedies, as should couples with multiple relationships. The very reason that we need to do this, is because the state will not permit these couples to marry; however, the state then provides these couples access to equivalent property/maintenance laws because, *for that purpose*, there is no reason to treat them differently. The potential for economic disadvantage is the same. There may (or may not) be reasons for denying same-sex couples the right to marry; but whatever those reasons may be, the legislature has made it clear that those arguments do not apply in the context of providing relief under family law legislation.

An historical, contextual consideration of the list of factors that are relevant to identifying a de facto relationship under state legislation (and now federal legislation) firmly identifies them as reflecting perceived notions of the common elements of marriage. However, as indicated above, it has been suggested that the analogy with marriage might be misplaced when interpreting the federal legislation and that reference to case-law interpreting the meaning of 'de facto relationship' in the state schemes is misplaced.

The comments of Reithmuller FM in the 2010 case of *Baker v Landon*[23] have been cited with approval[24] on these points. This case concerned the question of whether a man was in a de facto relationship with the mother of a child, at the time the woman underwent an assisted reproductive procedure; if he was, then he was legally the father of the child.[25]

Bender FM, in *Dakin v Sansbury,*[26] summarised Reithmuller FM's (relevant) conclusions as follows; next to those conclusions (in italics) are responses:

- 'the definition does not require an exclusive relationship and thus … is broader than a "marriage like" relationship which would ordinarily require some consideration of exclusivity' – *however marriage is not exclusive in that a person may be married and in one or more de facto relationships at the same time*;

- '… there are differences between that legislation and the Family Law Act 1975 in terms of wordings and the relevant considerations with the Family Law Act 1975 referring to a relationship as "a couple living together on a genuine domestic basis" rather than "adults who live together as a couple" that is referred to in the earlier mentioned legislation' – *however the question is not whether the words are precisely the same, but whether that necessarily requires an interpretation that they are directed at different relationships*;

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23 [2010] FMCAfam 280.

24 See *Dakin v Sansbury* [2010] FMCAfam 628 at [13]; *Kelly v Temple* [2011] FMCAfam 683 at [23]–[24]; *Randall v Adams* [2011] FMCAfam 209 at [148]–[149].

25 FLA, s 60H.

26 [2010] FMCAfam 628 at [10]–[12].

- 'whilst the definition of de facto relationship appears in a myriad of legislative provisions … there are differences in the relationships covered by the term 'de facto' as it appears in the different legislation, not only because of the different wording but also the different purposes of the statutory schemes' – *while this is true, none of the legislation referred to by his Honour was legislation dealing with financial relief on relationship breakdown*;

- Looking at the principles of statutory interpretation, the result is that the definition must be interpreted in the context of the operation of the Family Law Act 1975.

Reithmuller FM concluded at [27] by saying '[c]are must be exercised before relying upon either the authorities, or developed norms, with respect to the definition of the term "de facto" under other legislative provisions'. In reaching these conclusions, Reithmuller FM considered in some detail the interpretation of the phrase 'de facto relationship' in the FLA. As his Honour notes, the context of any provision is very important. Reithmuller FM cited High Court authority[27] to the effect that all important to statutory interpretation is 'the context, the general purpose and policy of a provision'.[28] As his Honour was considering the question of parentage, he went on to cite the objects section to Pt VII of the FLA, which deals with children and parenting orders. He then concluded that pre-2009 judicial statements considering state de facto legislation 'overstate the benefits of cases under statutory schemes with similar tests as to the nature of relationships'.[29] In other words, he cautions against the earlier accepted approach of drawing assistance from interpretations of 'de facto relationship' in cases dealing with the various different state legislation. Whether or not this is what his Honour intended, later decision makers have adopted his comments specifically in relation to cases involving de facto property disputes.[30]

However, Reithmuller FM did not consider the context, general purpose or policy of the de facto property and maintenance provisions under the FLA. He is undoubtedly correct when he stated that the phrase must be considered in the context of the relevant legislation, and so the same term in, for example, social security legislation may have a different meaning. Thus caution is warranted in drawing from cases dealing with the term 'de facto' in legislation in a context *other than* property settlement and maintenance, such as in *Baker v Landon* itself; it does not necessarily follow the same approach should be adopted with other state legislation dealing with property and maintenance orders on relationship breakdown.

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27 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
28 At [23].
29 At [27].
30 See for example *Kelly v Temple* [2011] FMCAfam 683 at [23]–[24]; *Randall v Adams* [2011] FMCAfam 209 at [148]–[149].

Over the years, in successive pieces of state and then federal legislation, drafters have sought to capture what it is we mean when we talk of a 'de facto relationship'. It is hard to argue that minor differences in terminology were intended to result in major differences in interpretation. Nor is it easy to argue that that was the intended effect of expanding the remedies to same-sex or multiple relationships.

Moreover, other examples of decision-making in this area belie the notion that marriage and de facto relationships must be treated as fundamentally distinct. One concept that has gained some acceptance as a measure of a de facto relationship is the notion of 'coupledom'. In *Jonah v White*,[31] a case dealing with the federal legislation, Murphy J referred to the following statement from a case heard under legislation in the state of Queensland:[32]

> '… a "de facto relationship" will not be established for the purposes of pt 19 of the Property Law Act … unless it can be seen that "the parties have so merged their lives that they were, for all practical purposes, living together as a married couple".'

Relying further on an extract from this case, Murphy J then highlighted why, apart from the legislation referring to the parties 'living together', a common residence at some stage is normally crucial to establishing a de facto relationship:[33]

> 'It would be a wholly exceptional case in which one could conclude that a man and a woman, who have never lived together as husband and wife in a common residence, and who have never made provision for their mutual support, have been "living together as a couple on a genuine domestic basis". That conclusion is not justified by the mere circumstance that the parties, or one of them, at some stage, intended eventually to marry. Such a case is one where friendship, or even courtship, has not matured into the commitment whereby the parties have so merged their lives that they were, for all practical purposes, living together as a married couple.'

In Murphy J's view 'the key to that definition … is the manifestation of "coupledom", which involves the merger of two lives as just described, that is the core of a de facto relationship as defined and to which each of the statutory factors (and others that might apply to a particular relationship) are directed'.[34]

This confusion as to whether the courts can or should draw any parallels to marriage in interpreting the de facto provisions is also evident in some cases dealing with termination of a de facto relationship. Unlike marriage, the rights available to de facto couples only crystallise when the relationship is terminated. For married couples, the question of the breakdown of their

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[31] This case was appealed and the Full Court affirmed Murphy J's approach: *Jonah v White* [2012] FamCAFC 200 at [44].

[32] *KQ v HAE* [2006] QCA 489; [2007] 2 Qd R 32 at [19].

[33] At [57].

[34] At [60]. Though see the comments of Cronin J in *Smith v Pappas* [2011] FamCA 434 at [7].

relationship is primarily relevant to divorce; establishing a year of separation proves the breakdown of the marriage. It is presently being said in the context of de factos that, whereas in marriage separation requires an intent, communication of the intent and action on the intention, for de factos communication of the intention to separate is not required.[35] Thus, some distinction is drawn between the breakdown of a marriage and a de facto relationship. However, as I have argued elsewhere, there is a strong argument based on the case-law that the approach being adopted for de factos is also true for married couples.[36] Wherever the onus of proof lies,[37] it is difficult to see (and indeed the cases show this) how the separation/termination enquiry is fundamentally different in these two contexts. For married couples, establishing the separation centres on showing the termination of the *consortium vitae* (marital relationship). This involves comparing the relationship before and after the alleged separation. Very similar analysis happens when considering the termination of a de facto relationship.[38]

It cannot be said that marriage and de facto relationships are precisely the same, even in the context of this remedial family law legislation. However, it would be surprising if the de facto provisions were interpreted in such a way as to draw some fundamental distinction between these two types of relationships; it is precisely because they are so similar that the legislation now applies equally to both. Of course there will be points of difference, but in practice they may make little difference. For example, while de facto rights only crystallise on termination, how many married couples utilise the provisions prior to separation?[39] Even same-sex couples are measured against the same standard, though it is to be expected that consideration will be given to their different circumstances. For example, there may be understandable reasons why a same-sex couple do not hold themselves out in public as a couple.[40] It is a difficult enough situation as it is for couples living together to know when it is they transition into a 'de facto relationship'. If there is to be any content at all to the concept sought to be captured by the legislative descriptions used for that relationship,[41] surely it must bear some similarity to what we understand to be marriage. The ultimate irony of course, and this is reflected in the case

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35 *Volen v Backstrom* [2013] FamCA 40 at [29] per O'Reilly J; *Clisbey v Viges* [2011] FamCA 611.

36 See L Young, G Monahan, A Sifris and R Carroll *Family Law in Australia* (LexisNexis Butterworths, 8th edn, 2013) [6.70].

37 It has been held that the person who maintains separation has not occurred (and therefore the de facto relationship still exists) bears the onus of proving the ongoing existence of the relationship; whereas someone seeking to divorce must establish separation: see L Young, G Monahan, A Sifris and R Carroll *Family Law in Australia* (LexisNexis Butterworths, 8th edn, 2013) [6.118].

38 See for example *Smyth v Pappas* [2011] FamCA 434 at [11].

39 In this context it is interesting to note the recent High Court decision of *Stanford v Stanford* [2012] HCA 52. Although it was acknowledged that the court has jurisdiction to make orders before separation, it considered it was not just and equitable to do so in the case at hand. This is discussed briefly in the conclusion to this chapter.

40 See the discussion in *Barry v Darymple* [2010] FamCA 1271 at [280].

41 Note it is clear the federal legislation is not intended to cover broader situations where personal relationships create inequity, such as is covered by state legislation applying to close and caring personal relationships. The parties covered by these provisions are specifically

decisions, is that it is important for de factos to look something like a traditional married couple, whereas a married couple can adopt any relationship style they like and still access the legislative provisions.

IV GENDER IDENTITY DYSPHORIA[42] – IS IT A SPECIAL MEDICAL PROCEDURE?

The Family Court of Australia has been given the bulk of the *parens patriae*[43] jurisdiction of the state Supreme Courts, via s 67ZC of the FLA.[44] This expands the Family Court's jurisdiction over children to include making 'orders relating to the welfare of children': s 67ZC(1). The following subsection states the paramount consideration in making any such order is the child's best interests. Exercising this power, it has been held that where a child is to undergo a 'special medical procedure'[45] court authorisation must be obtained; that is, a parent cannot give a valid consent to the procedure on behalf of their child. The context in which this question originally arose was the sterilisation of intellectually disabled girls. However, it is a principle of broader application. Over the years, considerable doubt has arisen as to the boundaries of the principle, thus it is difficult for both parents and medical practitioners to be certain as to whether or not they *need* court authorisation in a particular case.[46] In recent times, one of the more common situations in which court authorisation has been sought is where it is proposed to administer treatment to a child as a result of the child exhibiting gender identity dysphoria (GID). The treatment seeks to align the child's physical gender with their gender identity and is recommended where the child's gender identity does not align with their biological gender and this is causing the child severe distress. These cases involve a range of treatments, administered over a number of years, ranging from drug and hormone therapy to radical surgery. As we shall see,

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identified as *not* being de factos in the relevant legislation: see L Young, G Monahan, A Sifris and R Carroll *Family Law in Australia* (LexisNexis Butterworths, 8th edn, 2013) at [5.113]ff.

42 This is also referred to as gender identity disorder. In light of the very recent change to the treatment of this matter in the American Psychiatric Association's, *Diagnostic and Statistical Manual of Mental Disorders, DSM – 5* (5th edn, 2013) and the preference for the use of the term 'dysphoria' there, the term 'dysphoria' has been adopted in this chapter. See further below for discussion of the impact of this change in *DSM-5*.

43 This is the inherent jurisdiction of the Supreme Courts (deriving from the English Court of Chancery) to safeguard the interests of those not able to look after themselves, e g children and the intellectually disabled. To the extent that a matter may be brought under Pt VII of the FLA (the part dealing with children and in which s 67ZC is found) it *must* be brought there (FLA, s 69B), that is, resort cannot be had to the Supreme Courts any longer.

44 Though there are limitations: *Minister for Immigration & Multicultural & Indigenous Affairs and B (No 3)* (2004) 219 CLR 365. For the purposes of this chapter, however, the issue of jurisdiction is not central.

45 While this term does not appear in the FLA, it has over time become the common description for the procedures covered by this principle. It is also used in the Family Law Rules in setting out the evidence required in such cases: Family Law Rules 2004, Pt 4.2, Div 4.2.3.

46 There is no doubt, however, that once an application is made, even if authorisation were not required, the court would have power to make an order in this regard: see *Re Baby D (No 2)* (2011) 45 FamLR 313 at [169].

these and other cases are raising difficult questions as to when a medical procedure is 'special' and so requires court authorisation. To understand these decisions, and the complexities they highlight, it is important to review the original explication of the 'special medical procedure' principle.

The High Court was called on to consider this matter in 1992 in the decision now known as *Marion's case*,[47] a case where the parents wished to have a hysterectomy performed on their profoundly disabled teenage daughter. Despite some legislative changes since that time, this remains the leading authority on this point. In this case, the Full Family Court[48] had been split on the issue of whether parental consent was sufficient in the case of a minor's sterilisation. Strauss and McCall JJ held that, provided the parents were acting in the child's best interests, they had the necessary power to consent on behalf of their child. Nicholson CJ, however, dissented, affirming views he had expressed in an earlier case, *Re Jane*.[49]

In a joint judgment the majority[50] of the High Court upheld the appeal, favouring the approach taken by the then Chief Justice of the Family Court of Australia. The High Court considered Nicholson CJ's position in *Re Jane* in some detail. They noted that his Honour, in considering whether to treat sterilisation as a special procedure, had highlighted two common law rights impacted by such a decision: the fundamental principle of bodily 'inviolability' and the right of reproductive choice.[51] Relying on a United Kingdom decision,[52] Nicholson CJ considered the court's *parens patriae* powers to be wider than parental authority,[53] and noted with concern some procedures that might be (wrongly) permitted were it held that parents had unfettered parental authority: clitorectomy, organ donation and sterilisation for misguided reasons. The High Court also considered Nicholson CJ's discussion of the difference between therapeutic treatments (described as those necessary to treat some bodily malfunction or disease) and non-therapeutic treatments. Their Honours concluded that the determinative factors in the judgment of Nicholson CJ were the non-therapeutic nature of the treatment under consideration and the potential interference with someone's right to procreate.[54]

The High Court then reviewed the state of judicial authority in other common law countries at the time, concluding that a review of case law on this topic identified three bases for:[55]

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47 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 518.

48 *Re Marion* (1990) 14 Fam LR 427.

49 *Re Jane* (1999) FLC 92–007.

50 Mason CJ, Dawson, Toohey and Gaudron JJ, Brennan J dissenting.

51 At [32].

52 *Hewer v Bryant* [1969] 3 WLR 425 at 433.

53 Though note Brennan J's comments on this point in *Marion's case* at [33]. The precise ambit of the Family Court's jurisdiction under s 67ZC has been the subject of later High Court consideration; see n 43 above.

54 At [33].

55 At [47].

> '… isolating the decision to sterilise a child as a special case requiring authorisation from a source other than the child's parents appear …: first, the concept of a fundamental right to procreate; secondly, in some cases, a similarly fundamental right to bodily inviolability or its equivalent; thirdly, the gravity of the procedure and its ethical, social and personal consequences, though these consequences are not examined in any detail.'

The High Court concluded by holding that sterilisation is a special case requiring court authorisation, though their Honours said their decision was not based precisely on the same reasoning as any of the cases it had considered. They immediately pointed out, however, that this decision applied only to non-therapeutic sterilisation; though they expressed some discomfort at the ambiguity of the therapeutic/non-therapeutic divide, the High Court held it was a 'necessary' one.[56] The majority did not discuss this issue in great deal however, referring to the distinction being adopted in Canadian jurisprudence[57] and criticised in the United Kingdom.[58]

Brennan J (who dissented on the final outcome) had this to say about the meaning of therapeutic treament:[59]

> 'I would define treatment (including surgery) as therapeutic when it is administered for the chief purpose of preventing, removing or ameliorating a cosmetic deformity, a pathological condition *or a psychiatric dysphoria*, provided the treatment is appropriate for and proportionate to the purpose for which it is administered. "Non-therapeutic" medical treatment is descriptive of treatment which is inappropriate or disproportionate having regard to the cosmetic deformity, pathological condition or psychiatric dysphoria for which the treatment is administered and of treatment which is administered chiefly for other purposes.'

The next significant factor highlighted by the majority was that sterilisation involves 'invasive, irreversible and major surgery' though the point was made that this was not sufficient on its own, but was a relevant factor in combination with others. Further, the High Court held that:[60]

> 'Court authorisation is required, first, because of the significant risk of making a wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of the child who cannot consent, and secondly, because the consequences of a wrong decision are particularly grave.'

The factors the High Court felt contributed to a wrong decision being made were: the complexity of the question of consent which included the potential for biases in relation to disabled people affecting the decision making of those around them; the fallibility of the medical profession including a history of

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56 At [48].
57 *E (Mrs) v Eve* (1986) 31 DLR (4th) 1.
58 *In re B (A Minor)* [1988] AC 199.
59 At [11] (emphasis added).
60 At [49].

poor decision making in this area and that sterilisation is not just a medical issue; and the potential for parents to let their own interests override those of the child's best interests.

In terms of the gravity of the consequences of a wrong decision, the High Court noted two related considerations: the loss of the right to reproduce and the potential emotional consequences for the child of what might in effect amount to coercive sterilisation.[61] The High Court also made reference here to Nicholson CJ's concern about the procedures that might be permitted by parents were they to have untrammelled authority. The High Court concluded by saying:[62]

> 'For the above reasons, which look to the risks involved in the decision, particularly in relation to the threshold question of competence and in relation to the consequences of a wrong assessment, our conclusion is that the decision to sterilise a minor in circumstances such as the present falls outside the ordinary scope of parental powers and therefore outside the scope of the powers, rights and duties of a guardian …'

Given the history of sterilisation of the disabled, and concerns about culturally condoned clitorectomy and the harvesting of organs from minors (so-called saviour siblings), it is not surprising that the High Court approved some limitation on parental authority. However, it has become abundantly apparent from later cases that the question of when these criteria apply – and thus whether costly and time-consuming court authority is required – is not clear cut. Applications are therefore being made as a protective measure.[63]

Take for example the case of *Baby D (No 2)*,[64] which involved parents seeking authorisation, with the support of the advising medical practitioners, (a) to have a tube removed from their baby's trachea and (b) to be permitted not to have further life enhancing procedures delivered and to administer palliative care, which may have had the effect of suppressing Baby D's breathing to the point where she died. Baby D was born prematurely and as part of her treatment she had an endotracheal tube inserted. The tube was initially removed but Baby D's condition deteriorated; however, it proved very difficult to re-insert the tube and so there was a period where Baby D could not breathe. As a result Baby D suffered severe brain injury. After this, Baby D apparently required the tube to survive; however, she had no underlying life threatening condition. The parents, on medical advice, wished to remove the tube and let nature take its course. It was accepted that if Baby D's airways swelled after removal of the tube, making breathing difficult, she may suffer pain as a result of a desire to breathe. To alleviate this pain, palliative treatment could be administered in the form of sedation, which would suppress that desire, with

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61 At [51].
62 At [53].
63 In this regard see the comments of Murphy J in *Re: Sean and Russell (special medical procedures)* (2010) 44 Fam LR 210.
64 (2011) 45 Fam LR 313.

death being a possible consequence. The hospital's ethics committee recommended that the parents seek court authorisation.

Extensive medical evidence in favour of the proposed treatment (as being in Baby D's best interests) was led and accepted by Young J, and thus the procedure was authorised. However, did this qualify as a 'special medical procedure'? After detailed consideration of the authorities, Young J concluded that this case did not involve a special medical procedure, as the procedures involved were being carried out to treat 'a bodily malfunction or disease, namely Baby D's upper airway obstruction'.[65] This is not the only case where it has been held that authorisation was not, in fact, required.[66] Further, Young J, while supporting the ultimate need for a category of special cases, reiterated the sentiments of Murphy J in *Re Sean and Russell (special medical procedures)*[67] in saying that the court should 'tread lightly' in 'seeking to intrude or impose itself upon these extremely difficult decisions'.[68]

In recent years, a number of cases coming before the courts have involved applications to administer treatment to children diagnosed with GID. The cases typically exhibit strong parental support,[69] an extremely distressed child who wants the treatment and advising medical practitioners recommending the treatment being given. From the start the Family Court of Australia has characterised all treatment for GID as 'special', thus requiring court authorisation.[70] However, this orthodoxy is being challenged in an appeal presently pending before the Full Court of the Family Court of Australia, *Re Jamie*.[71]

There are a number of reasons why it might be argued that the treatment in these cases does not meet the threshold set in *Marion's case*. In the first place, and perhaps most importantly, therapeutic procedures do not require court authorisation. This was clear from *Marion's case* and is reflected in the Family Court Rules 2004, which set out the process for making applications concerning 'major medical procedures' and includes only those administered

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65 At [229].

66 *Re Inaya (Special Medical Procedure)* (2007) 38 Fam LR 546 (bone marrow harvest; compare *Re GWW and CMW* (1997) 21 Fam LR 612); *Re Baby A* (the administration of an unapproved drug to a baby with a fatal condition); *Re Sean and Russell (special medical procedure)* (2010) 44 Fam LR 210 (gonadectomy on boy suffering from rare condition).

67 (2010) 44 Fam LR 210.

68 At [233].

69 In the case of *Re Alex (hormonal treatment for gender dysphoria)* (2004) 31 Fam LR 503, Alex was in the care of the state but there was no opposition to the orders sought from his mother (his father having died). In *Re Brodie (special medical procedures)* [2008] FamCA 334 the father opposed the making of the order but did not appear at the trial.

70 The first case to be heard was *Re Alex (hormonal treatment for gender dysphoria)* (2004) 31 Fam LR 503.

71 (2012) FLC 93–497. The same question was also raised in *Re Jodie* [2013] FamCA 62. However, as the appeal in *Re Jamie* was pending Dawe J left the matter for the Full Court, as there was no doubt that, whether or not the procedure was 'special', there was jurisdiction to make the order sought. See also the decision of Collier J in *Re Bernadette (special medical procedure)* (2010) 45 Fam LR 248.

'for the purpose of treating a bodily malfunction or disease'.[72] As indicated, a number of cases concerning other procedures have relied on this distinction when determining that the procedure in question was within parental authority. However, there has been a marked judicial reluctance to take that path where gender reassignment treatment is concerned. For example, in *Re A (a child)*,[73] heard just a year after *Marion's case*, a 14-year-old female born child suffered from an adrenal gland abnormality[74] resulting in extreme masculinisation. Despite some early treatment, this genetically female child continued to develop male characteristics and identified as male. Mushin J was critical of the parents in this case, as there was some evidence that they did not pursue the corrective treatment to the extent necessary. However, there was no medical (or judicial) doubt that the best course now was surgery to assist the child to live as if male. While Mushin J referred to the therapeutic/non-therapeutic issue, he considered it only in relation to the consequence of the procedure being sterilisation, not in relation to the treatment itself. As he rightly notes, however, this was *not* a case about whether sterilisation was permitted and thus the issue before him was whether the surgery itself was therapeutic. As made clear in *Marion's case*, where sterilisation is the by-product of a therapeutic treatment then court approval is not required.[75] The answer to the question of whether the treatment was therapeutic must surely have been yes, notwithstanding the fact the parents may have played a part in exacerbating the negative consequences of this condition.

Nearly a decade later a similar issue arose in *Re Sally (a special medical procedure)*,[76] in that the child's desire to undergo a gonadectomy was the result of an underlying medical condition affecting her sexual development. Sally had been raised a girl and her condition and XY genotype were not discovered until she reached puberty. Murphy J was satisfied that the 14-year-old girl could not consent (ie she was not *Gillick*-competent)[77] and noted that this was not a psychological condition; however his Honour did not directly consider whether this was, in fact, a therapeutic treatment and thus within parental authority.

It may be that his Honour's failure to grapple with this important issue resulted from an implicit acceptance that court authorisation is required where sex reassignment treatment is involved. In particular, his Honour referred to the

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72 See r 4.08 ff and the definitions to the Rules. The rules are procedural only, of course, but they are clearly intended to address these cases and ensure that the proper evidence is led for a determination to be made.

73 (1993) 16 FamLR 715.

74 Congenital adrenal hyperplasia.

75 At [48].

76 [2010] FamCA 237.

77 As in the United Kingdom, and following the House of Lords decision in *Gillick v West Norfolk AHA* [1986] AC 112, Australian law considers that mature minors can have the capacity to consent (in this case to a medical procedure) according to the circumstances of a case. Note that in *Re Alex* (2009) 42 Fam LR 645 the child in question was 17. The Chief Justice was not prepared to find Alex was not '*Gillick*-competent'. However as no submissions were made in this regard, and, as it only mattered if she refused authority for the procedure, she made no finding either way.

2004 decision in *Re Alex (hormonal treatment for gender dysphoria)*.[78] However, there was a fundamental difference in *Re Alex*. In Alex's case, by the time he came to court at 13, it was acknowledged that, although exhibiting all normal female characteristics, he had 'a long-standing, unwavering and present identification as a male'.[79] Alex was diagnosed as having GID; there was no other underlying condition as in *Re A* and *Re Sally*. This was the first case of its kind in Australia. In considering whether the treatment proposed was therapeutic, and thus requiring court authorisation, Nicholson CJ concluded, after specifically considering the evidence he had on the aetiology of this dysphoria:[80]

> 'The current state of knowledge would not, in my view, enable a finding that the treatment would clearly be for a "malfunction" or "disease" and thereby not within the jurisdiction of this Court as explained by the majority in *Marion's* case. To my mind, their Honours were seeking in that case to distinguish medical treatment which seeks to address disease in or malfunctioning of organs. In the context of sterilisation for example, they would seem to have had in mind a malignant cancer of the reproductive system which required an intervention that was medically indicated for directly referable health reasons. The present case does not lend itself to such a comparison.'

Nicholson CJ reached this conclusion because of the uncertainty as to the cause of this condition and the extent to which it is biological. The problem with this approach is that it appears to ignore the fact the brain is an organ and assumes that doctors and parents can be trusted in the case of physical, but not psychological, disorders. Whether the cause of a condition is biological or psychological, as Brennan J recognised in *Marion's case*, treatment can be medically necessary for a range of reasons. However, even adopting the words of the majority, and of the Family Law Rules, it surely cannot be the case that bodily malfunction or disease does not include psychological disorders, whatever their cause.

However, this leads us to another very important issue: is it appropriate to characterise GID as a mental disorder (whatever the cause).[81] One matter that will no doubt feature in the court's reconsideration of this issue is the very recent release of the American Psychiatric Association's (APA) long awaited[82] 5th edition of its *Diagnostic and Statistical Manual of Mental Disorders, DMS-5*. After much deliberation, the APA has accepted that to label manifestations of transexualism as a disorder is stigmatising. Rather, the focus should be on patients who suffer distress as a result of their gender identity,

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78 (2004) 31 FamLR 503. See also the brief treatment of this issue by Carter J in *Re Brodie (special medical procedure)* [2008] FamCA 334 at [41].

79 At [80].

80 At [195]. Bryant CJ was 'content to adopt' these findings in the later case involving the same child, *Re Alex* (2009) 42 Fam LR 645 at [151].

81 For an interesting study in this regard, see L Newman 'Sex, Gender and Culture: Issues in the Definition, Assessment and Treatment of Gender Identity Dysphoria' (2002) 7 Clin Child Psychol Psychiatry 352.

82 The last edition was 1994.

hence the preference for the term 'gender dysphoria'. It is difficult to predict how the court may view this change. Can it be said that a child suffering severe emotional distress is a bodily malfunction or disease? How is this different to a child who is depressed and suicidal for another reason, and in need of treatment? To a lay person, it would seem strange to suggest that treatment of these symptoms is not therapeutic. The difficulty lies no doubt in the fact that the court thought about this issue in the context of sterilisation (and perhaps organ donation and female genital mutilation). It may be a High Court decision, but, in terms of its ratio, it would seem some greater consideration must be given to the context of that decision and to the meaning of 'therapeutic'. Certainly, there is a strand of definitions that tie this word to the treatment of disease, However, it also has the broader connotation of treatment being administered to restore health and to improve someone's mental state.

No doubt these questions will be considered in detail in *Re Jamie.* When Jamie first came to court,[83] the application sought an order to permit drug therapy to a child aged nearly 11, to suppress the (rapid) onset of puberty. This child, a male by birth, began exhibiting the desire to be a girl between the ages of 2 and 3 and now identified as a girl. Dessau J granted the order sought, noting there was no dispute at that time that court authorisation was required.[84] However, the parents sought one court approval to cover all future treatment. While Dessau J accepted that all stages of the proposed treatment were part of the one treatment plan,[85] she considered the question of whether authorisation should be given for different stages of the treatment at the one time turned on the facts of the case. Here, given Jamie's young age, her Honour held that later stages of treatment would require a return trip to court. Despite not arguing this at trial, Jamie's parents have now appealed on the ground, inter alia, that the treatment for GID falls outside the ambit of *Marion's case*. As indicated, this will require a detailed reconsideration of the therapeutic/non-therapeutic dividing line in these cases.

There are other issues that will no doubt be addressed in this appeal. For example, is 'invasive, irreversible and major surgery' required for a procedure to be special? The different stages of treatment for GID involve pharmaceutical and possibly surgical treatment, some effects of which are reversible and some of which are not. Thus, a patient goes through a plan of treatment usually starting with hormone treatments and possibly ending with sex affirmation surgery. On a plain reading of the High Court's judgment, one might conclude it is a necessary, though not sufficient, condition that the treatment requires 'invasive, irreversible and major surgery'. However, Nicholson CJ in *Re Alex* sensibly concluded that the High Court in *Marion's case* was not intending to limit the application of the principle to surgical treatments, but rather that was a factual circumstance relevant to the characterisation of sterilisation as

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83 *Re Jamie (special medical procedure)* [2011] FamCA 248.

84 At [33].

85 Referring to Nicholson CJ's discussion of this issue in *Re Alex (hormonal treatment for gender identity dysphoria)* (2004) 31 FamLR 503.

'special'.[86] His Honour held that pharmaceutical treatments with irreversible effects may also be captured.[87] The connection of this issue to the question of whether a procedure is therapeutic is important to consider. Unlike the surgical examples of saviour sibling organ harvesting or sterilisation (or perhaps some cosmetic surgery), it is difficult to hypothesise a circumstance in which a doctor and parents would support the administration of a drug to a child that had major and irreversible consequences, in circumstances where the child had not been diagnosed with some condition in need of treatment. Thus, in the case of GID, assuming irreversible drug treatment is captured by the test, the real issue will be whether the treatment is therapeutic.

However, this still leaves open the question of the extent to which it matters that a treatment is 'invasive' and/or 'irreversible'. Early stage treatment of GID currently requires court authorisation even when reversible. In *GWW v CMW*[88] it was held that harvesting bone marrow from a 10-year-old for his aunt was a special medical procedure because it was a non-therapeutic procedure involving the administration of a general anaesthetic and possibly drugs, which were of no benefit to the child; conversely in *Re Inaya (special medical procedure)*[89] the reverse decision was reached as the procedure (a bone marrow transplant the benefit the child's cousin) did not involve major surgery or have irreversible consequences.

This brings us to what lies at the heart of the decision in *Marion's case*. The High Court characterised the central core of its decision as guarding against the risk of making a wrong decision and the potentially severe consequences of that wrong decision. What their Honours' discussion evidences is that the High Court is trying to devise a rule that will protect children in situations where parental interest and cultural biases have the potential to conflict with the child's fundamental rights (the right of procreation, bodily inviolability). The High Court exploration of *why* a 'significant risk' of a wrong decision arises is directly linked to the possibility in these cases of conflicting parental self-interest and community and cultural bias. Three examples that sit squarely in that category are those which have been referred to by the Australian courts: sterilisation, organ donation and clitorectomy (though female genital mutilation as it is more commonly called is illegal in all Australian states and so will not feature in any applications!). The cause of the potential conflict of interest between parent and child, and the fundamental nature of the rights of the child which may be infringed in these example procedures, are self-evident. There is also the very real possibility that these are procedures that the child itself may not have consented to were they *Gillick*-competent.

Can the same be said of the cases involving GID? One can easily accept the argument that changing the apparent gender of a child through drug treatment

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[86] That reflects the High Court's clear statement that it was the *combination* of particular factors that led to the application of the principle in this case: at [49].

[87] At [178].

[88] (1997) 21 Fam LR 612.

[89] (2007) 38 Fam LR 546.

and surgery strikes at the fundamental human rights of a child (both the right to procreate and bodily inviolability). Thus, a wrong decision in this regard, made by a parent on the behalf of a child, would have very grave consequences. However, does this fall into the category of cases where there is a *significant risk* of making a wrong decision *because* of the potential for conflicting parental self-interest or cultural bias? The answer to that question must surely be no. If anything, one would imagine that there is very little parental self-interest in supporting such treatment;[90] rather, this would be something parents come to as an option of last resort after many years of dealing with the issues faced by their child.[91] Again, it can be argued this aspect of the test of a special procedure is inextricably linked to the question of the therapeutic nature of the treatment. The scenarios where parental self-interest or cultural bias are present, and which give rise to a significant risk of a wrong decision, are those cases where the child suffers from no underlying condition or bodily malfunction. As Brennan J highlighted, the prime motivation for the procedure is something other than treating the child. Once we are in the realm of a child presenting with significant medical problems, whether physical or psychological, and parents receiving medical advice in favour of treatment, then the arguments for requiring court authorisation seem very thin. There is every reason to suspect, in fact, that parents are far more likely than judges to hesitate about such treatment for fear of making a wrong decision – after all, this is their child.

A scenario that presents an interesting comparison is what is known as 'body integrity identity dysphoria' (BIID) – when a person has an overwhelming desire to have a functioning part of their body amputated or to sever their spine. A recent study found that the desire starts in early childhood and sufferers may exhibit signs of depression and mood dysphorias. Amputation alleviated the dysphoria resulting in dramatic improvement in quality of life.[92] The reason such a case would not present itself in the Family Court is that there is no obvious reason to consider treatment at an early age and it seems unlikely there would be medical advice in favour of early amputation. Thus, the person afflicted can decide as an adult. With GID, however, it is the physical consequences of the onset of puberty and the adverse emotional response of the child which cause parents to seek early treatment. In a paper considering the ethical arguments surrounding amputation and BIID, the authors note the possibility that in arguing against such treatment, some people may be influenced by notions of disgust. It is interesting to observe the ethical dilemma apparently presented by adults voluntarily electing to cut off a limb, when elective cosmetic surgery of the most extreme kind is performed on adults routinely. There is no doubt that social mores in relation to different procedures will colour the way they are viewed, and there is no reason to suspect that

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90 See n 69 above.

91 See for example *Re Brodie (special medical procedure)* [2008] FamCA 334 at [82] where it was clear that the mother and family had very deep reservations about the treatment but were prepared to support Brodie.

92 RM Blom, RC Hennekam and D Denys 'Body Integrity Identity Dysphoria' (2012) *PLoS ONE* 7(4): e34702. doi:10.1371/journal.pone.0034702.

judges are immune in this regard. While every application to court reported to date relating to GID has permitted treatment, it is interesting to reflect on whether the fundamentally challenging nature of the procedures involved have played their part in subtly influencing decision making in this regard in favour of retaining court oversight.

Thus, it is suggested here that the consideration of whether treatment for GID is therapeutic or not, is central to the outcome in the *Re Jamie* appeal and deserving of reconsideration. Further, it is argued that the factors which favour court authorisation for procedures like sterilisation do not necessarily apply in equal measure to GID. A recent study looking at hormonal treatment for GID[93] noted that Australia is the only country in the world to require court authorisation of treatment and that some parents were delaying treatment due to the stress and prohibitive costs of court proceedings. Further, it was suggested that ongoing court proceedings may inhibit children from expressing their true feelings about treatment. It is clearly a good time to review the question of GID as a special medical procedure.

V CONCLUSION

There is no reason to suspect it is going to get any easier for family law judges in the near future. However, many of the more complex issues in recent times have arisen in the area of children. It may be, however, that we are set to see some reconsideration of property related principles in the near future by the Full Family Court. The recent High Court case of *Stanford v Stanford*[94] is one example. This decision raises the question of whether the orthodox approach to resolving property disputes has now altered, in particular in relation to how the court addresses the statutory requirement that a decision be 'just and equitable'.[95] The case involved an application for property settlement in circumstances where the marriage had not broken down, the wife (who was suffering from dementia) having gone into an aged care facility. The case was essentially prosecuted by the wife's daughter, who sought the sale of the home in which the husband still lived. While the Full Court of the Family Court concluded a property order in favour of the wife (who had by this time died) was just and equitable, the High Court did not agree, paying particular attention to the application of the just and equitable requirement in s 79. It will be interesting to see what the Full Court makes of this; as usual the High Court was somewhat economical in its consideration of this family law matter.

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93 J Hewitt, C Paul, P Kasiannan, S Grover, L Newman and G Warne 'Hormone treatment of gender identity dysphoria in a cohort of children and adolescents' (2012) 196 Med J Aust 578.

94 [2012] HCA 52.

95 FLA, s 79(2). For a discussion of this issue, see J Campbell, '*Stanford:* An examination of s 79 by the High Court' (2012) available at www.fortefamilylawyers.com.au/site/DefaultSite/filesystem/documents/2013/Stanford%20article%20(228356).PDF (accessed 15 May 2013).

Further, a recent decision of Murphy J[96] has openly challenged the notion that any special rule or principle should be applied in cases of extreme wealth. While the Full Family Court has previously exhibited some disagreement on this point[97] a commonly accepted position is that a 'special contribution' can be argued in high net worth cases where those assets have been generated through business related activities of one party.[98] As yet the High Court has not had an opportunity to comment on this topic. However, this case is under appeal and this will provide a fresh opportunity for the jurisprudence to date to be reviewed. It is notable that despite eschewing any special contribution principle, his Honour nonetheless found that, on the facts of the particular case, the husband's business contributions outweighed the predominantly homemaker contributions of the wife (60/40); a figure still in keeping with some decisions where the special contribution principle was applied.

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96 *Smith v Fields* [2012] FamCA 510.

97 Compare the discussion in *Figgins v Figgins* [2002] FLC 93–122 at [55]–[58].

98 See for example the Full Court's implicit reference to this in *Franklin v Franklin* [2010] FamCAFC 131 at [120].

Denmark

IMPORTANT RECENT DEVELOPMENTS IN DANISH FAMILY LAW

Marianne Holdgaard[*]

Resumé

Le droit danois de la famille a connu, au cours des dernières années, un nombre croissant de changements qui, souvent, mettent de l'avant le principe de la liberté de choix. Ce chapitre s'intéresse à ces nouveautés dans quatre domaine: le mariage entre personnes de même sexe, incluant le mariage religieux; les changements en matière d'autorité parentale, notamment en ce qui a trait à la garde partagée, le droit de l'enfant d'être entendu, ses relations avec des tiers et son droit de saisir les tribunaux; l'insémination artificielle, dont les modalités se diversifient de plus en plus, notamment au chapitre de l'anonymat des donneurs; finalement, le partage des biens. La société a changé, la monogamie en série est plus courante et de nouvelles formes de famille ont vu le jour, autant de réalités qui ont un impact sur le développement du droit.

I INTRODUCTION

Recently, there has been an increasing number of amendments to Danish family law. Often, the background for this new legislation or amendments to existing family law in Denmark is that society has changed and/or new family forms have emerged.

There have been four significant amendments over the last couple of years, which will be dealt with below: first, the possibility for same-sex couples to marry; secondly, further emphasis on the best interests of the child, eg in custody cases; thirdly, new procedures for the probate court when dealing with the division of the assets in the event of divorce; and fourthly, an expansion of the Act on Artificial Insemination.

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II SAME-SEX MARRIAGES NOW POSSIBLE

In Denmark, same-sex couples were allowed to marry in church as of 2012, as the Danish Marriage Act was amended.[1] Before the commencement of the Act, same-sex couples could only enter into a registered partnership. At the same time, registered partnerships became a thing of the past with the termination of the Danish Registered Partnership Act.[2] Furthermore, with the amendment a registered partnership can be converted into marriage.

However, this does not mean full equality for same-sex couples who marry compared with heterosexuals who are married. The purpose of the 2012 Act was to give everybody[3] the possibility to marry in church – regardless of sexual orientation. The government therefore removed the ban on homosexual marriage in church, but priests in church can still refuse to marry two persons of the same sex.

In other words, so far a marriage between two persons of the same sex has the same legal effect only as that of the previous registered partnership. Therefore, a provision on the legal effect of marriage was added to the Act, stipulating that the provisions in Danish legislation containing special rules for one party in a marriage determined by gender do not apply to a marriage between two persons of the same sex. Nor do international treaty provisions apply to a marriage between two persons of the same sex, unless the contracting parties agree to this.

At the same time, the government stated though that steps would be taken to investigate the matter further in order to move in the direction of gender-neutral marriage legislation.

III THE DANISH PARENTAL RESPONSIBILITY ACT

In 2012, the government enacted new amendments to the Parental Responsibility Act of 2007.[4] In 2007, focus was on the perspective of the child. Parents' equal right to their children was the starting point as it was determined to be in the best interests of the child when two parents share custody. Ostensibly, the most significant amendments to the Act on Parental Responsibility from 2007 were that forced joint custody and equal contact rights in child custody cases could be decided where both parents were deemed responsible parents.

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1 Act no 532 of 12 June 2012. The law took effect on 15 June 2012.

2 See more on the subject in Ingrid Lund Andersen, 'Registered and Unmarried Partners in Denmark – Recent Legal Developments' in B Atkin (ed) *International Survey of Family Law 2011 Edition* (Jordan Publishing Limited, 2011) pp 157–164.

3 Ie all members of the Evangelical Lutheran Church in Denmark.

4 Act no 499 of 6 June 2007, and Act no 600 of 18 June 2012. The latter took effect on 1 October 2012.

However, after much public criticism and legal debate on problems concerning the Act of 2007 and after a formal evaluation process of the Act, an amendment was made in 2012. The 2012 Act is based on the existing principles stipulated in the Act on Parental Responsibility of 2007 but stresses the overall basic principle that parents share responsibility for the child. At the same time, the Act of 2012 should improve the possibility – and emphasise another basic principle of the Act – of making decisions that benefit the child, and improve the possibility of protecting the child from parental conflicts.

These principles were implemented through several initiatives. Below, the most significant initiatives will be described.

(a) Joint custody

The criteria to terminate joint custody were adjusted. The 2007 Act required that weighty reasons must be established to terminate joint custody. This requirement had been criticised because, in some cases, the best interests of the child were not taken into consideration to a sufficient degree. In one of the official evaluations, it was concluded that renewed cooperation between parents is not seen all of a sudden simply because joint custody is ordered, or because it is stipulated in the legislative history that parents must then agree on key matters concerning their child.

With the 2012 Act, the court can terminate joint custody only if there is reason to assume that the parents cannot cooperate in relation to their child and furthermore are unable to act in the best interest of the child.

However, the question still remains whether this will in reality be sufficient to stop the criticism still going on concerning problems in cases of, for example, alleged violence or sexual abuse against children. Article 12 of the Convention on the Rights of the Child emphasises that the views of the child are to be given due weight in accordance with the age and maturity of the child. However, problems may arise given the starting point that it is determined to be in the best interest of the child to have two parents who share custody and have equal contact rights.

(b) Children's rights to be heard

Similarly, in the legal history to the Act on Parental Responsibility of 2012, the following is stated:

> 'The involvement of the child is a cornerstone in the Parental Responsibility Act and must remain so. The evaluation indicates that the involvement must be maintained and even extended, since the involvement of the child is also seen as due process of law, which allows the children to have their say concerning their own lives. The involvement should therefore not be avoided due to misguided regard for the child.'

However, in order to avoid the child bearing responsibility for making a decision – for example in a case of joint custody – a child expert must now always perform the interviews with children. Furthermore, before an interview with their child parents must initially be informed about the nature and significance of the conversation between the child and the child expert. Nevertheless, quite often the child is in practice – despite the opposite statutory starting point – not interviewed.[5]

(c) Contact with persons other than the parents

The requirements for persons other than the child's parents to establish contact with a child were modified in the 2012 Act. The narrow scope of the Danish provision of 2007 could lead to a decision establishing no or only very little contact with a relative, even if establishing and maintaining such contact would be in the best interests of the child.

Therefore, the provision on contact rights with anyone other than the child's parents was amended to ensure that the decision on contact with a child must to a greater extent depend on an assessment of what is in the best interest of the child. The wording of the relevant provision, s 20, is now as follows:

> 'If one parent or both parents are dead, or if one of the parents is unknown, the state administration can, if requested, determine a right to contact with the child's closest relatives, to whom it is attached.
>
> If there is no or only very limited contact with the parent, with whom the child does not live, the state administration can, if requested, determine a right to contact with the child's closest relatives, to whom it is attached.'

However, it can still be argued that the amendments are insufficient to meet the human rights requirements in all cases. In my opinion, situations may still occur where continuing contact would be in the best interest of the child, but there is no authority in law to determine a right to contact with a non-parent. An example can occur in which a step-parent in a heterosexual or homosexual relationship has in reality been the primary caretaker of the child or has been the 'third parent' – although not biologically related to the child. If in such a situation, the relationship between a biological parent and the non-parent ends, the non-biological parent cannot obtain a right to contact with the child if the biological parents do not agree to make a permanent agreement on contact.

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[5] In cases brought to the courts interviews are made in 12% of cases with children at the age of 4–7, 38% of the children at the age of 8–11 and 59% of children at the age of 12–17. In custody cases examined by the state administrations, the child's perspective is illustrated by an interview with the child in 14% of the cases, whereas this occurs in 7% of cases of child custody and child's residence.

(d) Access to court

In the legal history to the 2007 Act, it is stated that Art 13 compared with Art 8 in the European Convention on Human Rights, gives the right to complain and the right of access to court. Nevertheless, from 2012 only the state administration has jurisdiction to examine and decide in cases concerning contact rights with the child. Obviously, this can cause serious problems in relation to the requirements established by the European Court on Human Rights according to Art 6 of the European Convention on Human Rights. Jurisprudence establishes that Art 6 guarantees the right of access to court in cases concerning civil rights.[6]

Furthermore, from 2012 the state administration can reject a request in a case concerning a change of custody or residence of one's child or the contact right with one's child if the conditions have not changed significantly.

IV THE ACT ON ARTIFICIAL INSEMINATION

The Danish Act on Artificial Insemination was amended in 2012[7] due to an ongoing debate on the current rules of anonymous egg and sperm donation in connection with artificial insemination treatment – but also due to the professional development in the area.

The scope of the Act on Artificial Insemination was expanded. Before 2012, the Act did only apply to artificial insemination treatment performed by a doctor or under a doctor's responsibility, but from October 2012, the Act applies to treatment, diagnosis and research, etc, in relation to artificial insemination, made by a health professional or under a health person's responsibility.

Furthermore, the requirement of *anonymity* in relation to egg and sperm donation for artificial insemination was repealed, and for each donor it has become optional to choose between anonymous or non-anonymous donation. Therefore, a lone woman or couple who want to receive a donation in connection with artificial fertilisation are now given discretion on the choice of donation. The amendment does not introduce public disclosure for the child, though. The child will therefore have to contact the treatment facility or the sperm bank to gain information about the donor.

The Act from 2012 does not change the fact that artificial insemination is unlawful if there is an agreement between the woman who seeks pregnancy and another woman to carry and deliver a child for that first woman (surrogacy).

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6 See e g Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press, 2009) pp 217, 228, and 235–236. I have previously dealt with that problem in 'Right to Access to one's Child – or – the Child's Right Not to See One of its Parents' in Lynn D Wardle and Camille S Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* (William S Hein & Co, Inc, 2007) Ch 79, pp 664–671.

7 Act no 602 of 18 June 2012. The Act took effect on 1 October 2012.

Furthermore, with the amendment the ban on *export of eggs* from Denmark was lifted. But the prohibition to sell, to arrange selling, or otherwise assist in the sale of unfertilised and fertilised human eggs still remains.

Similarly, the provision on the destruction of a spouse's or partner's stored sperm in the event of his death was repealed. Whether sperm must be destroyed after death will then be regulated by an agreement between the sperm bank and sperm donor. Correspondingly, fertilised eggs are not to be destroyed in the event that the male spouse or partner dies.

V THE ACT ON DIVISION OF PROPERTY OF SPOUSES

The previous Act which regulated the division of property of spouses had been criticised for no longer meeting today's requirements, for example the fact that the costs of a public division of property were too high. Furthermore, it was argued that the probate court did not have the necessary tools to ensure a quick and efficient division of assets. In other words, the purpose of the Act on Division of Property of Spouses[8] was to improve the offer to spouses who need government assistance with the division of their property after separation or divorce.

The 2012 Act is based on the fact that the general rule should remain that spouses themselves are responsible for the division of joint property, but that there is a need for appropriate assistance to spouses who disagree on the division of the estate in the event of separation or divorce.

A number of procedural rules have been amended in order to reach the goals. A new system of administration by the court of the property of spouses has been implemented, based on an interaction between the probate court and an authorised administrator. The probate court must conduct the initial guidance and explore the possibility of reconciliation between the spouses. If the spouses need more assistance, the probate court can appoint an authorised administrator to be in charge of the proceedings, and the probate court can settle disputes that may arise during the work of the authorised administrator. The probate court must also monitor the authorised administrator.

Generally, the costs of the administration by the court of the property of spouses have been reduced. Furthermore, the court fee has been reorganised to ensure that the court fee is smaller for married couples who take part in the process constructively.

One important amendment to a rule of the division of the estate should be mentioned. The time of the termination of joint property – which is still the starting point in Denmark – has been moved from the end of marriage (separation or divorce decree or court order) to the start of the proceedings (the

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[8] Act no 594 of 14 June 2011. The Act took effect on 1 March 2012.

state administration's receipt of a petition for separation or divorce by one of the spouses). The purpose of this has been to reduce the risk of abuse of one's estate during the process of separation or divorce.

VI CONCLUSION

There has been an increasing number of amendments to Danish family law in recent years. Generally, the principle of individuality is a factor in many of these new Acts. For instance in accordance with the new Act on Artificial Insemination, the individual using this treatment has been given several new possibilities and options to choose between.

The four amendments presented in this chapter follow in the footsteps of a similar development in previous family law. This was the case in 2006 with the amendments to the Legal Effects Act[9] where a break with the principle of equal division of joint property was made in relation to pension rights. Now the main rule is the opposite in relation to pension rights: it is given in advance to the owner of the pension right in the event of divorce or separation. This break with the equal division principle in the event of divorce or separation also expresses a strengthening of the individual rights principle. Similarly, the individual rights principle clearly gained a stronger foothold in the Inheritance Act in 2007, when the possibility of bequeathing one's belongings was broadened from ½ to ¾ of one's effects.[10]

Other crucial factors in relation to the amendments to family law are that society has changed and new family forms have emerged. Serial monogamy is a common phenomenon today and the individual's family is therefore no longer static but dynamic. More divorces increase the need for an efficient public procedure to deal with assets after a divorce. Correspondingly, a need arises for an efficient system, which implements the principle of the best interest of the child when parents split up. The fact that society has changed and new family forms have emerged was similarly the reason for amending the Inheritance Act in 2007.

Both the principle of individuality and new family forms can be seen as the background for giving gay couples an equal right to marry.

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[9] Act no 483 of 7 June 2006. The Act took effect on 1 January 2007.
[10] Act no 515 of 6 June 2007. The Act took effect on 1 January 2008.

England and Wales

THE BATTLE FOR CHILDREN'S SOULS: THE ROLE OF RELIGION IN PARENTAL DISPUTES

Mary Welstead[*]

Résumé

Trois décisions récentes des juridictions d'Angleterre et du Pays de Galles ont examiné la question difficile de l'éducation religieuse d'un enfant, après la rupture de ses parents de différentes confessions religieuses. Elles constituent d'intéressantes illustrations de la tâche difficile, presque insoluble, qui incombe aux tribunaux confrontés à des parents désireux de contrôler l'avenir religieux de leurs enfants, dont l'un demande l'application des dispositions de la Loi relative aux enfants de 1989. Les décisions ont examiné en détail la signification du principe de prépondérance du bien-être de l'enfant; elles ont également envisagé la manière d'apprécier ce qui est dans l'intérêt supérieur de l'enfant lorsque les croyances religieuses sont en cause. Ces décisions attirent l'attention sur le caractère discrétionnaire de cette appréciation et les jugements de valeurs incontournables attachés à la notion de « parent judiciaire raisonnable ». Deux des trois décisions envisagent l'application de la Convention européenne des droits de l'homme (1950) à la détermination de l'éducation religieuse d'un enfant, et en particulier de l'article 9 (1) qui confère aux parents le droit à la liberté de penser, de conscience et de religion. Il est suggéré que cette disposition ait une valeur limitée pour les parents qui souhaitent donner à leur enfant une éducation en accord avec leur foi, en raison des conditions qui leurs sont imposées par l'article 9 (2). Ces conditions, encore une fois, donnent aux « parents judiciaires raisonnables » une large marge d'appréciation.

I INTRODUCTION

Richard Dawkins, the English High Priest of Atheism views all religion as a type of virus and education based on religion as a form of child abuse worse than paedophilia. He questions:[1]

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1 http://old.richarddawkins.net/articles/1-imagine-no-religion.

> 'Why, then, is our entire society happy to slap a label like Catholic or Protestant, Muslim or Jew, on a tiny child? Isn't that, when you think about it, a kind of mental child abuse?'

There are many who take a different view of religion from that of Dawkins; they see it as a force for good rather than evil.[2]

Given these opposing views (and given that, in the jurisdiction of England and Wales those who do have religious beliefs are on the decline),[3] it seems to be an opportune time to examine the extent to which parents of different religious persuasions, whose relationship has broken down, have a right to share their religious and moral values with their children. Three recent decisions relating to this issue will be considered; they illustrate the difficult, almost intractable task, facing the courts in determining the religious upbringing of children whose parents cannot agree.

II THE DECISION IN *RE N (A CHILD: RELIGION: JEHOVAH'S WITNESS)*[4]

(a) The background

In the first of the three decisions, the parents of a 4-year-old boy, N, had separated and were in dispute about the child's religious upbringing. The mother had been brought up in a Jehovah's Witness family but, during her relationship with N's father who was an Anglican, had not been very fervent in the practice of her Faith. Contrary to the tenets of her religion, she had cohabited with him prior to their marriage. She had also ignored the fact that he was a member of the armed forces. She maintained that her heart had overruled her head.

After the separation, the mother became more zealous in the practice of her Faith. She took N to meetings at Kingdom Hall, the Jehovah's Witness' place of worship, whenever possible. She also took N on house-to-house visits to evangelise. When N was with her, the mother ensured that he regularly watched religious DVDs or read religious books. N was not allowed to be involved in

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2 See eg www.huffingtonpost.com/rev-james-martin-sj/in-defense-of-religion_b_494797.html; www.guardian.co.uk/books/2012/aug/31/trouble-with-athiests-defence-of-faith; www.guardian.co.uk/commentisfree/belief/2011/dec/17/religion-force-for-good.

3 The 2011 census revealed that 59% of the population described themselves as Christians compared with 72% in 2001. 25% described themselves as having no religion, an increase of 10% from 2001. 5% of the population claimed to be Muslims; their numbers had grown from 3% in 2001. The remainder of the population was divided into Hindus, Sikhs, Jews and Spiritualists (www.ons.gov.uk/ons/guide-method/census/2011/census-data/index.html). One of the problems with census material is that religion is not only about belief. People may describe themselves as members of a religious group, and not because they are practising members of the religion but because they regard religion as a badge of identity or cultural heritage, or even an indication of their moral beliefs.

4 [2011] EWHC 3737 (Fam).

any other religion, including church services, school assemblies, or religious activities (she had already withdrawn N from nursery school when she discovered that he was to act in a Nativity play). He could not celebrate, or attend, Christmas or birthday parties but the mother was prepared to arrange alternative 'treat days' for him. She maintained that she was not averse to his having friends outside her religious circle or visiting their homes provided that their parents were not a same-sex couple.

The father described himself a not greatly religious Anglican but did attend his local Anglican church most Sundays. When N stayed with his father, he went to church and Sunday school with him. The father maintained that the mother's overwhelming and extreme commitment to her religion meant that N was socially isolated when he was with her. If N continued to be over-exposed to the mother's lifestyle, her religion would become the sole focus of his life. The father applied to the court to restrict the extent of N's religious exposure.[5] By this time, the conflict between the parents amounted to open warfare; N was trapped on their battlefield. There was a very real danger that their dispute would become irresolvable in any satisfactory manner.

The guardian's report acknowledged that both parents loved N and had his best interests at heart. However, their warring behaviour was having an effect on N. The mother had unilaterally removed N from the Christmas Nativity celebrations at his nursery without any explanation to the staff. She had also decided to move him to a different nursery against the guardian's advice. N was showing signs of regression and had begun to cling to his mother. The father's behaviour was controlling and led to the mother's withholding of information from him. The guardian was concerned that both parents might compete for N's sympathies, especially over religious and spiritual matters. Their mixed messages could lead N to reject one parent in favour of the other. She also thought that N might become isolated if not allowed to socialise freely with other children. If he did socialise freely, he might experience a clash of lifestyles. It was essential that N should be aware that he had two parents and two homes. The guardian recommended, inter alia, that his time should be divided equally between them.

(b) The judgment

HHJ Bellamy began his judgment by setting out some basic facts about the practices of Jehovah's Witnesses which he believed to be relevant in the context of the family before him. In his view, Jehovah's Witnesses:

- are committed to proselytisation, and each week, often with their children, engage in house-to-house evangelism;

- are committed to bible study, using their own translation of the Bible, both at Kingdom Hall, and at home;

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[5] Children Act 1989, s 8.

- do not celebrate Christmas, Easter or birthdays; such celebrations, in their view, are based on pagan customs;
- believe that blood transfusions and the use of blood for the medical treatment of themselves or their children are contrary to the will of God;
- must refuse military service because they do not believe in war;
- try to restrict their social contacts to other members of their religion;
- do not engage in inter-faith dialogue and are religiously insular.

(i) The welfare of the child

The judge emphasised that in determining N's future upbringing, he was bound by s 1 of the Children Act 1989 which provides that the welfare of the child shall be the court's paramount consideration. Section 1(3) of the Act demands that the court has to apply the checklist in s 1(3) of the Act in deciding where the welfare of the child lies.

(ii) The European Convention for the protection of Human Rights and Fundamental Freedoms (1950) (ECHR)

The judge accepted that he must also have regard to the rights of the mother, the father, and N, under Art 8 of the ECHR, and try to reach a decision which would be in N's best interests and proportionate to the Convention rights of all members of the family. The judge acknowledged that the mother's right to freedom of religion was guaranteed under Art 9,[6] and her right not to be discriminated against in either the choice or manifestation of her religion was protected by Art 14.[7]

However, the judge thought that the law was unclear on the extent to which the Art 9 right included a right to allow or encourage a child to share in the religious beliefs and practices of a parent. Two decisions to which he had been referred suggested that, in certain circumstances, it would not be unreasonable for a parent to demand that a child be allowed to follow his or her religious beliefs contrary to the other parent's wishes. In *Re T (Minors) (Custody:*

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[6] Art 9(1) provides that: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance'. Art 9(2) provides that: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

[7] Art 14 is not a free-standing right but merely provides that: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Religious Upbringing),[8] a mother had become a Jehovah's Witness and the father, who was a nominal member of the Church of England, objected to the mother raising their three children in her faith. Scarman LJ made the point that:

> 'We live in a tolerant society. There is no reason at all why the mother should not espouse the beliefs and practice of Jehovah's Witnesses. It is conceded that there is nothing immoral or socially obnoxious in the beliefs and practices of this sect … It is as reasonable on the part of the mother that she should wish to teach her children the beliefs and practice of the Jehovah's Witnesses as it is reasonable on the part of the father that they should not be taught those practices and beliefs.
>
> … it was not necessarily wrong or contrary to the welfare of children, that they should be brought up in a narrower sphere of life and subject to a stricter religious discipline than that enjoyed by most other people, nor that they be without parties at Christmas and on birthdays; in this case it was essential to appreciate that once the mother's teaching was accepted as reasonable it had to be considered against the whole background of the case and not in itself so full of danger for the children that it alone could justify making an order which otherwise the court would not make.'[9]

In *M v H*,[10] Charles J took a similar view:

> '… it cannot be said that the beliefs and practices of a parent who is a Jehovah's Witness creates a situation that is so inimical to good family life that ordinary considerations have to give way to it in determining what will best promote the welfare of the relevant child …
>
> … Rather the relevance of the religious difference relates to the impact in all the circumstances of the case on S's welfare of the respective beliefs of the parents and thus of their respective lifestyles and attitudes based thereon. This is an exercise that can only be carried out in all the circumstances of a given case …'

The judge was also referred to the decision of the European Court of Human Rights (ECtHR) in 2008 in *Ismailova v Russia*.[11] The applicant mother had converted from Islam and became a Jehovah's Witness. The domestic social

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8 [1981] 2 FLR 239, although the decision pre-dated the Children Act 1989, similar principles applied.

9 See also *Harrison v Harrison* (unreported, 17 June 1980) in which Sheldon J made the point that certain aspects of the religious practices of a Jehovah's Witness: 'may be thought by many to create an environment which is not the happiest for a child's upbringing, particularly if it leads to his or her isolation from other children and from his or her wider family. Clearly, moreover, these may be matters of great importance when considering the welfare of any particular child and the orders to be made for custody and access. But there are many other matters which also have to be taken into account and it would be quite wrong for anyone to assume, in any dispute between two parents of whom one is and the other is not a Jehovah's Witness, that the custody and care and control of their child will necessarily, or even more often than not, be given to the latter. Each case must depend upon its own particular circumstances.'

10 [2008] EWHC 324 (Fam).

11 *(Application N 37614/02)* [2008] 1 FLR 533.

service authorities had recommended that the children live with the father, partly because the mother was holding Jehovah's Witnesses' meetings in her flat. There was concrete evidence that the children had been frightened by some of the things they had heard at the meetings. The mother alleged that she had been discriminated against on the grounds of her religion.

The ECtHR found that the domestic courts had considered the implications of the mother's religious beliefs and practices on the children's upbringing. However, nothing in their reasoning suggested that they might have reached a different decision had the mother not been a Jehovah's Witness. They were influenced more by the fact that her former husband was more able to provide financially for the children. He could also house them more satisfactorily. In spite of this, the ECtHR decided to proceed on the assumption that the mother and her former husband were in an analogous situation and had been treated differently. Such treatment would be discriminatory for the purposes of Art 14 if it did not pursue a *legitimate aim* or if there was not a *reasonable relationship of proportionality between that aim and the means employed to realise it*.

The domestic court's aim was held to be legitimate in that it sought to protect the children's interests. There was also a reasonable relationship of proportionality between the means employed and the pursuit of that legitimate aim. The courts had not acted in an arbitrary or unreasonable manner. The mother's application, therefore, failed.

(iii) The orders

HHJ Bellamy accepted that the involvement of N in the practice of her religion was only one of the factors to be taken into account in determining what was in N's best interests.[12] He invited both parents to submit drafts of the orders they wanted and thereby reduce the issues on which the court would have to rule. This resulted in the parents agreeing that:

- the mother would not take N with her to engage in house-to-house ministry;
- the mother should be permitted to take N to the annual evening celebration of the Memorial of Christ's death as practised by Jehovah's Witnesses;
- N would spend every Christmas Day with his father;
- N would spend time with his father both on his own birthday and on the father's birthday;

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[12] Although, HHJ Bellamy acknowledged that in certain circumstances, such beliefs might require to be given greater weight than in others.

- if N were invited to attend celebrations which the mother's religious beliefs precluded her from accepting, she would let the father know so that he would be able to ensure that N could attend if he wished to do so.

With respect to those matters on which the parents did not agree, the judge set out the principles, derived from the decisions above, which he thought should guide his approach in making orders relating to N's upbringing. These were:

- parental responsibility is joint and equal. Neither parent has a predominant right to choose a child's religious upbringing;

- where parents follow different religions and those religions are both socially acceptable, the child should have the opportunity to learn about and experience both religions;

- the court is entitled to restrict the child's involvement in the religious practices of one parent if they involve a lifestyle which conflicts with that of the other parent, and the court is satisfied that the conflict has had or may have an impact on the child's welfare;

- a restriction which is imposed for welfare reasons does not necessarily amount to a breach of that parent's right to follow the beliefs and practices of his or her religion provided that the restriction is justified by the findings made by the court and are proportionate.

He ordered that:

- N should spend equal time, or close to it, with each parent. A broadly equal sharing of time would be a way of guarding against the risk that the religious views of either parent would predominate;

- N would be free to attend the Kingdom Hall with his mother without limits to the frequency of the visits. Equally, he would be able to attend the Anglican Church (including Sunday school) with his father;

- neither parent should instruct or give lessons concerning their respective and very different Christian beliefs; to order otherwise would risk N becoming entangled in further *conflict between the two sets of beliefs and experience inner conflict between his loyalty to one parent and his loyalty to the other*;

- N should be allowed to participate in those school activities, including Nativity plays, other plays, performances, concerts, after school clubs, sports and field trips, which his father had proposed, even where they were in conflict with the mother's religious beliefs. To order otherwise would be likely to make him feel different from other children which might be distressing for him.

(iv) Blood transfusions and the use of blood

The law is clear that a doctor may overrule the view of a parent who objects, inter alia, on religious grounds, to the transfusion of blood or the use of blood products in the medical treatment of children.[13] Nevertheless, in response to the father's demands, the mother had agreed to clarify her agreement to allow him to consent to the use of blood should N require it. The judge, however, had reservations about the extent to which she could be relied upon to keep to her agreement. He, therefore, preferred to incorporate her recital into an order and include further modifications suggested by the father:

- each parent should deposit a signed copy of their respective consent forms,[14] relating to the use of blood in medical treatment for N, with each other, and with N's General Practitioner and his school;

- neither parent may vary or withdraw these consent forms without prior notification to, and the written consent of, the other parent;

- each parent will notify the other immediately of any non-trivial medical treatment proposed to be given to N while in their care;

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[13] The well-being of a child under the age of 12, overrides any religious objection on the part of a Jehovah's Witness parent. If such a parent refuses to give permission for any medical treatment which involves the use of blood or blood products, an application can be made to the High Court for treatment to proceed. Before such an application is made, two doctors of consultant status have to sign an unambiguous entry in the clinical record that the use of blood is essential, or likely to become so, to save the child's life or prevent permanent serious harm. If a young person is over the age of 12 and is capable of understanding the issues, a doctor may be able to rely upon the young person's consent. If an emergency arises which requires the immediate use of blood, a doctor may go ahead without a court order. In the event of a later challenge as to the legality of the doctor's action, it is likely that the court would uphold the legality of the doctor's decision (The Association of Anaesthetists of Great Britain and Ireland, 'Management of Anaesthetics for Jehovah's Witnesses' s 3.6 (2005)).

[14] APPENDIX MOTHER'S CONSENT TO MEDICAL TREATMENT in respect of N.
I JLM:
1. STATE that I am the lawful mother of and hold Parental Responsibility for my child N described above. I also have a Shared Residence Order under which N divides his time and care between myself and his father. His father also holds Parental Responsibility and Shared Residence as described above;
2. CONSENT to all such necessary medical treatment for N, including anaesthesia, surgery and the administration of appropriate pharmaceutical products together with associated ancillary treatment such as (but not limited to) X-rays and MRI scans, intubation and/or ventilation as shall be recommended by qualified Registered Medical Practitioners treating him and considered necessary for his welfare SAVE AND EXCEPT that this consent is limited in that it does not extend to the administration to N under any circumstances of allogeneic blood or blood products;
3. ACKNOWLEDGE that N's Father is entitled as a matter of law to give valid Consent to Treatment of N that includes the administration of allogeneic blood and blood products;
4. REQUEST that all members of the treating team respect so far as they properly can my wishes for non-blood management for N and, in accordance with Best Practice and their legal duty, that they consider and if practicable deploy less invasive alternative treatment that does not involve allogeneic blood or blood products …

- each parent will ensure that the other is informed immediately should N attend at, or be admitted to, hospital for any reason whatsoever and whether in the UK or abroad;

- each parent will bring both signed forms of Consent to Treatment to the attention of the treating clinicians;

- in the event that any medical professional, either in the UK or abroad, recommends the use of blood or any other medical treatment for N when he is in the mother's care, the mother shall inform the professional, or any other medical authorities, immediately of the father's contact details, and his ability to consent to such treatment.

Finally, the judge ordered that there should be a Family Assistance Order for a period of 6 months to help the parents in the implementation of the court's order and make it work for the good of N. Unless the parents could learn to work together to promote N's well-being, this could become a high conflict and intractable case.

(c) Discussion

The decision in *Re N* provides a very good model judgment for resolving parental disputes about a child's religious upbringing if one accepts that compromise is inevitable. It was a decision as much about ensuring equal respect for the religious beliefs of both parents as it was about securing N's best interests. The judge showed a sensitivity towards the strong feelings of both parents and took them into account in reaching a compromise acceptable to them. Whether N's best interests were well served by his being split not just between two parents and two homes but two sets of very different religious practices – one liberal and the other more overwhelming and rigid – remains to be seen.

The court paid attention to the rights of each member of the family under the ECHR. In particular, it appeared to be hugely reluctant to interfere with the right of either parent to religious freedom under Art 9 of the ECHR. By implication (on the basis of its extensive analysis of the decision in *Ismailova v Russia*), the court accepted that the Convention right does include a right to encourage a child's participation in a parent's religious practices.

The right was held not to be unlimited and has to be balanced against a child's welfare. N's religious experiences were to be divided between the respective religions of his parents. However, this would not be an equal division; the nature of the parents' religions and their religious beliefs meant that N's mother spent more time in the practice of her religion than did his father. This would inevitably impinge on N's religious upbringing. The court attempted to lessen the impact of the mother's zealotry on N and, in particular, from its interfering with N's participation in the normal celebrations of Christmas

enjoyed by his friends and his paternal family. It also ordered that neither parent was to be allowed to teach N the religious principles of their respective religions.

It is this latter order which is perhaps the most questionable part of the court's judgment, children absorb religious and moral principles without formal teaching. In the context of a religion such as that of a Jehovah's Witness, N would find it difficult to avoid the effects of spending half his time with his mother when he could hardly escape from her all embracing religious world. N was only 4 years of age and had already spent a lot of time in that world. One must remember the maxim attributed to the Jesuits: 'Give me a child until he is seven and I will show you the man.'

III THE DECISION IN *RE C (A CHILD)*[15]

(a) The background

In the second of the three cases, the parents of C, a 10-year-old child, were both Jewish by birth. After their divorce, the father became a convert and adopted the Anglican Faith. The parents had agreed to a shared parenting arrangement in which C, and her brother A, divided their time equally between them. Both children had asked their father to allow them to attend church with him on the Sundays when they were living with him. The mother had agreed to this, although she later maintained that the father had brainwashed the children into attending his church and it was not their choice to do so. The father had also taken the children to a Christian festival. After the festival, C told her mother that she had come to believe in God and wanted to be baptised. The mother, immediately applied, ex parte, for an order to prohibit the father from arranging the baptism, confirmation, or dedication of either child into the Christian faith.[16]

(b) The court hearing

At the full hearing of the application, the father maintained that he had always accepted his own Jewish heritage and culture and that, by virtue of their birth to a Jewish mother, C and A would always be Jewish. However, he pointed out that during the marriage neither he nor his wife had been strictly observant Jews. They did not go to the synagogue regularly or celebrate Jewish festivals or follow a kosher diet. The only occasions on which he and his wife had attended a synagogue were as guests at a wedding or at a bar mitzvah. The children had received no instruction in the Jewish religion. Although the son had been circumcised according to Jewish custom, the father said that he did not regard it as being of any religious significance but, rather, as beneficial for the boy's health. Both sets of grandparents had also made clear their wish that their

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[15] www.bailii.org/ew/cases/Misc/2012/15.html.

[16] The application was for a prohibited steps order under s 8 of the Children Act 1989.

grandson should be circumcised. The mother claimed that during the marriage, the father had prevented her from practising her Jewish faith. However, she accepted that, since the end of the marriage, she had not made any serious effort to introduce the children to Judaism, apart from lighting a candle on Friday evenings and explaining to them the reason for doing so.

The father explained that, at first, he had not been enthusiastic about C's desire to be baptised. He had told her that she would have to wait until she was older. He had also assured C's mother that he would not do anything to further C's wish without consulting with her. He wanted to wait and see if C was serious and committed. He later learned that C had gone behind his back and spoken to her Sunday school leader and asked him to speak to the Minister about the possibility of baptism. The father claimed that he was unhappy about C's action but felt that the mother's reaction in making an ex parte application was extreme and probably motivated by spite because of his imminent remarriage. He believed that the mother's action had distressed the children because it appeared as if their parents were at war with each other.

According to the father, C was a very bright and mature girl who knew her own mind. For the 10 months preceding the court hearing, she had not veered from her commitment to be baptised. He thought that her wish should be respected and that it would be in her best interest to permit her to apply to be baptised.

The mother maintained that the reason she had applied for an ex parte order was because she believed that the father had told C to lie to her about her proposal to be baptised. She was convinced that C was too young and immature to make such an important decision and that she should wait until she reached the age of 16. According to her, C had not been able to give her a reason why she wanted to be baptised, other than that she believed in God.

Both C's grandmothers, who were Jewish but not observant, wrote letters to the court in which they accused the father of proselytising and forcing the children to become Christians and destroy their Jewish heritage. A Rabbi, who had been misinformed by the mother that the children had been enrolled in a baptism programme without her knowledge or consent, also wrote to the court, and in highly emotive terms. His letter stated:

> 'It was extremely disturbing to hear last night of the proposed baptism of the two young children named above [A and C] in clear contradiction to the wishes of their biological mother and all four grandparents – all of whom are proudly Jewish.'

He maintained that Judaism does not encourage conversion either in or out of the faith; it regards it as unnatural for a person to change the religion they are born into which is ingrained deep in their souls. It was unfair to put a child under pressure to do something unnatural to his or her soul. The Rabbi's accusations were rejected by both the father and the Area Dean of his church.

The Cafcass officer visited C twice, once at the mother's home and once at the father's home. She had also talked with C on her own to clarify what she wanted. Her report stated that:

> 'C presents as a bright engaging child who is able to offer her own views and opinions. She is very clear in saying that she wishes to be baptised into the Christian faith. She is able to give some reasons for this and said she wishes to show her commitment to her community.'

The report recommended that:

- C's current feelings be noted, acknowledged and respected by the court and her parents;
- the parents ensure that C has access to information and teaching of both Christianity and Judaism to enable her to fully understand the implications of baptism;
- the matter be reviewed in 2 years' time, when C might have acquired the maturity and information to allow her to make a fully informed decision;
- there should be an order for the parents to attend a Parenting Information Programme and work together to protect the children from the conflict between them.

(c) The judgment

HHJ Platt considered the meaning of baptism and suggested that there were many different beliefs about its significance according to which Christian tradition was under consideration. Here, the father belonged to the Anglican Church where the ceremony of baptism welcomes the child into the church community and starts her on a religious journey which may eventually lead to her confirmation as a full communicant member of the church. He accepted that C did understand the significance of baptism.[17]

The judge also recognised that baptism could be seen by the mother as a rejection of her Jewish faith. However, he drew attention to the fact that neither she nor C's grandparents had made any real effort to understand what was best for C, or the consequences of baptism in terms of Jewish law or the rules of the Anglican church. In particular, the mother had been unable to explain whether there were any irrevocable consequences of baptism if C wished to revert to Judaism in the future. His understanding of Jewish law (although he acknowledged that he had no expertise in this area) was that a person who is born a Jew could not deprive herself of her Jewish status; Christian baptism would not alter that. He found that the mother had made little effort to teach

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[17] See *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 All ER 402 (HL) for a discussion of children and their ability to consent.

the children about Judaism whereas the father had encouraged his children to understand his Christian religion. He accepted that it was C's own wish to learn, and participate, more in her father's faith. The father, as a committed Christian, wanted to support C on her religious journey but believed that:

> 'Faith is a free gift from God to his daughter and not something which he would ever try to force upon her.'

The judge held that it had been wrong of the mother to seek an ex parte order. Her action had distressed both children who now viewed their parents as being at war with each other.

(i) The principles

The judge set out the principles which he had to consider in determining the mother's application.

The welfare principle

Clearly, of prime importance was the welfare principle in s 1(1) of the Children Act 1989.[18] Section 1(2) of the Act, provides that the court shall have regard to the fact that any delay in determining the child's future is likely to prejudice the child's welfare. Section 1(3) gives further guidance in the form of a statutory checklist. The judge considered in detail s 1(3)(a)–(g) and related them in turn to the facts before him:

(a) The ascertainable wishes and feelings of the child in the light of her age and understanding

C had consistently made clear her wishes and feelings appropriate to her age and was entitled to have them respected.

(b) Her physical emotional and educational needs

C's emotional needs had not been met during her first 8 years. She had been given no significant religious teaching 'upon which her own moral compass could be based'. Her positive reaction to her exposure to Christianity indicated that her emotional need was now being met.

(c) The likely effect on her of any change in her circumstances

Given C's Jewish heritage, her embarking on the road to full commitment to Christianity would be a significant change but not an irrevocable one. There was nothing to suggest that her mother would love her any less as a consequence. Similarly, her Jewish grandparents would continue to welcome

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[18] C Bevan 'Is welfare faring well? In praise of the welfare principle: a case study from Romford' [2012] Fam Law 1141.

her. Should she wish to attend the synagogue in the future and learn more about the Jewish faith, she would be able to do so.

(d) Her age, sex, background and any other characteristics which the court consider relevant

These factors were inapplicable here; they had already been considered under the other paragraphs of s 1(3).

(e) Any harm which she has suffered or is at risk of suffering

C had clearly suffered emotional harm because of the conflict between her parents sparked by the mother's unwise decision to seek an ex parte order prematurely. If C's wishes were left in limbo, the parental conflict might well continue and cause C further harm.

(f) How capable each of her parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting her needs

The judge found that C's father was more capable of meeting her needs in terms of her religious education than was her mother who had failed to further her Jewish education. The father had shown much greater sensitivity to C's emotional needs in the way he had handled a difficult situation.

(g) The range of powers available to the court

The court had no power to order C's baptism; only the Minister of her church could do that. The court's powers were limited to deciding whether to prohibit the father from taking any positive steps towards enabling C's baptism, or to making any specific issues orders to permit him to take such steps without the mother's consent.

Section 1(2) delay

Finally, the judge returned to the issue of delay which he considered to be a most important factor. Ten months had elapsed since C had first raised the issue of her baptism and it was over 5 months since the matter was brought to a head. This was a long time in a child's life and potentially emotionally damaging. The only justification for delaying the decision, as the Cafcass officer had requested, would be if the court was not satisfied that C had the maturity and understanding to request baptism.

(d) The court order

The court decided to refuse the mother's application; however, before making the court order to that effect, the judge gave the parents a draft of his judgment and strongly encouraged C's mother, preferably together with the father, to meet with the Minister of C's church to discuss C's baptism. That way, the

mother would not only be better informed but C would also have the benefit of seeing her parents working together. At the same time, and somewhat unusually, the judge decided to write a letter to C explaining the reasons for his decision:

(i) The judge's letter to C

'20th April 2012

Dear C,

It must seem rather strange for me to write to you when we have never met but I have heard a lot about you from your parents and it has been my job to make an important decision about your future.

Sometimes parents simply cannot agree on what is best for their child but they can't both be right. Your father thinks it is right for you to be baptised as a Christian now. Your mother wants you to wait until you are older so they have asked me to decide for them. That is my job.

I have listened to everything your mother and father have wanted to say to me about this and also to what you wanted to tell me. You have done that by speaking to the Cafcass lady and she has passed on to me what you said to her. That has made my job much easier and I want to thank you for telling me so clearly why you want to be baptised now. It is important for me to know how you feel.

My job is to decide simply what is best for you and I have decided that the best thing for you is that you are allowed to start your baptism classes as soon as they can be arranged and that you are baptised as a Christian as soon as your Minister feels you are ready.

Being baptised does not mean that you give up your Jewish heritage. That will always be part of you and I hope that you will continue to learn more about that heritage and about you mother's faith. Even after you are baptised you are still free to change your mind about your faith later when you are older. Finally, and this is the most important thing, both your mother and father will carry on loving you just as much whatever happens about your baptism.

I understand that the past few months have been a difficult time for you but that is over now and the decision is made. I send you my very best wishes for the future.

Yours sincerely,

Judge John Platt'

(ii) Further questions

The judge had requested that C read the letter together with her parents. After doing so, C responded in a way which involved the court in further issues. She had asked her parents whether the judge's decision meant that she could attend

church every Sunday regardless of which parent's home she was living in. The father, of course, was delighted to support C's proposal. He also wanted clarification about C's attendance at a baptism preparation class during the summer. The class would require her to go to church on a number of evenings when she would be living with her mother. He was prepared to collect C from the mother's home and return her there.

The mother objected to both these proposals on a number of grounds:

- instruction classes for Jewish children were normally held on Sundays; C would not be able to attend if she were to go to her father's church every Sunday;
- her quality time with C would be eaten into and the father would see more of C;
- church attendance every Sunday would also interfere with C's social life; for instance, it would be impossible for her to have friends to sleep over on Saturday nights;
- the children had a settled regular routine in which their life was equally divided between her and the father; any change would be detrimental to C's welfare.

(iii) The judge's response

The judge responded to the mother's objections by pointing out that C had not actually been enrolled in Jewish classes and her attendance at church on Sundays would not interfere with her attendance at the synagogue on the Jewish Sabbath if she desired to do so. He accepted the father's assurance that if C wanted to attend the synagogue on one of 'his' Saturdays he would respect her wishes and expected the mother to reciprocate. Although the judge accepted that it was perfectly natural and understandable that a separated parent would want to spend as much time with their children as possible, it might not always be practical.

Furthermore, he held that s 1(3) of the Children Act 1989 does not include the wishes and feelings of either parent in the statutory check list. Parents in private law cases do not have rights but rather they have responsibilities; these are not limited to:

> '… providing a warm safe nest in which the fledglings can be nurtured. It also includes giving them wings with which to fly. Without this a child simply cannot become a fully developed and rounded adult. Because all children are different that process can start at differing ages and when it starts it is perfectly natural for any mother to feel some sense of loss, even of anguish but there is nothing unusual about this case. As the father correctly points out the fact that C wishes to attend

> the father's church every Sunday does not increase father's time at the expense of the mother. C is simply choosing to spend more time with her own friends and with her God.'[19]

The judge cited the words of Wall LJ in *ETS v BT*:[20]

> 'In twenty years time it will not matter a row of beans whether or not L spent x or y hours more with one parent rather than the other: what will matter is the relationship which L has with her parents, and her capacity to understand and engage in mutually satisfying adult relationships. If she is given a distorted view of adult relationships by her parents, her own view of them will be distorted, and her own relationships with others – particularly with members of the opposite sex – will be damaged.'

According to the judge, every activity which a child chooses to undertake will interfere to some extent with their social life, whether it is playing football, taking swimming lessons, or attending church. Choices and sacrifices are a necessary and normal part of life. Furthermore, it would be wrong to assume, as the mother did, that there would be a rigid regime set in concrete which would force C to go to church every Sunday regardless of the circumstances. Rather, the parents needed a sensible framework which could be adjusted to C's needs:

> 'So if the mother wishes to go away with both children on one of her weekends for some special treat or event she should be free to do so. If C is invited to a birthday sleepover by one of her friends and that event runs on until lunchtime on Sunday she will have to decide either to leave early or miss church on that day. She is old enough and mature enough to make those decisions for herself.'

Although, in principle, the judge accepted that children thrive better if they have a settled routine in their lives, children grow up and changes in their routine are bound to happen. What suits a 5-year-old or an 8-year-old may be wholly inappropriate for a 10- or 12-year-old. What causes distress and difficulty is not changes in a child's routine but unnecessary changes. The changes proposed for C were a necessary consequence of her decision to become a Christian and ones which the judge was in no doubt that she would adjust to without difficulty.

(iv) The final order

Having rejected all of the mother's objections, the judge's final order was that:

- the mother's application for a prohibited steps order in relation to C's proposal that she be baptised be dismissed;

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[19] This view has been criticised by academic writers who maintain that it unjustly overlooks the importance of parental welfare, and suggest a re-evaluation of the welfare principle to take greater account of the needs and interests of parents: see e g H Reece 'The Paramountcy Principle: Consensus or Construct?' [1996] *Current Legal Problems* 267.

[20] [2009] EWCA Civ 20.

- the father was forbidden to arrange for C's confirmation without the written consent of the mother before C attains the age of 16;

- the father was to be permitted to make arrangements for C to attend Christian baptism classes and to present the child for baptism as soon as practicable, subject to the decision of the appropriate Minister that she is ready to take such a step. If the mother does not consent to this, C may attend classes and be presented for baptism without her consent;

- both parents must attend a parenting information programme to be arranged by Cafcass;

- the mother must make C available to attend church each Sunday and for any attendance at *Behold the Man* preparation for baptism classes when C is living with her;

- the father must notify the mother of the dates and times of these classes as soon as such information is available to him and is to be responsible for collecting and returning C to the mother's home.

(e) Discussion

Perhaps, the most valuable aspect of HHJ Platt's judgment was his thorough, and reasoned, application of the welfare checklist to the facts before him. However, it is arguable that he over-emphasised religion as the most important factor on the check list when considering C's emotional welfare. HHJ Platt referred to religion and morality on two separate occasions. He made the comment that neither of the children had grown up practising any religious beliefs although he acknowledged that they had been brought up with some general moral principles. They had been taught to be obedient to their parents, and to understand the difference between right and wrong, principles which he regarded as being indistinguishable in both the Christian and Jewish faiths of their parents. However, he later suggested that C's wish to be baptised indicated that she had emotional needs which had not been met during her early upbringing. He stated that, until her father's conversion, C's upbringing was lacking in any religious education which would have allowed her to develop a moral compass. The decision favoured a Christian upbringing in C's father's new religion, to which he was a fervent convert, over a more nebulous religious future in her mother's inherited faith.[21]

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[21] Does this approach rather contradict the judge's claim that parental wishes and feeling are of no importance in determining a child's welfare and that parents have no rights in private law cases?

Several further criticisms might be made of the judgment. First, there was no discussion of Arts 8 or 9 of the ECHR. In spite of the decision in *Re N*,[22] which preceded *Re C*, the judge rejected out of hand the idea that parents have any rights in private law cases.

Secondly, the decision fails to understand that membership of a religious group, and in particular Judaism, has many aspects to it including the cultural and social. Jewish children undergo a ceremony of Bar Mitzvah (for boys) or Bat Mitzvah (for girls) at the age of 12 or 13 which roughly coincides with puberty, after which they are able to participate more fully in Jewish life. The judge suggested that baptism would not exclude C from her Jewish heritage or Jewish family. However, it might lead to considerable confusion on C's part with respect to her Jewish heritage. Baptism with the consent of the person undergoing it implies a commitment on her part to Christianity. It does not encourage exploration of an alternative faith and the possibility of a commitment to Judaism by way of Bat Mitzvah in 2 years time. The two ceremonies are mutually exclusive.

Might C's welfare have been better served had her mother's request been granted? Given the stressful effect on C by virtue of the parent's battle, the court could perhaps have taken a more conciliatory approach. C's welfare cannot be considered outside of the context of her relationship with her family. She had a dual heritage and identity; she was born Jewish and wanted to become a Christian. Her baptism could have been delayed without affecting her participation in both the Christian religion of her father or the further exploration of the Jewish faith, culture and heritage of her mother and grandparents. C could have continued to attend church with her father (her mother did not object to this) and left open the decision about baptism until a more appropriate age when it might be a little more credible that her religious beliefs had stabilised.

Thirdly, there is the issue of consent. It must be questioned whether a child of 10 is seriously able to understand the implications of baptism into her newly discovered religion. Ten-year-olds have many overwhelming wishes which change in a whirlwind manner. They have little concept that the satisfaction of one desire may exclude, or make problematic, the possibility of the fulfilment of ones which arise at a later stage in life. Although, the judge accepted the validity of C's overwhelming desire to be baptised, his judgment implicitly acknowledged that baptism of a child in the Anglican Church requires the consent of the child's parents. The court order specified that, if the mother continued to withhold her consent, C's entry into baptismal classes could proceed without it. In other words, the father's consent would suffice. If C was judged to be truly able to consent, why was parental consent required?

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[22] Above n 4.

IV THE DECISION IN *RE G*[23]

In *Re G (Children)*, the third of the decisions under consideration, Munby LJ gave the lead judgment in the Court of Appeal. As might be expected, it was both erudite and extensive. It ranged from Aristotelian views of what constitutes the good life, through nineteenth century judicial views on parenting, to a discussion of the nature of the court's task in assessing the welfare of children in the twenty-first century.[24]

(a) The background

The decision related to the education of five children aged between 3 and 11. Prior to the parents' divorce, the children had been brought up in an ultra-orthodox Chareidi Jewish community in London. This form of Judaism consists of a wide range of extremely conservative Hasidic sects. Each sect has its own diverse spiritual and cultural rules. Munby LJ described the community as:[25]

> '… a very religious people, to the extent that the practice of their religion – observance might be a better expression – becomes a way of life. Outwardly visible manifestations of the community's observance include, for men, beards and long hair at the sides – peyos – and the wearing of the kippah; and, for women, covering the hair in public, frequently by wearing a wig, and the wearing of modest dress. Importantly for present purposes, the children of the Chareidi community attend single sex schools. Indeed, according to the father's evidence, mixed gender schools are strictly forbidden according to the leading Hallachic authorities of our generation.'

The parents' marriage had been arranged by their parents and for some time they ran their life in accordance with traditional Chareidi beliefs. The mother fulfilled her expected role of childbearing, housekeeping and ensuring that the family enjoyed a kosher diet. There was no access to television or the internet. The father pursued his Talmudic studies and taught part-time in a Talmudic college or Yeshiva. The children went to single-sex Chareidi schools which had been chosen by their father. The schools did not prepare them for any form of higher education.

The mother became discontented with her lack of education. She had been unable to go to university because of the Chareidi gender segregation rules. She, therefore, decided to study for an Open University degree from home and qualify to become a teacher. During her studies, she became less orthodox in her beliefs and embraced a more liberal form of Judaism. After the breakdown

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[23] [2012] EWCA Civ 1233; [2012] All ER (D) 50 (Oct); see J Ecob and F Iveson 'An orthodox approach to education' [2013] Fam law 56.

[24] Lord Upjohn, in *J v C* [1970] AC 668, had begun this evolutionary approach to the concept of a child's welfare.

[25] At [4].

of the marriage, the children lived with the mother but continued to see their father regularly. They remained in their Chareidi schools.

In July 2012, the mother applied for a residence order and an order to allow her to send the children to less orthodox Jewish co-educational schools, chosen by her.[26] She believed these schools would give the children greater educational opportunities including the option of a university education. The mother also thought that the children would cope more easily with the consequences of the parents' divorce if they were to attend schools where there were other children whose circumstances were similar.

The father opposed the mother's application. He did not want his children to attend schools which, although Jewish, did not conform with his religious beliefs. He also applied for a shared residence order. He explained the difficulties which he believed would arise if the children were to go to more liberal schools:[27]

> 'It is therefore unlikely that our children would be able to eat in the homes of the children who attend [the B school] if there is any doubt that food served there is kosher. Indeed, I would consider it my duty to prohibit my children from going to the homes of children from [the B school or the A school]. The same difficulties would arise with attending parties with children from those schools … I would be willing to invite those children to my home provided I am certain that they are not a negative influence, for example talking about TV programmes, movies or the internet.'

The father feared that the children would become even more alienated from their extended family, and community, than they were now. Following the parents' separation, the children had ceased to lead an exclusively Chareidi way of life. They were living with their mother in a far less strict religious environment. The children and their mother had already become estranged from their previous Chareidi world.

(b) The decision at first instance

HHJ Copley had to decide whether the mother's desire to educate the children outside the Chareidi community should prevail over the father's wish that they should remain within the orthodox community to which they had belonged since birth. Having listened to the parents' evidence and the recommendations of the Cafcass officer, he held that in the context of twenty-first century society, the children's welfare would be best served if the mother's application for both the residence order and the education order were to be granted. The father was given extensive contact.

The judge took a broad view of the likely advantages to the children as a consequence of his decision. He believed that the mother's plan for the children

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[26] Children Act 1989, s 8.

[27] At [6].

would provide them not only with a better education than would be available to them if they remained in Chareidi schools but it would also provide wider employment opportunities in the future. This would benefit the children economically and would allow them greater satisfaction were they to pursue professional careers or vocations. To allow the children to live with their mother but not to go to schools of her choice would give them very mixed messages. The judge shared the mother's view that a more liberal form of education would also benefit the children emotionally in that they would be likely to meet other children whose parents were also divorced. He also acknowledged the disadvantages which the children might suffer in that their lifestyle would alter even more significantly than had happened already. However, the mother's proposal would not prevent the children from returning to a Chareidi way of life as adults if they so wished.

(c) The appeal

The father applied for permission to appeal both orders and the Court of Appeal agreed to hear his appeal of the education order but not the appeal of the residence order.

(a) No division between the secular and the divine

Munby LJ stressed the fact that any issue about children's education is always important. However, for these Jewish children it was not merely a matter of a choice of school because, unlike those whose religion played a small part in their lives, they had been brought up in a religion where there was no division between the secular and the divine:

> 'Every aspect of their lives, every aspect of their being, of who and what they are, is governed by a body of what the outsider might characterise as purely religious law.'[28]

(b) Parental equality

In the nineteenth century, the decision would have been simple; the father's view would have prevailed unless he had forfeited his right to exercise his paternal authority because of '*gross moral turpitude*'.[29] Today, however, Munby LJ emphasised that parents come to court on an even footing.

(c) The child's welfare

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[28] At [18]. According to Munby LJ, the same would also be true of 'the devout Muslim, every aspect of whose being and existence is governed by the Quran and the Sharia'.

[29] *Agar-Ellis v Lascelles* [1883] 24 ChD 317; in *J v C* [1970] AC 668, Lord Upjohn described the decision as 'a dreadful case where the Court of Appeal permitted a monstrously unreasonable father to impose upon his daughter of 17 much unnecessary hardship in the name of his religious faith'.

Munby LJ stressed, of course, that the child's welfare is the paramount consideration of the court. He explained in some detail what this meant. Welfare, he viewed, as synonymous with 'well being' and 'interests' and any consideration of a child's best interests:[30]

> 'involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account.'[31]

Munby LJ thought that a child's happiness was also an important element of welfare:[32]

> 'behind a judicial determinations of welfare there lies an essentially Aristotelian notion of the "good life".[33] What then constitutes a "good life"? There is no need to pursue here that age-old question. I merely emphasise that happiness, in the sense in which I have used the word, is not pure hedonism. It can include such things as the cultivation of virtues and the achievement of worthwhile goals, and all the other aims which parents routinely seek to inculcate in their children.'

A further important factor for consideration was the child's network of relationships which provide him or her with a framework for self-understanding.

(d) The assessment of welfare

Munby LJ considered how a child's welfare should be assessed. He accepted that although the concept of welfare is the same today as it was in the early twentieth century, the conceptions of that concept or the contents of that concept are not static;[34] they change over time. A child's welfare requires a consideration of the present as well as the future.[35] It is to be judged in a holistic manner by the standards and expectations of today's reasonable man and woman or, rather, today's judicial reasonable parent, who recognise the changing nature of the world including the natural world, technological change, and changes in social standards and social attitudes. Such a person would be broad-minded, tolerant, easy-going and slow to condemn.

(e) The role of the religious beliefs of the parents

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30 At [27].

31 See also *Re McGrath (Infants)* [1893] 1 Ch 143.

32 At [29].

33 Herring and Foster 'Welfare means rationality, virtue and altruism' (2012) 32 *Legal Studies* 480

34 See *Birmingham City Council v Oakley* [2001] 1 AC 617, 631.

35 See *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 129, where Sir Thomas Bingham MR said 'the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems'.

Munby LJ was eager to explain that in making a decision about the children's future education in terms of their welfare, it was not the role of the court to judge the religious beliefs of both the parents. The court does not recognise religious distinctions and does not pass judgment on the religious beliefs or tenets, doctrines or rules of any particular section of society provided that they are worthy of respect in a democratic society and are compatible with human dignity,[36] and 'legally and socially acceptable',[37] and not 'immoral or socially obnoxious'[38] or 'pernicious'.[39] He accepted that, within limits, the court had to tolerate the divergent religious views of parents even where one was a member of an unpopular minority sect.[40] He also referred to his own decision in *Re S: Newcastle City Council v Z*,[41] where he held that:

> 'Religious belief is no more determinative of whether a parent is acting reasonably than it is of whether something is in a child's best interests. Whilst the court will no doubt be slow to conclude that a parent faithfully striving to follow the teachings of one of the great religions of the world is acting unreasonably, there is nothing to prevent the court coming to that conclusion in an appropriate case. Everything must depend upon the facts and the context. In this, as in so many other areas of family law, context is everything.'

(f) The judicial reasonable parent

After emphasising the provisions of Art 9 of the ECHR, Munby LJ questioned how the court should proceed faced with the difficult dilemma of two well-meaning parents with different religious convictions who wanted different futures for their children. He could not fault HHJ Copley's reasoning because he had taken into account the religious upbringing of the children and had in his own way grappled with the fundamental question which Munby LJ voiced:[42]

> 'What in our society today, looking to the approach of parents generally in 2012, is the task of the ordinary reasonable parent? What is the task of a judge, acting as a "judicial reasonable parent" and approaching things by reference to the views of reasonable parents on the proper treatment and methods of bringing up children? What are their aims and objectives?
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> …
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> In the conditions of current society there are, as it seems to me, three answers to this question. First, we must recognise that equality of opportunity is a fundamental value of our society: equality as between different communities, social groupings and creeds, and equality as between men and women, boys and

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36 See *Campbell and Cosans v United Kingdom (No 2)* (1982) 4 EHRR 293 at [36].
37 See *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163, 171.
38 See *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239, 244.
39 See *Re B and G (Minors) (Custody)* [1985] FLR 134, 157.
40 *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239.
41 [2005] 1 FLR 861 at [56].
42 At [79] and [80].

girls.[43] Second, we foster, encourage and facilitate aspiration: both aspiration as a virtue in itself and, to the extent that it is practical and reasonable, the child's own aspirations. Far too many lives in our community are blighted, even today, by lack of aspiration. Third, our objective must be to bring the child to adulthood in such a way that the child is best equipped both to decide what kind of life they want to lead – what kind of person they want to be – and to give effect so far as practicable to their aspirations. Put shortly, our objective must be to maximise the child's opportunities in every sphere of life as they enter adulthood. And the corollary of this, where the decision has been devolved to a "judicial parent", is that the judge must be cautious about approving a regime which may have the effect of foreclosing or unduly limiting the child's ability to make such decisions in future.'

The father's appeal was rejected.[44]

(d) Discussion

The decision in *Re G* was no doubt a tour de force in terms of its erudite discussion of the meaning of the welfare of the child. It also imposes severe limits on the role of Art 9 in protecting the religious freedom of parents. It is arguable that this limitation leads to the conclusion that the Court of Appeal did make a judgment about the relative values of the religious beliefs of both parents even though the Court attempted to emphasise the educational aspects of its decision.

Munby LJ stated that happiness is part of the concept of welfare and includes 'the cultivation of virtues and the achievement of worthwhile goals, and all the other aims which parents routinely seek to inculcate in their children' and not mere hedonism. He also believed that an appraisal of a child's welfare should consider a wide range of ethical, social, moral, religious, cultural, and emotional factors. How can this view be squared with the fact that he also stressed that the religious beliefs of parents (which, surely, embrace these

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[43] Munby LJ contrasted the situation in the Chareidi community with that of the wider community and emphasised the issue of equality: 'It is hard to imagine how either law or medicine could operate today without the women who at every level and in such large numbers enjoy careers which they find fulfilling and from which society as a whole derives so much benefit. Take the law: when I was called to the Bar in 1971 there were 2,714 barristers in practice at the independent bar of whom only 167 (some 6%) were women; by 2011 there were 12,673 of whom 4,106 (some 32%) were women. That is a measure of just how far society has moved in the last 40 years. And that, in my judgment, is the kind of societal reality to which a family judge must have regard in a case such as this. It is, after all, the reality which is daily on display in our family courts. The present case, as it happens, is typical of many: all three counsel who appeared before us were women, so too were the two solicitors, and so too was the CAFCASS officer' at [84].

[44] In a postscript to the decision in *Re G* (at [90]ff), Munby LJ emphasised that this decision did not apply in cases where the State was seeking to intervene in family life. In those circumstances, the public authority must first persuade the court that a child has suffered, or is at risk of suffering, significant harm if the parental care failed to meet the standards expected of a reasonable parent. Unless that threshold is met, the State cannot intervene and object to a child's religious upbringing, see eg *Re A and D (Local Authority: Religious Upbringing)* [2010] EWHC 2503 (Fam).

factors) should not, under normal circumstances be judged in determining what is in the best interests of children?

Munby LJ accepted, at least implicitly, that the Chareidi religion was 'legally and socially acceptable … not immoral or socially obnoxious,[45] or pernicious',[46] and was entitled to respect.[47] He also noted that the religion embraces every aspect of life, both secular and divine, and that no differentiation is made between them; their view of education is an essential part of their religious way of life. Once the Court of Appeal upheld HHJ Copley's preference for the mother's more worldly, albeit still Jewish, educational plans for the children, was religious neutrality abandoned?

It seems that Art 9 rights will now have very little meaning, if any, for a Chareidic parent or a parent of a similar religious persuasion where religious beliefs and practices cannot be separated from everyday life. The rights protected by Art 9 will always be trumped by the view of the judicial reasonable parent that modern social expectations of professional and economic success, equality of opportunity, the fostering of aspirations, and the preparation of children to fulfil these aspirations in adult life, are the most important factors in determining a child's welfare. They should prevail over spiritual values, and the benefits of a religious cultural heritage (perceived as such by the Chareidi community) which are so far removed from those of the present day materialistic world. It would seem unlikely that, in any parental dispute over a child's upbringing, a Chareidi parent will ever be given responsibility for their children's upbringing. Dawkins would approve.

V CONCLUSION

All three of the decisions under discussion demonstrate the difficult task which the courts face in determining a child's future when parents have very different religious views and practices. The immense discretion given to the judiciary in deciding where the best interests of a child lie means that the cases will always be fact and context dependent. Judicial reasonable parents are not dispassionate. Value judgments are inevitable,[48] as is a certain amount of crystal ball gazing when trying to make predictions about the effect of a decision on a child's future. It is not unreasonable to suggest that a different conclusion could have been reached in all three decisions. Munby LJ acknowledged in *Re G* that the view of the child's welfare:[49]

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45 *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239, 244.

46 *Re B and G (Minors) (Custody)* [1985] FLR 134, 157.

47 *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163, 171.

48 See e g S Gilmore 'A Critical Perspective On The Welfare Principle' in L Long et al (eds) *The Law and Social Work: Contemporary Issues For Practice* (Palgrave, 2001); RH Mnookin and E Szwed 'The Best Interest Syndrome as the Allocation of Power in Child Care' in H Geach and E Szwed (eds) *Providing Civil Justice for Children* (Edward Arnold, 1983) at 7–20.

49 At [13] citing Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1373.

> 'might well strike different judges in different ways … But there are many cases which involve value judgments on which there are no such generally held views … These are value judgments on which reasonable people may differ. Since judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act … The appellate court must be willing to permit a degree of pluralism in these matters.'

This approach means that it is very difficult for a parent to challenge a decision relating to the religious upbringing of a child on the basis of the welfare principle; it can be used to justify almost any decision. Even challenges under Art 9 of the ECHR will prove difficult given the major limitations imposed upon the right to religious freedom.

The parental religious beliefs at issue in the three decisions were accepted, at least implicitly, as worthy of respect. The parents all belonged to the Judaic Christian traditions common to the jurisdiction, even if in the case of *Re G* the father's religion was of a more fundamental nature. Our judicial reasonable parents understand these traditions. In today's multicultural society, it will be interesting to see how the courts deal with cases where the religious beliefs of both parents are not mainstream and neither of them conform with the accepted values and traditions with which the courts are familiar.

France

A CHRONICLE OF FRENCH FAMILY LAW

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Résumé

L'actualité du droit français de la famille est avant tout marquée par le projet de loi ouvrant le mariage et l'adoption aux couples de même sexe. Il a provoqué de vifs débats qui risquent fort d'entrainer un nouvel examen des lois bioéthiques. Changement de société, changement de droit? Peut-être, peut-être pas … En effet, si le législateur entend modifier une partie des règles du Code civil relatives aux personnes et à la famille, la Cour de cassation semble se refuser à des changements de position radicaux, spécialement en matière de preuve du transsexualisme permettant d'obtenir un changement de la mention du sexe dans les actes de l'état civil. Forte de l'absence de condamnation de la France par le Cour européenne des droits de l'homme à propos de sa position quant au refus d'assimiler la *Kafala* à une adoption, il n'y a aucune raison que la jurisprudence française évolue sur ce point non plus. Certes une autre conception de la société semble émerger peu à peu, comme en témoigne la réforme envisagée en matière d'attribution des allocations familiales. Pour autant, il ne s'agit là que d'un projet, dicté avant tout par des considérations financières et il n'est pas évident qu'il aboutisse s'il provoque dans l'opinion autant de remous que celui sur l'ouverture du mariage aux couples de même sexe. Le législateur n'osera peut-être pas affronter l'opinion publique deux fois de suite … Moins médiatique, mais constituant pourtant une avancée essentielle pour nombre de couples 'internationaux', l'entrée en vigueur de la loi créant un régime matrimonial franco-allemand doit également être soulignée.

I INTRODUCTION

The current news about French family law is marked, above all else, by the law opening marriage and adoption to same-sex couples (see Part II). This Bill has provoked heated debates that are likely to trigger a review of bioethics laws (Part III). Social change, legal change? Maybe, maybe not … In fact, while the legislature intends to amend some of the provisions of the Civil Code (C civ) relating to individuals and families, the Court of Cassation seems to refuse any

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* This chronicle was written collectively by the academic staff, PhD holders and PhD candidates at the Centre for Family Law at Jean Moulin University Lyon 3 (research team on private law – EA3707) aimed at presenting recent developments in family law in France: Hugues Fulchiron (Director), Christine Bidaud-Garon (Deputy Director), Younès Bernand, François Chénedé, Jézabel Jannot, Aurélien Molière, Amélie Panet and Stessy Tetard.

drastic changes, especially regarding proof of transsexualism to register a sex change in civil status records (Part IV). With the absence of a judgment against France by the European Court of Human Rights regarding its refusal to consider the kafala as equivalent to an adoption, there is no reason why French jurisprudence should not evolve on this point (Part V). It certainly seems that a new conception of society is gradually emerging, as evidenced by the proposed reform in the allocation of family allowances (Part VI). However, this is just one project, driven primarily by financial considerations, and it remains unclear whether it will come to fruition if it risks causing as much turmoil as was created by the opening of marriage to same-sex couples. The legislature may very well not want to face off with the public twice in a row. With a lower media profile, but nonetheless considered a fundamental step for many international couples, the enacting into law of a Franco-German matrimonial regime should also be emphasised (Part VII).

II THE FRENCH DRAFT BILL OPENING MARRIAGE TO SAME-SEX COUPLES

The legislative process is completed. France is the seventh European country to open marriage to same-sex couples. However, among the dozens of countries around the world that have already removed the condition of sex difference in marriage, few of them have unleashed such a media storm and virulent protests: several thousand people took to the streets to denounce same-sex marriage and, most especially, homosexual filiation. Indeed, unlike what is suggested by its title, this law is not just about marriage, but also about the opening up of adoption to same-sex couples.

Presented to the Council of Ministers on 7 November 2012, the text was subsequently submitted to the National Assembly and was adopted on its first reading on 12 February 2013. In accordance with French parliamentary rules, especially a system known as 'the shuttle', the text was then sent to the Senate, which is the upper assembly of the French Parliament. After some modifications, the senators adopted the law, too, but with a very small majority: 171 for, 165 against. The law was then returned to the National Assembly. It adopted the text as amended by the Senate on 23 April 2013 (331 for, 225 against). Opponents of the project have initiated an appeal to the Constitutional Council, but it has little chance of success.

Beyond the policy and the incendiary crowds, from a strictly legal point of view we must nevertheless find that the text is likely to provoke many difficulties relating to marriage in terms of both domestic law (Part I(a)) and international private law (Part I(b)). However, it is over the subject of filiation that the most important questions arise. The law presents marriage as a status of the couple and parentage as its consequence (Part I(c)).

(a) The opening of marriage to same-sex couples in terms of domestic law: symbolic or juridical revolution?

A new art 143 will be introduced into the French Civil Code: 'Two people of different sex or the same sex can enter into marriage.' This single subparagraph is almost enough to 'ungender' the French law of marriage. Indeed, at times when different laws relevant to spouses were adopted or reformed, no one imagined the possibility of same-sex marriage. Thus, when in the sixties, seventies and even eighties, the French legislature removed concepts of marital and paternal power and introduced nearly systematic references to 'spouses' instead of 'husband' and 'wife' to ensure equality between them, it could hardly have imagined that, one day, semantics would facilitate the opening of marriage to same-sex couples. Once the article is registered into French law, the remaining changes to be made will be more symbolic than upending to the Civil Code.

The first set of modifications aims at equality and results in a total 'ungendering' of marriage law. Originally called 'Marriage for All', the law aims to apply the rules in a way which is indifferent to the sex of the spouses. Thus, when exchanging consent to marriage, spouses will no longer say they take each other for husband or wife, but for spouses (art 75 C. civ). Article 144 of the Civil Code affirms that 'No one can enter into marriage before eighteen years of age', without reference to man or woman, which was previously the case. As for restrictions on marriage, those between direct ascendants were already formulated without reference to sex, but not those between collateral relatives. Now, they also aim to prohibit marriage between brothers, between sisters, between uncle and nephew, as well as between aunt and niece. A new article relating to spouses' names was also added (C civ, art 225–1). According to this text: 'As a customary name, each spouse can use the name of the other spouse by substitution or addition to his/her own name in the order he/she chooses.' This text ends centuries of custom in which the wife could use the name of her husband by substitution or addition to her birth name, while the husband had the right only to add his wife's name to his birth name. Of course, this unwritten sexist rule needed to be reformed. However, it is unfortunate that the legislature did not formulate this rule so that spouses use the same name. The reform aims at providing equal rights to use the name of the other, but not the use of the same name by both spouses, since each can use the name of the other. Even though the name is also the symbol of union, the legislature did not consider this aspect. It had the opportunity of establishing a system of marital names into French law, but refused to do so.

The second set of modifications tends to assert a modern conception of marriage. First of all, the secular nature of marriage is reaffirmed. Since 1789, only civil marriage may be validly celebrated on French territory or by French authorities. Ministers of religion are not allowed to celebrate a religious marriage if the spouses cannot present their civil status act of marriage, subject to a fine. However, an amalgamation of the two remains present in popular imagination. The new version of art 165 of the Civil Code should therefore

strengthen this separation between civil and religious ceremonies by stating that marriage is a 'republican ceremony'. Furthermore, art 34–1 answers civil status officers, who wanted to claim a 'conscience clause' in refusing to celebrate same-sex marriages, that 'Civil status records are established by civil status officers' and that 'they exercise their functions under the control of the public prosecutor'. Article 53 of the Civil Code already specified that the public prosecutor had to check civil status registers, but the notion of 'supervisor' was not identified in the law. The introduction of this article into the law is not neutral. It shows that civil status officers, whatever their beliefs or religion, will not have the option of refusing to conduct the celebration of same-sex marriage. Finally, and this is enough criticism from a legal point of view, the legislature seems willing to eliminate the 'legal commitment' aspect of marriage. It is not a revival of the old debate questioning the institutional or contractual nature of marriage, but of minimising what spouses are committing to when they enter into marriage. The law removes the reading of art 220 of the Civil Code during the celebration of marriage. This text establishes that both spouses are in solidarity responsible for any debts one or the other has contracted for the needs of the household or the education of children. The reason for each marriage is personal and it is hoped that, in the vast majority of cases, this arises from deep and sincere love between two persons. However, is it not somewhat irresponsible of the legislature not to say that the desire to see this love become a legal marriage implies property consequences, whatever the matrimonial property may be? As the economic crisis continues to bite and as the Debt Commissions of individuals are always full, it is not certain that this choice is wise …

(b) Same-sex marriage in international law and private French law: marriage for all?

In endorsing same-sex marriage, the French legislature intended to ensure the greatest international influence possible for its decisions. To this end, it enacted a new rule of conflict of laws that is largely inspired by the Belgian example.

Articles 202–1 and 202–2 of the Civil Code traditionally separate substantive and formal requirements. Formal marriage requirements are governed by the *lex loci celebrationis*; substantive requirements depend, according to French tradition, on the national law of the spouses. Given that gender difference involves both spouses, same-sex marriage should be, in principle, authorised by each spouse's national law. However, to ensure a 'marriage for all', art 202–1 of the Civil Code expressly excludes that foreign law would prohibit such a union:

> 'Art. 202–1. - The qualities and requirements in order to marry are governed, for each spouse, by his/her personal law.
>
> However, two people of the same sex can marry when at least one of them, or his/her personal law, or the law of the State in which he/she is domiciled or resides so permits.'

Unprecedented, same-sex marriage adoption has been defined as French public policy in international affairs.

In practice, art 202–1, allows all marriage celebrations in France for which the French state civil status registrar is deemed competent. This latitude is particularly broad in domestic law: under art 74 of the French Civil Code, marriage may be celebrated in the town where one of the future spouses has a domicile or residence.

Thus, regardless of whether the national law of any of the future spouses, or both national laws, or the law of the country where they have their domicile or habitual residence prohibits such union, the existence of a minimum tie (domicile or residence within the meaning of the domestic law rather than the French international private law) allows the marriage on French territory and, hence, a valid same-sex marriage according to French law.

Such is the case of a marriage between an Italian national and a French national residing in France, marriage between two English nationals residing in France, marriage between a Turkish national living in France and an Austrian national residing in Austria, or marriage between two Germans living in Germany with a secondary residence in France.

The same rule applies in assessing the validity of same-sex marriage celebrated abroad. The marriage of two Greek nationals, one of whom is resident in Spain, will be regarded as valid in France, even though their common nationality prohibits such a union. It will be the same for a marriage in Belgium between a Polish and a Dutch national.

The French legislature has also expressed concern for the fate of French nationals residing abroad and whose hosting country's law prohibits same-sex marriage. As a marriage before the French consular authorities might cause difficulties with regard of the Vienna Convention on Diplomatic Relations, art 171–9 of the Civil Code allows the celebration of the wedding in different towns of France: the town of birth or last residence of one spouse or the town where one of their parents has a domicile or residence or, failing that, in the town of their choice.

A French and a Moroccan with their principal residence in Rabat should be able to marry in France in the municipality of the French spouse's parents. Two French nationals with dual nationality residing in Brazil for several generations, without any territorial ties whatsoever with France, can marry in France in the town of their choice.

When combining these rules with the rulings of the European Court of Justice (ECJ)[1] and the European Court of Human Rights (ECtHR)[2] on issues of dual

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[1] See especially rulings *Garcia Avello* – 2 October 2003, C-148/02 – and *Sayn-Wittgenstein* – 22 December 2010, C-208/09.

nationality and recognition of situations validly entered into abroad, we understand that same-sex marriage adoption is largely granted, at least in terms of their celebration and recognition in France. As for the recognition abroad of marriages to be celebrated *more gallico,* the greatest uncertainty prevails: it is up to each country to decide, under the watchful eyes – in the European area – of the European Court of Justice and the European Court of Human Rights.

(c) Draft bill 'Marriage for All': parenthood and kinship

By adopting same-sex marriage, the law accepts the principle of single-sex kinship in French law. Indeed, in addition to taking into account the homosexual 'step-parent', the text opens the adoption door to homosexual couples, while the issue of access to medically assisted procreation (MAP) is postponed to a subsequent family-related bill (see below).

Preserving links with the 'step-parent' – Without elaborating an authentic status of the 'third' or 'step-parent', the law considers the partner situation (whether homosexual or not), not during the union, but in the case of separation. The current art 371–4 of the Civil Code already provides that the judge could determine, should the child so require, the relationships between the latter and third parties, whether parents or otherwise. The law adds that this decision is particularly relevant 'when the third party has resided stably with the child and one of his/her parents has provided for his/her education, care and housing, and created lasting bonds of affection between them'.

Today: access to adoption – Until now, French law did not recognise the establishment of a dual, single-sex parentage bond via adoption. Only a married couple, hence heterosexual, could seek joint adoption of a child (C civ, arts 346 and 361)). Only a husband or wife could seek adoption of the child of his or her spouse.[3] By facilitating same-sex marriage, the legislature opened the adoption process to same-sex couples.

However, we should not be misled by the exact scope of such a reform. The low number of adoptable children and the refusal of numerous countries to place children with same-sex couples will hardly allow French homosexual couples to assert their right to jointly adopt a child. Therefore, the most feasible approach would be seeking adoption (simple or full) of the spouse's child to satisfy their desire to start a family. This child may be from a physical relationship unrelated to the couple, adoption, or medically assisted procreation performed abroad.

Tomorrow: access to medically assisted procreation (MAP)? – After some hesitation, the French government decided not to integrate MAP into the law, which is now reserved for heterosexual couples (Public Health Code, art L

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[2] See especially rulings *Wagner* – 6 October 2011, Req 43490/08 and *Negrepontis-Giannisis* – 3 May 2011, Req 56758/08.

[3] Cass civ 1ère (First civil chamber of the Cour de cassation), 20 February 2007, *Bull civ* I, No 71.

2141–2, para 2). However, it is expected that the issue of female couples' access to MAP will be discussed during an upcoming reform of family law. Due in October 2013, this text will be preceded by a notice of the National Consultative Ethics Committee, which acted on its own motion on this matter.

However, the authorities have already ruled out the possibility of legalising gestational surrogacy in favour of male couples. Gestational surrogacy arrangements should therefore remain prohibited under French law (C civ, art 16–7). Let us recall that, under this law and the principle of unavailability of personal status, the Court of Cassation did not hesitate to suspend the legal effect of a gestational surrogacy agreement, which had been validly concluded abroad.[4] However, wishing to protect the interests of children of such illegal practices, a ministerial circular of 25 January 2013 has prompted prosecutors to accept the issuance of a certificate of French nationality, even though availing of gestational or reproduction surrogacy is likely, given that the parentage with a French national arises from a foreign civil status within the scope of art 47 of the Civil Code.[5] While the *Mennesson* case is pending before the European Court of Human Rights, it is not impossible that the Strasbourg judges will soon open up this debate.

III NEWS ON FRENCH LAW ON BIOETHICS

The year passed since the previous 'Chronicles' in the *International Survey of Family Law* did not see the introduction of major amendments to the French law on bioethics. This, however, is not surprising since the last comprehensive review is relatively recent[6] and all enforcement measures thereof, necessary for its effectiveness have not been implemented. Given that the principle of periodic review, recalled by the law of 2011, demands a major reconsideration by the legislature only within a maximum period of 7 years, it might seem a priori early to question the ins and outs of the next reform, even if partial, of the matter at hand.

However, as the debate seemed to subside, two subjects suddenly took centre stage: embryo research and medically assisted procreation (MAP).

Embryo research: should the exception become the principle? – Since 2004, French bioethics law regarding research on embryos and embryonic stem cells relies on a principle of prohibition of experimentation, with some exceptions. Only 2 years ago, during the revision of 2011 and following heated debates on the matter, the legislature extended this regime, further pursuing the prevalence of ethics over scientific performance. Nevertheless, the debate has just reopened and appears highly complex: a draft bill (No 576) is currently being discussed in

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4 Cass civ 1ère, 6 April 2011, case *Mennesson, Bull civ* I, No 72.

5 Circular Min Just No 1301528C.

6 Law No 2011 -814 7 July 2011 – see 'France: A Chronicle of Family Law in 2011' in B Atkin (ed) *International Survey of Family Law 2012 Edition* (Jordan Publishing Limited, 2012) Part VI.

Parliament – although regrettably without consulting the population. This text provides a reversal of perspective, in that it proposes to amend the bioethics law of 2011 so that the principle of controlled authorisation replaced a ban. As it stands, the draft bill authorises research on four conditions: the project must be scientifically sound, have a medical purpose, it cannot be driven with human embryos, and finally, it must follow ethical safeguards.

Facilitating access to medically assisted procreation (MAP)? – Opening MAP to same-sex couples and single women, ie 'social' infertility, was one of the most important social issues addressed in the latest revision of the bioethics law: the legislature chose to deny such a possibility, thus reaffirming that access to MAP is only possible to address pathological infertility in couples and that we cannot, therefore, legally arrange for the deliberate procreation of a fatherless child. It is unclear whether this position can be held much longer. While the draft bill on opening marriage and adoption to same-sex couples (see above) does not address the issue of MAP access, the tie between both problems is obvious and consideration of this question, which divides the public more than ever, will certainly occur: a broader 'family law' draft bill has been submitted and it is due in autumn 2013. Thus, it will be necessary to determine whether access to MAP for female couples is indeed allowed (to those married, but also others. On what basis could MAP be restricted to married homosexual couples, since the current law does not provide a marriage requirement?). If nothing else, its adoption would surely put an end to reproductive tourism and financial excesses that sometimes go with it. On the other hand, MAP would be thus separated from pathological infertility and likewise from the 'Nature' model, all in the name of equality between couples. Accordingly, it would be necessary to consolidate the entire legal regime for MAP, thrown off balance as a result. Still in the name of equality, the domino effect will raise the issue of male couples' access and, more generally, of all couples to 'assisted procreation' via surrogacy: should we lift the ban on surrogacy contracts? Finally, the issue of medically assisted procreation for single women or men would inevitably arise. No more pathological infertility, no more couple conditions: would MAP access be contingent, beyond the requirement of being alive and of childbearing age, only on the existence of a parental project, even if unilateral? It is noted that, depending on the answers chosen and the potential symmetry between marriage, adoption and MAP, the debate may shift its focus: from an equality concern among couples to a freedom concern for procreation – a 'right to a child' in the name of freedom of choice. At some point, it will be also necessary to address the extent to which the rights of people and families should be a matter of contractual agreements …

IV THE ROLE OF SEX CHANGE PROOF IN OBTAINING A SEX CHANGE IN CIVIL STATUS RECORDS

French law belatedly considered transsexualism as it was only in 1992 that the Court of Cassation allowed sex change in the civil status records.[7] This solution, which followed the condemnation of France by the European Court of Human Rights,[8] established for several years the rigorous position of French judges, both concerning conditions for this change and probationary requirements, which imposed de jure the use of medical expertise. Indeed, after the applicant presents the syndrome of transsexualism, the same must prove having undergone a medical and surgical treatment for therapeutic purposes, no longer having all the attributes of the original sex, and presenting the appearance of the desired sex. In other words, the Court seems to impose a total sex reassignment established by judicial expertise. On this last point, the Court of Cassation issued two new judgments during 2012.[9] In this respect, it recalled that the burden of proof lies solely on the applicant, required thus to provide evidence on the reality of the syndrome and irreversible transformation. Regarding irreversibility in particular, the Court noted that medical certificates provided must attest to its effectiveness as, otherwise, the judge may require a medical examination. The latter, however, does not seem necessary to prove the irreversible transformation of the applicant. This solution, along the lines of the report of the Commissioner of Human Rights at the Council of Europe[10] and a circular of the Ministry of Justice following said report,[11] reflects a desire to ease the evidentiary requirements for sex change.

However, less than a year after these rulings, the Court of Cassation again considered the issue of transsexualism.[12] Still on matters of proof and after a reminder of both of the conditions placed upon sex change, judges clarified the condition of irreversible transformation and justified their refusal to allow the change in the light of European requirements. First, regarding the proof of irreversibility, this should not arise merely from the fact of the applicant's belief of belonging to the sex that that person wishes to obtain, and secondly, hormonal treatments are considered insufficient to characterise sufficient proof. The Court therefore holds a strong position in terms of sex change, but without touching on the freedom of proving the transformation, which is left to the

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7 Cass AP, 11 December 1992 (two rulings) No 91–11900 and No 91–12373.

8 ECtHR, 25 March 1992, *B v France*.

9 Cass civ 1ère, 7 June 2012, (two rulings) No 10–26947 and No 11–22490.

10 T Hammarberg *Human rights and gender identity* (Rapp Con Eur, October 2009) for the French version, p 43. The report denounces the conditions for obtaining a sex change as too stringent or intrusive. It recommends 'establishing expeditious and transparent procedures for name and sex change using birth certificate extracts, IDs, passports, diplomas and other official documents'.

11 Circ 14 May 2010, NOR: JUSC1012994C. It recommends an extension of the method of proof. This probationary relaxation meets an overall logic to ease requirements on sex change applicants. In the same text, it was recommended that sex changes even without sex reassignment be admitted, if the transformation had become irreversible.

12 Cass civ 1ère, 13 February 2013, (two rulings) No 11–14515 and No 12.11–949.

discretion of judges. In other words, this extension proves of limited applicability as all types of evidence are allowed but their probative value is determined by the discretion of judges. Then, regarding the motivation of judges, it is noteworthy that the Court justified its position against the requirements of the European Court of Human Rights in insisting that its decision did not involve either the right to privacy or the principle of non-discrimination. Rather from a desire to protect itself from possible condemnatory rulings of Strasbourg, the Court appears to indicate that it has given its decision proper consideration, while attempting to balance between all interests involved.

While the severity of the judges may prove an obstacle for certain applicants, it is also a guarantee of maintaining the objectivity of the French system of identification of individuals, which demands, beyond the will of the individual, solid evidence to amend civil status records.

V PROHIBITION OF ADOPTION AND THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE: THE MEASURED ARBITRATION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Surprise in a part of the French doctrine: the European Court of Human Rights takes a relatively unexpected position on adoption. In the autumn of 2012, the ECtHR released its decision in the case *Harroudj v France*[13] concerning the impossibility, according to French law, of adopting a minor child of prohibitive status, examined in light of fundamental rights. This is the very first time the ECtHR has expressed an opinion on the kafala. This legal caretaking, which may be defined as the voluntary undertaking of a person (the kafil) to provide for a child (the makfoul) and assume responsibility for his or her welfare and education, exists in Muslim countries as a substitute for adoption, when and where this institution is prohibited.

Remember that French jurisprudence initially allowed the transformation of kafala into adoption, subject to the consent of the representatives of the minor. However, as the law of 6 February 2001 entered into force, this possibility was foreclosed by the insertion into the French Civil Code of art 370–3, para 2, which reads as follows: 'L'adoption d'un mineur étranger ne peut être prononcée si sa loi personnelle prohibe cette institution, sauf si ce mineur est né et réside habituellement en France' ['the adoption of a foreign minor child may not be pronounced if his or her personal law prohibits this institution, unless this minor is born and is ordinarily resident in France']. The French Cour de Cassation then changed its position by striking down the decisions of the Court of appeal, which pronounced the adoption of children raised under kafala by French couples.[14]

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[13] ECtHR, 4 October 2012, No 43631/09.

[14] Including Cass civ 1ère, 10 October 2006, subsequently followed constantly.

Some thought the ECtHR would come to the rescue of applicants for adoption: it has not. In the case *Harroudj v France* (above), the ECtHR considered, in light of positive obligations of the state, the question of compatibility of the prohibition of adoption for those children, having regard to the prohibition of discrimination and the right to respect of private and family life. The Court first considered that there was indeed a de facto family life shared between the child and the kafil, while kafala does not create a filial bond. This point is interesting, because the ECtHR takes the kafala into consideration, and not the *legal* family life the applicant is trying to obtain by adoption.

Citing international conventions in support of its argument, such as the United Nations Convention on the Rights of the Child (UNCRC) and the Convention of 1993 on protection of children and co-operation in respect of intercountry adoption, the Court considered that kafala, acknowledged in international law, creates conditions which foster the best interests of the child. In particular, the kafala, while it does not create a parent–child relationship, vests the kafil with parental authority, producing conditions similar to those found in the guardianship of a minor. As the applicant put forward the lack of inheritance effects and the impossibility for the child to obtain the kafil's nationality, the Court underlined that the rules of conflict of laws of art 370–3 of the Civil Code are subject to several ameliorating measures:

First, the makfoul raised by a French couple can obtain French nationality after a period of 5 years (C civ, art 21–12). Then, the prohibition against adoption disappears as the personal status of the child has been changed. Moreover, making a will can circumvent the lack of inheritance effects. Finally, the Court reminded us of the fact that the Convention does not guarantee a right to adopt.

As a result, the Court considered that the gradual elimination of the prohibition shows that France, which 'sought to encourage the integration of such children without immediately severing the ties with the laws of their country of origin, respects cultural pluralism and strikes a fair balance between the public interest and that of the applicant' (point 51 of the judgment). Thus, regarding the wide margin of appreciation the state has on this question, insofar as there was no consensus, the Court held that there had been no violation of arts 8 and 14.

The position of the French Cour de Cassation, which some will describe as 'rigorous',[15] still has a long life ahead of it, unless the French legislature moves in a different direction. This, however, is not on the agenda.

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[15] A Gouttenoire, JCP G 2009, II, p 10072.

VI FUTURE REFORM OF FAMILY POLICY

As part of the reduction in public spending, the French government decided to undertake a review of the social benefits implemented under our family policy.

In Europe, France and Ireland show the highest fertility rates (2.1 children per woman) – a major asset within the context of an aging population. Even if this demographic dynamism cannot be solely attributed to French family policy, our family-support model appears useful, nonetheless. Childbirth allowances, housing allowances, school allowances, family income supplement,[16] these ample, sometimes costly, benefits – together representing 5% of GDP – fall under a solidarity framework, which, during economic crisis and family breakdown, prove particularly valuable, especially so for the poorest households.

Thus, family policy redesign must be carefully approached by the government. Among the proposed measures, the most emblematic concerns the reform of family allowances. Family allowances are based on the principle of universality (one child = one benefit). Accordingly, financial compensation is paid starting with the second dependent child (art L 521–1 of the Social Security Code) regardless of family income. Based on a system of horizontal redistribution (transfer from childless households to households with children), these depart from the traditional social policy, designed on the 'Beveridgian' model, which pursues a vertical solidarity approach (transfer from affluent households to poorest households). Further, the distribution of family allowances meets two objectives: encourage birth rates and support parenting. This intent provides families with the means to fulfil their educational function, which the welfare state guarantees and that the minimal state, according to Hayek, expressly excludes.

Technically, family policy reform can be approached in several ways: review, their progressiveness, tax them, or make them contingent upon income, which would exclude the more affluent households. A recent report to the Prime Minister[17] does not intend to challenge the principle of the universality of family allowances, albeit recommending reducing their amount by dividing them by two or three above a certain threshold, depending on the number of children. For the government, the challenge lies in retaining a threshold deemed neutral to the middle class, while driving significant savings.

Undoubtedly, compelling under the prevailing spirit of fiscal contraction, introducing income-dependent allowances induces a paradigm shift, the 'vertical integration' of family policy, which could ultimately justify and inspire reform in other sectors, including health, with the accompanying risks of state disengagement and privatisation. Revolution of our future social model?

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16 See the exhaustive list in art L 511–1 of the Social Security Code.

17 Fragonard Report relating to aid to the families of 9 April 2013.

VII NEWS ON THE OPTIONAL FRANCO-GERMAN MATRIMONIAL REGIME: FINALLY A RATIFICATION BILL!

It is trite to point out that Germany and France share many things. One the them – largely ignored – is their matrimonial regime. On 4 February 2010, an agreement establishing an optional matrimonial regime of joint ownership of acquired property was indeed signed. Ratified on 15 March 2012 across the Rhine in Germany, the French Parliament must do likewise with a law of 28 January 2013. Fifty years and six days have lapsed from the famous Elysée Treaty, which committed to strong co-operation between both countries. Thus, this symbolic date marks the introduction into French law of the regime arising from that commitment. This particular idea, however, was mainly propelled by statistics: 'an increasing proportion of married couples – about 12 per cent – are binational and Franco-German couples are particularly numerous among them'.[18] The main idea behind this project is that binational couples may face uncertainty as to the applicable law in certain situations. It is this particular challenge that the ratified agreement claims to address. To that end, the drafters enlarged its scope as much as possible. Indeed, the regime established may be adopted by the spouse whose matrimonial law falls under German or French law, depending on habitual residence, nationality or location of the property. Binational couples may therefore favour this regime, but also same-nationality couples residing, for example, in France or Germany. The scope therefore goes beyond the original idea.

The optional matrimonial regime that both countries intend to establish concerns the joint ownership of acquired property. No surprises there, as it is a reflection of the nature of the agreement: a matter of compromise. The legal regime of the German spouse (s 1363 BGB) is already known on both sides of the Rhine, and can be conveniently selected by married French nationals (C civ, art 1569). Built on the model of separation of property during the union, it is governed by rules of community spirit in the event of dissolution, since spouses share the assets jointly acquired and created during the marriage. The community spirit of this regime does not transfer well to its implementation, as assets are not pooled and each spouse owns the assets individually acquired. Upon liquidation, however, all acquisitions shall be considered. Indeed, a comparison between initial and final assets will be conducted per spouse. Unfortunately, this theoretical netting proves hard to implement in practice as we compound inventory problems and property valuation issues. Regardless, this calculation will yield a representation of the enrichment or impoverishment per spouse. Whoever is the least enriched will be entitled to a further share for half the difference between that person's enrichment and that of the other spouse.

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[18] PY Le Borgn, *Notice n° 308*, 24 October 2012, p 5, www.assemblee-nationale.fr/14/rapports/r0308.asp.

Even if spouses retain the independent management of their personal property, the fact that this hybrid system is conceived to attain an accounting community justifies imposing certain limits to their powers and independence. Indeed, each one can freely dispose of such property, but those items which have been fraudulently alienated, dissipated or even donated shall still be considered under the final assets. Exceptions will be reasonable donations or those granted in favour of a relative in direct line.

Although the regime is optional, the agreement provides for mandatory rules. The unavailability of the family home has been incorporated into the agreement (art 5). Already well-known under French law (C civ, art 215) and indirectly provided for under the German Civil Code concerning joint ownership of acquired properties (s 1365 BGB prohibiting the universal disposition of assets, under which falls the disposal of housing as the main one; see also s 1369 BGB for furniture and fittings), this rule will lead to the nullity of all acts of disposition by one spouse alone of the rights under which the couple's housing is guaranteed. One further mandatory provision has been introduced. Based on art 220 of the French Civil Code, it provides that spouses are jointly and severally liable for all debts assumed whether jointly or separately for household maintenance and children education (art 6). Apart from these provisions, the optional regime remains a conventional one, hence subject to further amendment. With only two mandatory provisions, the text draws inspiration from but fails to replicate a set of rules comparable to the primary regime which, more comprehensively, applies to all marriages where property consequences are governed by French law (C civ, art 212).

In conclusion, we have certain reservations as to the success of this optional regime which, in fact, largely mimics our conventional regime for joint ownership of acquired property. This scepticism is based on the fact that, in France, this little known system of married people, vaguely if ever recommended by professionals to key stakeholders, might give rise to a certain deal of mistrust. That notwithstanding, an accession clause was introduced to allow for its endorsement abroad. At this point, one can but wait and duly note the number of adherents, among couples and states, to specifically assess the attractiveness of this innovative civil law mechanism in the European landscape.

Germany

ABOLITION OF LEGAL DISCRIMINATION AND IMPLICATIONS OF HIGHEST-COURT CASE-LAW

Luise Hauschild[*]

Résumé

En 2013, la législation allemande s'est conformée à plusieurs arrêts marquants dont, avant tout, deux arrêts rendus respectivement par la Cour européenne des droits de l'Homme et la Cour constitutionnelle fédérale d'Allemagne, qui ont entraîné une réforme des dispositions légales en matière de responsabilité parentale jugées discriminatoires à l'égard des pères non mariés. Une autre réforme touche au partenariat enregistré qui fut crée en 2001 en vue d'offrir un statut légal aux couples de même sexe. Depuis 2005, ces partenaires peuvent adopter l'enfant biologique de leur conjoint. Par contre, jusqu'à récemment la possibilité d'adopter l'enfant adoptif d'un conjoint était réservée aux époux en mariage. En février 2013 la Cour constitutionnelle a jugé cette restriction inconstitutionnelle et elle a invité le législateur a modifié la loi en conséquence. Les débats sur l'égalité des droits des partenaires de même sexe a semé la discorde au sein des partis au pouvoir à propos de l'éventuelle extension, au partenariat enregistré, des dispositions fiscales favorisant les couples mariés. Un autre sujet ayant enflammé les esprits, a abouti à une législation sur la circoncision des enfants pour raisons religieuses. D'autres réformes législatives en droit familial sont actuellement à l'étude, comme celle sur la médication obligatoire des inaptes sous régime de protection en raison de leur état mental et celle concernant la possibilité d'accoucher de façon anonyme.

I INTRODUCTION

The year 2013 marks the implementation of several landmark rulings in German legislation. Most prominently, the requirements established in two judicial decisions made by the European Court of Human Rights (ECtHR) and the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) respectively have finally resulted in the adoption of an Act amending provisions on parental responsibility that led to the discrimination of

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unmarried fathers[1] (Part II). Another outstanding amendment concerns the registered partnership that was introduced in 2001 and provides a legal framework for same-sex couples. Since 2005 partners of such a registered partnership have been able to adopt their spouse's biological child. However, until recently, the possibility of adopting a child whom the partner had formerly adopted him- or herself was only reserved for married couples. In February 2013 the BVerfG ruled that this was unconstitutional, resulting in the objective of amending the law accordingly (Part III). The discussion on same rights for homosexual partnerships has caused discord within the governing parties as to whether tax law provisions favouring married couples should be extended to registered partnerships. Another problem that was subject to heated debate throughout 2012 has been resolved by an Act that governs religious circumcision in children (Part IV). Several issues concerning other areas of family law, too, are currently under legislative review such as compulsory medication of persons who are under legal custodianship due to mental illness and the option of 'confidential birth' (Part V).

II IMPROVING THE LEGAL SITUATION OF UNMARRIED FATHERS

(a) Parental responsibility

When a child is born out of wedlock, German law assigns sole parental responsibility to the mother unless both parents issue joint declarations of responsibility. The fact that there was no legal means for fathers to gain parental responsibility in lieu of the mother's consent was deemed unconstitutional by the German Federal Constitutional Court that granted the possibility of judicial review in such cases and imposed upon the government the obligation to change the written law accordingly.[2] After lengthy discussions, in October 2012, the government presented a draft law that would meet the criteria established by the court.[3] This draft was passed by both the *Bundestag* and the *Bundesrat* in January 2013 and will therefore enter into force in the foreseeable future.

The draft focuses on the best interest of the child which has to be taken into primary consideration with every ruling on parental responsibility. While the mother remains sole holder of parental responsibility when the child is born, unmarried fathers are now able to submit an application for parental responsibility to the family court to which the mother may or may not object. If the mother does not dispute the application and does not present any facts indicating that it would prove detrimental to the child's welfare, shared parental

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1 See also Dethloff and Maschwitz 'Courts strengthening equality and new ways in cross-border matrimonial property questions' *International Survey of Family Law, 2011 Edition* (Jordan Publishing Limited, 2011) p 199 et seq.

2 *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*), NJW (*Neue Juristische Wochenschrift*) (2010) 3008.

3 BT-Drs (*Drucksachen des Deutschen Bundestages*) 17/11048.

responsibility may be granted by the court. This does not even require a formal hearing as in this case the law assumes that shared parental responsibility does not conflict with the child's best interests.[4] This application may also be submitted by the mother if she prefers shared custody with the child's father.[5] It is not to be expected that this possibility will be of great practical relevance, however, as there still is no way to force a father to participate in his child's upbringing if he is not so inclined.

The new legislation not only abolishes the disadvantages that unmarried fathers were faced with prior to the Federal Constitutional Court's judgment but also lowers the threshold even further. While the court stated that shared parental responsibility shall be granted if this best serves the interest of the child, the new law allows for this already if the decision does not conflict with the best interest of the child in any way. This expresses the legislators' view that a child's needs are usually best served if both parents carry legal responsibility.[6] However, in order for the court to be able to grant the father *sole* parental responsibility, this has to serve the best interest of the child.[7]

(b) Visiting rights

In order for a man to gain parental responsibility for a child, his paternity needs to be legally recognised. This is the case when he is married to the child's mother at the time of its birth, when he has acknowledged paternity or when it has been judicially established.[8] If the mother is married to a man who is not the natural father of the child born into the marriage, his legal paternity is established by virtue of law. If that is the case, the biological father may only contest this legal paternity if there is no social and family relationship between the child and the legal father.[9] Therefore, exercising visiting rights may be the biological father's only means of being a part of his child's life. His right to contact with the child, however, only exists if the child relates closely to him and if he has or has had actual responsibility for the child. This 'social and family relationship' is in general to be assumed if the father has been living for a long period in domestic community with the child.[10]

The problem this provision entails is obvious: if the biological father has not had the opportunity to care for his child yet because the child lives with the legal father, he is not entitled to contact because there is no such 'social and family relationship'. Such a relationship, paradoxically, cannot be formed because the father has no visiting rights. This legal situation has been recognised to violate the European Convention on Humans Rights by the ECtHR. In January 2013 the German government drafted an amendment to

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4 German Civil Code, s 1626a(2) (to be amended).
5 BT-Drs (*Drucksachen des Deutschen Bundestages*) 17/11048, p 16.
6 BT-Drs (*Drucksachen des Deutschen Bundestages*) 17/11048, p 17.
7 German Civil Code, s 1671(2) no 2 (to be amended).
8 German Civil Code, s 1591.
9 German Civil Code, s 1600(2).
10 German Civil Code, s 1685(2).

remedy this. According to the draft, the biological father may have visiting rights if he has shown sustained interest in the child and if this contact serves the best interest of the child. The existence of a social and family relationship would therefore no longer be required. The same provision grants the biological father the right to demand information on the personal circumstances of the child if he has a justified interest and this does not oppose the child's welfare.[11] The drafted amendment was adopted by the *Bundestag* in April 2013 and will have to pass the *Bundesrat* later this year.

III ABOLISHING THE UNEQUAL TREATMENT OF REGISTERED PARTNERSHIPS

(a) Adoption

Since 1 January 2005 registered partners are able to adopt their spouse's biological child under the same rules that apply to married couples.[12] However, this provision does not apply to children who have previously been adopted by the spouse as the subsequent adoption of a child, just like joint adoption, is still only available to married couples. The Federal Constitutional Court found this to be unconstitutional in regards to equality[13] in conjunction with the special protection of family.[14] As a consequence, the court instructed the government to amend the Registered Partnership Act accordingly by 30 June 2014. Until then, s 9(7) will be applied to non-biological children as well.

Reserving the right to adopt their partner's adopted child to married couples essentially ensures that the possibility to mutually adopt remains reserved to them as well. Persons who are not married are prohibited from adopting together in order to protect the child from being caught up in unstable relationships that do not endure. The current law has been drafted on the assumption that the only way to ensure consistency for the child is to allow only couples in stable relationships to adopt.[15] However, there is no reason to believe that a marriage is any more stable than a registered partnership as registered partnerships also offer a degree of continuity and are characterised by mutual responsibility for each other.[16]

The decision is based not only on the notion that homosexual partners in a formalised relationship shall have rights equal to their married counterparts;[17] the court also took into consideration the welfare of children growing up in

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11 German Civil Code, s 1686a (as drafted) in BT-Drs (*Drucksachen des Deutschen Bundestages*) 17/12163, p 4.

12 Registered Partnership Act, s 9 (7).

13 Basic Law for the Federal Republic of Germany, art 3(1).

14 Basic Law for the Federal Republic of Germany, art 6(1).

15 Dethloff *Familienrecht* (CH Beck, 30th edn, 2012) § 15 at 19.

16 *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG), NJW (*Neue Juristische Wochenschrift*) (2013) 847 at 852.

17 Critical of this doctrinal reason: Brosius-Gersdorf 'Gleichstellung von Ehe und Lebenspartnerschaft' FamFR (*Familienrecht und Familienverfahrensrecht*) (2013) 169.

registered partnerships. It has been shown in multiple studies that children raised by same-sex parents do not fare worse than those from traditional relationships.[18] Therefore, it was determined by the court that not allowing same-sex spouses to adopt their spouse's adopted child would deprive the child in question of the benefit of having two legal parents that come with maintenance claims, a right of succession and other legal obligations that benefit the child. This provides a disadvantage to them when compared to children adopted by married parents.[19] The court also recognised the fact that denying a person in a registered partnership the right to adopt a child who was previously adopted by his or her partner will not prevent children from growing up in these partnerships anyway, instead denying them the chance of gaining a second legal parent.[20] Hence, the Federal Constitutional Court's judgment not only ensures equality between homosexual and heterosexual couples, but also safeguards children's rights.

(b) Fiscal law

The Federal Constitutional Court has yet to decide[21] on another issue of equality that is threatening to cause a rift among the reigning parties: if both married partners are gainfully employed, their income will be assessed jointly and then split in half to deduct the applicable tax rate which is then doubled.[22] This provides a great tax relief to couples whose incomes vary considerably as the larger income is subject to a lower tax rate due this so-called 'splitting'. Legal scholars have been demanding amendments to tax law that allow equal fiscal treatment of registered partnerships and marriages for quite some time now.[23] However, as of now, couples in a registered partnership are taxed in the same way that unmarried couples are.

These differences in fiscal law are effectively the last legal provision distinguishing registered partnership from marriage. Some claim that the valid reason to continue disadvantaging registered partnerships was that only heterosexual partners are capable of producing children who ultimately should be the ones benefiting from these tax reliefs. This argument, however, is obviously invalid as children might be adopted or born into previous relationships. Moreover, this line of argumentation leads to the inevitable conclusion that not only married couples, but also unmarried hetero- and homosexual couples with children should be subject to tax relief. The Federal

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18 Rupp *Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften* (Bundesanzeiger Verlag, 2009).

19 *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*), NJW (*Neue Juristische Wochenschrift*) (2013) 847 at 855.

20 *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*), NJW (*Neue Juristische Wochenschrift*) (2013) 847 at 854.

21 Currently, two complaints are pending before the Federal Constitutional Court (2 BvR 909/06 and 2 BvR 1981/06).

22 German Income Tax Act, s 32a(5).

23 See Muscheler 'Die Reform des Lebenspartnerschaftsrechts' FPR (*Familie Partnerschaft Recht*) (2010) 227 at 232 et seq.

Constitutional Court is expected to rule in favour of the plaintiffs in this pending case, so that tax reliefs will have to be extended to registered partnerships. In this context, legislators should seriously consider abolishing tax reliefs for married couples altogether and instead grant them to families.[24]

IV PROVIDING A LEGAL FRAMEWORK FOR RELIGIOUS CIRCUMCISION

In May 2012, a judgment of the *Landgericht Köln* (Regional Court of Cologne) caused a heated debate in the media that eventually led to an amendment to the law on parental rights a few months later.[25] The court found a medical practitioner who had performed a religiously motivated circumcision on a 4-year-old boy guilty of battery as the surgery had not been medically indicated. It was found that, even though the operation had been performed according to medical standards, the parents' consent could not justify the infringement of the physical integrity of the child.[26] The court asserted that parental responsibility only covered decisions in the best interest of the child,[27] which circumcision, as a potentially harmful and painful procedure, was not.[28] The ruling caused a frenzied debate on whether an old religious tradition should be criminalised like this and whether this was in accordance with the right to freedom of religion.

The problem was then solved not by amendment of criminal law, but by inserting the new s 1631d into the German Civil Code. The new provision explicitly allows parents to consent to the non-medically necessary circumcision of their male child, if it is being performed according to medical standards and if the child's welfare is not endangered by the procedure. The written law does not state that the circumcision has to be necessarily religiously motivated.[29] However, the second paragraph clarifies that circumcision may also be performed by especially educated non-medical persons who are recognised as competent among the religious community during the first 6 months of the child's life.[30] It should be mentioned that the explanatory memorandum to the Act explicitly states that religious circumcision was not illegal before the

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[24] In favour of this: Pfab 'Familiengerechte Besteuerung – Ein Plädoyer für ein Familiensplitting' ZPR (*Zeitschrift für Rechtspolitik*) (2006) 212; Haupt and Becker 'Kinder in schlechter Verfassung? Zum Neuanlauf für eine verfassungsgerechte Familienbesteuerung' DStR (*Deutsches Steuerrecht*) (2013) 734; Schuler-Harms 'Ehegattensplitting und (k)ein Ende?' FPR (*Familie Partnerschaft Recht*) (2012) 297 at 301.

[25] 'Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes' of 20 December 2012 (see also: BT-Drs (*Drucksachen des Deutschen Bundestages*) 17/11295).

[26] Landgericht Köln (Regional Court Cologne), NJW (*Neue Juristische Wochenschrift*) (2012) 2128.

[27] German Civil Code, s 1627 sentence 1.

[28] Critical of this: Klinkhammer 'Beschneidung männlicher Kleinkinder und gesetzliche Vertretung durch die Eltern' FamRZ (*Zeitschrift für das gesamte Familienrecht*) (2012) 1913.

[29] See also Spickhoff 'Grund, Voraussetzungen und Grenzen des Sorgerechts bei Beschneidung männlicher Kinder' FamRZ (*Zeitschrift für das gesamte Familienrecht*) 337 at 338.

[30] German Civil Code, s 1631d(2) (to be amended).

amendment.[31] The new provision is therefore meant to resolve the current situation of uncertainty and prevent criminal judicial assessments like the one made in Cologne. However, only time will tell whether the Act can reconcile the various affected constitutional rights such as the child's right to physical integrity and to freedom of faith.[32]

V MISCELLANEOUS LEGISLATIVE PROJECTS

(a) Legally constituting the option of 'confidential birth'

At the present time, there is no legal way for a woman to give birth in a hospital to her child without disclosing her identity. Although some hospitals offer 'anonymous births' they thereby risk criminal prosecution.[33] Due to this, women in psycho-social distress sometimes choose to give birth to their children at home, without professional medical assistance to then dispose of them via so-called 'baby hatches' (*Babyklappen*). Baby hatches have been operated in Germany since 1999 but they are considered illegal, too, as they deprive the children placed therein of their right to know their own identity.[34] To avoid infringement on these children's basic rights, the *Bundestag* passed an Act in March 2013 to legally constitute the option of 'confidential births';[35] it is expected to enter into force by May 2014.

'Confidential births' must not be confused with 'anonymous births' as, technically, the mother does not remain anonymous. Instead she has to provide her personal information to be kept in a sealed envelope that the child will receive at the age of 16. The option to do this, however, is considered to be somewhat of an ultima ratio as the Act primarily aims to give pregnant women guidance and counselling so that, at best, they decide to keep their child.[36] The draft has been criticised on many counts such as over-regulation that stems from the fact that no less than up to seven parties can be involved in the process of providing counselling.[37] Furthermore, while the draft tries to balance the woman's wish to stay anonymous and the child's right to know its own origin, it does not properly consider the father's rights as it does not give him a means to intervene or even be informed. Other problems arise from the fact that the Act is not in accordance with adoption law as the mother has a right to withdraw

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31 BT-Drs (*Drucksachen des Deutschen Bundestages*) 17/11295, p 6.

32 Spickhoff 'Grund Voraussetzungen und Grenzen des Sorgerechts bei Beschneidung männlicher Kinder' FamRZ (*Zeitschrift für das gesamte Familienrecht*) (2013) 337 at 343; see also: Isensee 'Grundrechtliche Konsequenz wider geheiligte Tradition' JZ (*Juristen Zeitung*) (2013) 317.

33 See *Personenstandsgesetz*, s 19 sentence 1 no 2; Criminal Code, s 169.

34 For pros and cons considering abolishing baby hatches see 'Abschaffung der Babyklappen' ZPR (*Zeitschrift für Rechtspolitik*) (2010) 63.

35 '*Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt*'.

36 See BT-Drs (*Drucksachen des deutschen Bundestages*) 17/12814.

37 *Kinderrechtekommission des Deutschen Familiengerichtstags* 'Stellungnahme zum Referentenentwurf eines Gesetzes zum Ausbau der Hilfen für Schwangere – Regelung der vertraulichen Geburt' ZKJ (*Zeitschrift für Kindschaftsrecht und Jugendhilfe*) (2013) 71 at 72.

her consent to the child's adoption up until it is finalised – which may take up to a year – while consent to adoption is normally irrevocable.[38] Ultimately, this option may destroy the bond that has already been formed between the child and its adoptive parents.[39]

Despite the many irregularities, the general effort to provide pregnant women who find themselves in difficult personal circumstances with more assistance is to be welcomed. However, only time will tell whether the new provisions will have the desired effect after all.

(b) Compulsory medication of persons under legal custodianship

Section 1906(2) no 2 of the German Civil Code states that it is permissible for the custodian to put the person under custodianship in accommodation that is associated with deprivation of liberty only as long as this is necessary for the best interests of the person under custodianship because an examination of the state of health of the person under custodianship, therapeutic treatment or an operation is necessary without which the accommodation of the person under custodianship cannot be carried out and the person under custodianship, by reason of a mental illness or mental or psychological handicap, cannot recognise the necessity of the accommodation or cannot act in accordance with this realisation.

Until June of 2012, the *Bundesgerichtshof* (BGH, Federal Court of Justice) regarded this provision sufficient to justify the compulsory medication of such persons.[40] Two recent judgments,[41] however, found this to be in breach of the constitution in the light of judgments of the *Bundesverfassungsgericht* regarding compulsory treatment in custody.[42] Due to the fact that compulsory medication constitutes an encroachment upon fundamental rights, it may only be ordered on a precise and specific legal basis[43] which s 1906 does not provide. This judgment led to the urgent need to draft a new provision since it was now impossible to force medication upon a person under legal custodianship even if not treating them would lead to damage to their health or even death.[44]

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38 See German Civil Code, s 1750(2) sentence 2.

39 *Kinderrechtekommission des Deutschen Familiengerichtstags* 'Stellungnahme zum Referentenentwurf eines Gesetzes zum Ausbau der Hilfen für Schwangere – Regelung der vertraulichen Geburt' ZKJ (*Zeitschrift für Kindschaftsrecht und Jugendhilfe*) (2013) 71 at 73.

40 *Bundesgerichtshof* (Federal Court of Justice – *BGH*), NJW (*Neue Juristische Wochenschrift*) (2006) 1277; (2010) 3718.

41 *Bundesgerichtshof* (Federal Court of Justice – *BGH*), NJW (*Neue Juristische Wochenschrift*) (2012) 2967.

42 *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*), NJW (*Neue Juristische Wochenschrift*) (2011) 1128; 3571.

43 *Bundesgerichtshof* (Federal Court of Justice – *BGH*), NJW (*Neue Juristische Wochenschrift*) (2012) 2967, 2969.

44 Grengel and Roth 'Die Zwangsbehandlung von Betreuten – Notwendigkeit und Inhalt einer Neuregelung' ZRP (*Zeitschrift für Rechtspolitik*) (2013) 12 at 14.

Entered into force in February 2013,[45] the amended s 1906 of the Civil Code now states specific conditions under which persons under legal custodianship can be medically treated against their will. These are now in accordance with highest-court case-law. However, compulsory treatment may only be administered if the patient is in a closed institution. Therefore, there is still no legal basis to treat out-patients against their will.[46] The custodian may only consent to the measure against the patient's will:

(1) if the person under legal custodianship is unable to recognise the necessity of a medical measure or unable to act according to such an understanding due to a mental illness or disability;

(2) if the treatment is necessary in the interest of the person's well-being in order to avert impending substantial damage to their health;

(3) if this damage may not be averted by any other means; *and*

(4) if the expected benefit of the measure clearly outweighs the expected impairments.[47]

VI PROSPECTS

While the solutions presented in this chapter will have to prove their worth in practice, other issues have yet to be dealt with. Faced with the fact that after the Federal Constitutional Court's ruling, registered partnerships will most likely be almost indistinguishable from marriage legally, opening marriage to same-sex couples and abolishing the Registered Partnership Act will have to be seriously considered. In fiscal law, just as in the other areas of law that have been presented here, children's rights will have to occupy a more significant position in future.

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[45] '*Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme*'; see also BT-Drs (*Bundestagsdrucksache*) 17/11513.

[46] See Dodegge 'Ärztliche Zwangsmaßnahmen und Betreuungsrecht' NJW (*Neue Juristische Wochenschrift*) (2013) 1265 at 1270.

[47] For further infomation on procedural provisions see: Dodegge 'Ärztliche Zwangsmaßnahmen und Betreuungsrecht' NJW (*Neue Juristische Wochenschrift*) (2013) 1265 at 1268 et seq.

Hungary

PARENTAL RESPONSIBILITIES AND THE CHILD'S BEST INTEREST IN THE NEW HUNGARIAN CIVIL CODE (2013)

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Résumé

Le processus de codification du nouveau Code civil hongrois initié en 1998 est parvenu à son terme en février 2013 avec l'approbation du Parlement. Le nouveau Code entrera en vigueur le 15 mars 2014. Lorsque l'idée d'un nouveau Code civil a émergé, un débat est survenu sur la nésscité d'y inclure le droit de la famille, réglementé par une loi à part sur le marriage, la famille et l'autorité parentale. La decision de faire figurer les disposition du droit de la famille a été réellement decisive pour cette matière. Le nouveau Code civil est divisé en sept livres, le quatrième portant sur le droit de la famille. Les principe de ce livres sont les suivants : la protection du mariage et de la famille, la protection des intérêts de l'enfant, l'égalité des époux et enfin l'équité et la protection de la partie faible.

I INTRODUCTION

The codification process of the new Hungarian Civil Code began back in 1998 and reached its end in February 2013 when the new Civil Code was accepted by Parliament. The new Code enters into force on 15 March 2014.[1]

When the idea of a new Civil Code emerged, a debate began whether family law, which is already regulated in an independent Act, namely Act No IV of 1952 on marriage, family and guardianship, should have been included in the Civil Code. The decision which was made has been a really decisive one for family law as it has been returned to the corpus of the Civil Code. The new Civil Code, namely Act No V of 2013 of the new Civil Code,[2] consists of seven books among which the fourth is the Family Law Book.

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1 15 March is a highly respected day in Hungary. It was the first day of the Hungarian Revolution of 1848 and it is one of the three national holidays.

2 The Act has been published in the Hungarian Official Gazette, 2013/31 (26 February 2013).

II PRINCIPLES OF THE FAMILY LAW BOOK

Four principles are introduced in the Family Law Book with the aim of emphasising that family law is a special branch of civil law where distinctive legal rules are to be applied according to special considerations. The principles are the following: protection of marriage and family, protection of the child's interest, equality of spouses, and lastly fairness and the protection of the weaker party. All principles affect the child's position and his or her best interest.

The so-called 'Experts' Proposal', elaborating upon the conception of the new Civil Code and coordinated by Professor Lajos Vékás, was published in 2008. The principles of the new Civil Code coincide with those of the Experts' Proposal, except for the first one.

(a) Protection of marriage and family

The Experts' Proposal promoted the protection of family relationships in the first-mentioned principle instead of the protection of marriage and family (art 4:1(1)). The Hungarian Constitution, being in force in 2008, specified the protection of marriage and family, which is partly why the Experts' Proposal had intended not to repeat it. Another reason for underlining the protection of family relationships generally was a rational one. According to demographic trends several people live in so-called factual relationships even in Hungary. The phrase 'family relationships' would have included not only relationships having legal effect through marriage, parental status, adoption and guardianship but also factual situations such as cohabitation, stepchild–step-parent relationships, and foster child and foster parent relationships. Although this conception, based also on the practice relating to Art 8 of the European Convention on Human Rights, was supported by experts of family law and civil law, the Constitution had also changed and a new Act, namely Act No CCXI of 2011 on protection of families, entered into force in the meanwhile.

The Act on protection of families is expressly mentioned in art L of the Fundamental Law and it is a cardinal Act, which means that two-thirds of MPs are needed for its acceptance and modification.

The new Fundamental Law of Hungary being accepted in April 2011 specified in art L that:

> 'Hungary shall protect the institution of marriage, the conjugal union of a man and a woman based on voluntary and mutual consent. Hungary shall also protect the institution of the family, which it recognizes as the basis for survival of the nation.'

At the same time the new Act on protection of families stated that the basis of the family is the marriage of a man and a woman or lineal affinity or guardianship. This strict conception of family in the Act on protection of

families was deemed to be unconstitutional and annulled in December 2012. In March 2013 the Fundamental Law of Hungary was modified for the fourth time, so according to the actual wording of art L of the Fundamental Law:

> 'Hungary shall protect the institution of marriage, the conjugal union of a man and a woman based on voluntary and mutual consent and the family as the basis for survival of the nation. The basis of the family is marriage and the parent-child relationship.'

These changes explain the change to the first principle of the Family Law Book in comparison with that of the Experts' Proposal. The factual relationship between child and his or her step-parent, foster-parent or other relative is nevertheless somewhat protected in the special regulations of the Family Law Book. According to the academic and judicial commentary on the principles, family is not to be strictly interpreted.

(b) Protection of the child's interest

Although the Family Act in force now guarantees the protection of the child's rights and interests, the new Civil Code emphasises some children's rights. According to art 4:2(1)–(4) the child's interests and rights are specially protected in family relationships and the child has the right to be brought up in his or her own family. If it is not possible, it has to be guaranteed that the child will be brought up in a familial environment as far as possible and maintain his or her family relationships. According to the last paragraph, the rights of the child to be brought up in his or her family or familial environment and maintain the family relationship should be restricted only in legally determined cases, exceptionally and only in the child's interest.

The Experts' Proposal did not intend to provide a whole catalogue of children's rights because of the fact that Act No XXXI of 1997 on the protection of children guarantees several rights based upon the United Nation's Convention on the Rights of the Child of 1989. In the meanwhile the above-mentioned Act No CCXI of 2011 on protection of families has a regulation concerning the parent–child relationship, which affects the children's rights. The parents are obliged and have the right to care for and bring up their child in their family, and provide circumstances suitable for the child's mental, physical and moral development and his or her access to education and medical treatment.

(c) Equality of spouses; fairness and protection of the weaker party

One of the classic and traditional family law principles is the equality of spouses (art 4:3), which is protected in several international and European documents. The equal rights and obligations of spouses guarantee their equal status towards their common children. This regulation is parallel to the protection of spouses and of course does not mean that cohabitants or the

mere legal father and mother of one child would not have the same position in their parent–child relationships. Fairness and protection of the weaker party (art 4:4) is a new general family law principle, although judicial practice applies it in relation to some family law issues.

III PRINCIPLES ON THE EXERCISE OF PARENTAL RESPONSIBILITIES

Although the Family Law Book has its own principles that are special in relation to the general civil law principles of the whole Code, the chapter on exercise of parental responsibilities introduces its principles with a special view to the child and his or her best interest. Parental responsibilities encompass several rights and obligations, namely the determination of a child's name, care and education, determination of residence, administration of property, legal representation, designation of a potential guardian in case of the parents' death and exclusion of someone from guardianship. (Parental rights concerning the guardian (designation or exclusion) obviously mean only rights and not obligations at the same time.)

It is substantially emphasised that parents should exercise their parental responsibilities in the interest of the child's physical, mental and moral development. They have to co-operate with each other. Parents have equal rights in exercising joint parental responsibilities (art 4:147(1)–(2)). The equality of parents is required not only where the parents are spouses or ex-spouses but also in the case of cohabitants or ex-cohabitants. Parental status does not depend on the personal status of parents or their relationship as partners.

In harmony with the principles of the Family Law Book, the responsibilities of the parents may be restricted or suspended by the court or public guardianship authority only in exceptional cases, being determined in an Act, and the restriction or suspension should not exceed the extent which is necessary for providing for the child's interests (art 4:149).

Concerning the child's own opinion, the regulations of the new Family Law Book are in harmony with those of the Convention on the Rights of the Child. Parents should inform their child about the decisions concerning the child and guarantee that the child who is capable of forming his or her own views can express them during the decision-making process or decide together with their parents. Parents should give due weight to the views expressed by the child having regard to the child's age and maturity.

IV THE JOINT EXERCISE OF PARENTAL RESPONSIBILITIES

In the case of parents living together, parental responsibilities are exercised jointly and irrespective of whether they are spouses or cohabitants. Nevertheless, even if they live apart from each other joint parental responsibilities may be the main rule. According to the Family Law Book parents exercise parental responsibilities jointly even if they do not live together in the absence of an agreement between them, or the court or the public guardianship authority decision (art 4:164 (1)). Although this regulation seems to be a good one, it generates several conflicts when the parents' relationship has already broken down or has become a high-conflict case and there is not yet a decision. If they cannot agree and are waiting for a judgment, this period is an 'interregnum'. Although a court may give an interim decision, it occurs only rarely in Hungarian judicial practice.

Concerning the parental agreement about joint parental custody in the case of divorce upon the basis of the spouses' mutual consent, there are some consequences upon which the spouses must agree and one of these consequences – so-called ancillary questions – is that of parental responsibilities. According to the new Civil Code parents may agree on joint parental responsibilities. If this occurs, they do not have to agree on contact but have to agree on the child's maintenance and determine the residence of the child. Hungarian judicial practice sometimes recognises alternating residence for the child but it is not a well-known and widespread legal institution. Maybe that is the reason for it not being regulated in the Family Law Book. Nevertheless, it is to be emphasised that alternating residence is not prohibited.

Even if there is no mutual consent, when divorcing parents or parents who were not spouses break up their common life, they have the option to put their agreement on joint parental responsibilities before the court and claim its approval. This agreement has to extend to the child's residence as well. According to art 4:165(2) of the Family Law Book, the court has a discretionary power as it may weigh whether the joint parental responsibilities serve the child's best interest.

Joint parental responsibilities have been regulated very briefly in the Family Act. The fact that there are more and more divorces was taken into account during the codification process just as the phenomenon of a growing tendency of parents after the relationship's break-up to co-operate may be recognised. These are reasons why the new Civil Code gives some instruction to the parents living apart from each other but exercising joint parental responsibilities. Parents should provide a balanced lifestyle for their child and both of them have the right to act alone in the interest of the child, alongside informing the other parent if an important decision has to be taken promptly. In case of a disagreement on an important matter the parents could up until now apply to the court. The competent authority has been changed. The parents should

apply to the public guardianship authority according to the Family Law Book except for matters concerning freedom of conscience and religious freedom (arts 4:164 (2)–(3) and 4:166).

If parents cannot co-operate when exercising joint parental responsibilities, either of them may ask the court to terminate the joint parental responsibilities.

V THE DIVISION OF PARENTAL RESPONSIBILITIES AND ITS SOLE EXERCISE

In the case of either divorce upon the spouses' mutual consent or reaching an agreement after the break-up of the relationship, parents who live apart from each other may divide the rights and obligations in relation to parental responsibilities or may agree that either of them should exercise parental responsibilities solely (art 4:165(1)). If they cannot agree, the court will decide on parental responsibilities either upon their application or ex officio if this is necessary in the child's interest.

The court cannot order joint parental responsibilities against the will of either of the parents. One of the parents may be given parental responsibilities and it is up to the court's discretionary power which parent this will be. The court has to weigh every circumstance and the crucial thing is how the child's physical, mental and moral development might be better promoted. In that case the child will reside with that parent and the non-residential parent will have the right of contact with the child. The parent who does not exercise parental responsibilities maintains the right to decide important matters affecting the child in conjunction with the holder of the parental responsibilities.

However, the new Civil Code allows the court to empower the non-residential parent to exercise some rights and tasks even whilst giving parental responsibilities to the other parent. On the other hand, even the right to decide important matters affecting the child in conjunction with the holder of the parental responsibilities might be taken away from the non-residential parent. The Family Law Book empowers the court to make flexible decisions according to the best interests of the child.

In the legal proceedings brought for arranging parental responsibilities, the court may oblige the parents to have recourse to mediation. It is up to the court to consider whether mediation is an appropriate method to solve a conflict between the parents in individual cases. The aim of this alternative dispute resolution is to promote the proper exercise of parental responsibilities and co-operation between the parents. Mediation is also available in cases when contact between the child and non-residential parent is to be improved.

VI THE RIGHTS AND OBLIGATIONS OF THE NON-RESIDENTIAL PARENT

Because of the huge number of parents and children who live in separate households after the break-up of the parents' marriage or cohabitation, an independent and brand new chapter of the Family Law Book is devoted to the rights and obligations of the non-residential parent. The parent exercising parental responsibilities and the non-residential parent have to co-operate with each other to be able to provide a balanced lifestyle for the child. Besides, they have to respect each other's family life (art 4:173). Although those are imperative rules, no direct sanction is introduced in case of either parent's failure. If the obligation of cooperating is infringed it has – sometimes indirect – consequences on a rather long-term basis.

The parent who does not exercise parental responsibilities maintains the right to decide important matters affecting the child in conjunction with the holder of the parental responsibilities. Both parents are involved in those decisions even in the absence of joint parental responsibilities. These issues are the determination and change of the minor's name, the child's residence, change of child's citizenship, his or her education and career. In the case of the parents' failure in reaching a decision on any of the important matters, the public guardianship authority has competence to decide. Earlier the court had competence to proceed but the public guardianship authority is now considered to be an authority being in a proper position to resolve the parents' dispute.

Special obligations on informing the other party are introduced. The residential parent is obliged to regularly inform the other parent about the child's development, health and studies. If the non-residential parent asks for information, the residential parent has to give the information requested for. If the non-residential parent is empowered with some rights and tasks concerning the child, this parent also has to comply with the requirement of informing the other parent. These obligations are not balanced with any direct sanction. Nevertheless, in the longer term there may be indirect consequences.

VII CLOSING REMARKS

Neither the Family Law Book nor the regulation of parental responsibilities has been planned to deviate from the known path of family law rules. Parental responsibilities have not been dependent upon whether the parents are married or not for several decades in Hungary. The legal possibility of joint parental responsibilities was introduced in 1995 but it is regulated in a broader sense in the new Civil Code. The known and applied institutions of parental responsibilities have remained in the better-organised structure of the Family Law Book but some emphases have been shifted according to the changed circumstances of society. Also the requirement of taking into account the child's best interest has for today been strengthened. The partly new rules tend to serve the child's interests in an even better way.

There are changes which people have urged should be taken into account like the increasing number of broken homes and divorces and the growing number of children having a residential and a non-residential parent. The result may be seen in the rather detailed regulations and the new and transparent structure of the rules. Besides, a different attitude may also be perceived when comparing the existing rules on parental responsibilities and those included in the new Civil Code. This attitude encounters with the fact that lifestyles of families and those of parents' and children's are diverging and continuously changing. The more flexible rules may permit the distinctive treatment of different cases for the sake of the child's best interest.

India

LAW AND SURROGACY ARRANGEMENTS IN INDIA

Anil Malhotra and Ranjit Malhotra[*]

Résumé

La gestation pour autrui (GPA) est courante en Inde où elle attire les étrangers qui veulent un enfant. Le pays reconnaît pour le moment, en application du droit commun des contrats, la légalité de la GPA, incluant la GPA rémunérée. Les étrangers, à moins d'être Hindous, ne peuvent adopter un enfant né d'une gestation pour autrui. Cependant, un tribunal peut rendre une ordonnance de garde autorisant l'enfant à quitter le pays. Ce principe a été confirmé par la Cour suprême de l'Inde dans une affaire impliquant un couple de Japonais qui se sont séparés avant la naissance de l'enfant. La mère de l'époux avait initié les procédures et elle a pu, à l'issu de la décision de la Cour suprême, amener l'enfant au Japon. Cet arrêt aura un impact sur d'autres cas, notamment lorsque le père génétique est célibataire ou vit en couple avec un autre homme. Un projet loi, préparé par un comité d'expert, propose un encadrement de la gestation pour autrui et rend les ententes de GPA exécutoires. En attendant, le gouvernement indien vient cependant de modifier ses exigences en matière de visas, de manière telle que le commerce international de la GPA risque bien de plonger du nez. Les personnes qui veulent se rendre en Inde en vue d'une GPA devront désormais obtenir un 'visa médical' plutôt qu'un simple visa de touriste. Or un tel visa ne sera délivré qu'à la vue d'une lettre des autorités du pays du demandeur établissant que la GPA y est reconnue et garantissant que l'enfant pourra y entrer. En réalité, cette nouvelle réglementation vient suppléer le défaut du Parlement de contrôler le commerce de la gestation pour autrui.

I POSITION OF INDIAN LAW FOR SURROGACY ARRANGEMENTS

Surrogacy in India is as of now considered legitimate because no Indian law prohibits surrogacy, but then, as a retort, no law to date permits surrogacy either. Hence, surrogacy agreements in India are governed by ordinary contract law, ie the Indian Contract Act 1872, to determine the legality of any such contract or agreements executed in India for different forms of surrogacy

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arrangements. The enforceability of any such agreement is within the domain of Indian civil procedural laws and the main component of this is in the Indian Code of Civil Procedure.

In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) had issued guidelines in 2005 to check the malpractices in India but these guidelines being non statutory are not mandatory, do not have any compulsive force and are not enforceable or justiciable in a court of law in India.

The recent case[1] of a Japanese baby born of an Indian surrogate mother has triggered a debate as to the natural/genetic father's rights, since, after divorce, he could not claim custody according to Indian laws on the facts of that case. The Supreme Court of India had in the case dealt with the matter upon the grandmother's claim to custody and had made observations regarding commercial and other forms of surrogacy since the Union of India had pleaded before it as follows:[2]

> 'that there is no law governing surrogation in India and in the name of surrogation, a lot of irregularities are being committed. According to it, in the name of surrogacy, a money making racket is being perpetuated. It is also the stand of the said respondent that the Union of India should enforce stringent laws relating to surrogacy.'

However, it may be added that the Supreme Court of India stated that:[3]

> 'Surrogates may be relatives, friends or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies, the amount a surrogate receives varies widely from almost nothing above expenses to over $30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.'

It may further be added that the Supreme Court of India, fully realising the existing surrogacy practices prevalent in India, observed:[4]

> '5. Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may … as a gestational carrier carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

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1 *Baby Manji Yamada v Union of India and Another* Judgments Today 2008 (11) Supreme Court 150.
2 Ibid, para 3, p 151.
3 Ibid, para 12, p 153.
4 Ibid, paras 5–11, pp 152–153.

The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.

6. In "traditional surrogacy" (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (inter-cervical insemination) which is performed at a fertility clinic.

7. In "gestational surrogacy" (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e g because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

8. "Altruistic surrogacy" is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of her child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing and other related expenses).

9. "Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

10.Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

11. Alternatively, the intended parent may be a single male or a male homosexual couple.'

From a reading of the above, it is apparent that 'commercial surrogacy' is a medical procedure which is considered to be legal in India due to the factors mentioned in para 9 of the judgment above. However, the fact remains that there is no statutory codified law governing commercial surrogacy and other arrangements.

It may be noticed here that a Draft Bill called the 'Assisted Reproductive Technology (Regulation) Bill & Rules – 2010' which has been prepared by a 12-member committee including experts from Indian Council for Medical Research and from the Ministry of Health and Family Welfare, as well as medical specialists and other experts, has been circulated for comment and posted online recently for feedback. The new Assisted Reproductive Technology (Regulation) Bill & Rules 2010, propose to legalise commercial surrogacy and its salient points are:

- The surrogacy agreement will be legally enforceable.
- The surrogate mother may receive monetary compensation for carrying the child in addition to health care and treatment expenses during pregnancy.
- The surrogate mother will relinquish all parental rights over the child once the amount is transferred and birth certificates will be in the name of genetic parents.
- The prescribed age limit for a surrogate mother is between 21 and 45 years. The proposed Bill also states that no surrogate mother can undergo an embryo transfer more than three times.
- Single parents can also have children using a surrogate mother.
- All foreigners seeking infertility treatment in India will first have to register with their embassy. Their notarised statement will then have to be handed over to the treating doctor. The foreign couple will also state whom the child should be entrusted to in case of an eventuality such as a genetic parent's death.

The Bill is still being debated and has not yet become law in India. Hence, anything quoted above is only a proposed law. Therefore, in the absence of any codified law as the situation exists today, in respect of surrogacy arrangements, the ordinary civil law of the land is applicable in respect of surrogacy also since there is no specific law on the subject to govern such arrangements. The Code of Civil Procedure 1908, is an Act made by the Indian Parliament for the entire territorial jurisdiction of India as a federal law to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. Section 9 of this Code permits courts to try all civil suits unless barred:

> '9. Courts to try all civil suits unless barred— The Courts shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.'

As a result, in the law as it exists in India today, both the validity and enforceability of any surrogacy arrangement or agreement can be achieved in a civil court by a civil suit under s 9 of the Code, seeking appropriate relief as is

admissible to parties under Indian law. However, the touchstone of the validity of a civil suit would have to be tested under contract law.

Against this backdrop, it may thus be necessary to also see the position of surrogacy arrangements or agreements under the Indian law of contract. It is first be pertinent to quote s 10 of the Indian Contract Act 1872:

> '10. What agreements are contracts – All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.'

For the present context, any surrogacy arrangement or agreement, which is arrived at by the free consent of the parties who are competent to contract and who have entered into the arrangement or agreement for a lawful consideration as also with a lawful object which is not expressly declared to be void, would be a contract. It may be added that since under the prevalent law in India, commercial surrogacy procedures are legal in India, subject to the fulfilment of other conditions of s 10 of the Contract Act a surrogacy arrangement or agreement would be a contract. In the face of this conclusion, a surrogacy agreement or arrangement would be a contract enforceable by civil suit under s 9 of the Code of Civil Procedure.

For the present purposes, it may be helpful to note certain observations of the Supreme Court of India interpreting s 9 of the Code of Civil Procedure. The Supreme Court of India in the case of *E Achuthan Nair v P Narayanan Nair and Another*,[5] held as follows:

> 'In India, the question whether a suit is cognizable by a civil court is to be decided with reference to Section 9 of the Civil Procedure Code. If the suit is of a civil nature, the court will have jurisdiction to try the suit unless it is either expressly or impliedly barred.'

Further, the Supreme Court of India in another case, *PMA Metropolitian v MM Marthoma*,[6] held:

> 'The expansive nature of the Section 9 is demonstrated by use of phraseology with positive and negative. The earlier part opens the door widely and later debars entry to only those, which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilized jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the

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5 All India Reporter 1987 Supreme Court 2137.

6 All India Reporter 1995 Supreme Court 2001 at 2022-23.

> ambit of the section by use of the word "shall" and the expression, "all suits of a civil nature" unless "expressly or impliedly barred". Each word and expression casts an obligation on the Court to exercise jurisdiction for enforcement or right. The word "shall" makes it mandatory. No Court can refuse to entertain a suit if it is of description mentioned in the section. That is amplified by use of expression, "all suits of civil nature". The word "civil nature" is wider than the word "civil proceeding". The section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature.'

In the face of the above interpretations of s 9 of the Code of Civil Procedure by the Supreme Court of India, it is safe to conclude that surrogacy agreements or arrangements which satisfy the ingredients of s 10 of the Indian Contract Act would be contracts which are enforceable in a civil court since the cognisance of such a civil suit would neither be expressly or impliedly barred.

There also exists in India another piece of federal legislation applicable throughout the territory of India called 'The Guardian and Wards Act 1890', which is an Act to consolidate and amend the law relating to guardians and wards prevalent in India. Section 4 of the Act specifies the persons entitled to apply for a guardianship order and s 9 prescribes the court as having jurisdiction to entertain the guardianship application. Section 10 lays down the form of the application and s 11 prescribes the procedure on admission of the application. Section 13 lays down the requirement of hearing of evidence before making of an order under the Act and s 26 permits the removal of a ward from the jurisdiction of the court. This is the second possible option which can be availed of by the biological father in the present case for enforcement of his rights arising from the surrogacy arrangement or agreement existing in the present case.

II FACTS AND LAW RELATING TO JAPANESE BABY MANJI YAMADA BORN IN INDIA ON 25 JULY 2008 BY SURROGACY ARRANGEMENT

Since there is no statutory codified law governing surrogacy in India, there is only a 126-page document regulating the technologies used in surrogacy. The Indian Council of Medical Research (ICMR) issued the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India in 2005, but the guidelines being non-statutory have no legal sanctity and are not binding. They are hazy on issues like the right of the surrogate, the minimum age of the surrogate, details about the contracts, informed consent, adoption requirements etc. The issue of legal parentage has been particularly contentious in the absence of any law.

Dr Ikufumi Yamada (45), an orthopaedic surgeon attached to a Tokyo hospital and his former wife Dr Yuki Yamada came to India in 2007 and had chosen a surrogate mother in Anand, Gujarat. When Dr Yuki Yamada could not

conceive, the couple had chosen the surrogate mother in Ahmedabad to carry the child. They signed an agreement of surrogacy with Dr Nayanaben Patel of Akansha IVF Centre, an Ahmedabad Hospital on 22 November 2007.

The surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. Pritiben Mehta, wife of Brijeshbhai Mehta also from Ahmedabad, signed the agreement to serve as the surrogate mother. The fertilisation process of Yuki's eggs with Ikufumi's sperm was completed in Tokyo and the embryo was brought to Ahmedabad to be implanted in the surrogate mother. The embryo transfer was done at Dr Nayanaben's Hospital on 22 November 2007 in the presence of the Japanese couple. After that they left for Tokyo and the child was born on 25 July 2008 in Anand, Gujarat. However, a month before that Yuki divorced her husband Ikufumi Yamada and she subsequently disowned the child.

On 3 August 2008, the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat and she was provided with much needed care including being breast-fed by a woman who had given birth to a baby girl as the surrogate mother had also abandoned the baby. A friend of Ikufumi, Mr Kamal Vijayvargiya, a jeweller from Jaipur and settled in Tokyo, was instrumental in getting the baby shifted to Arya Hospital in Jaipur and also to get Ikufumi's mother to come down and take care of the child.

It transpired that the biological father Ikufumi had come to take custody but had to return to Japan before his visa expired. Custody was denied even to the grandmother (Ikufumi's mother) after a habeas corpus petition was filed in the Jaipur Bench of the Rajasthan High Court by an NGO, Satya, who claimed that in the absence of surrogacy laws in India, the custody of the child should not be given to the grandmother. To complicate things further, before the Rajasthan High Court, neither the biological father nor the surrogate mother had moved an application seeking custody of the child. The Municipal Council at Anand in Gujarat had issued a birth certificate to the baby indicating the name of the genetic father.

Against the directions of the Rajasthan High Court, the grandmother, Emiko Yamada filed a writ petition in the Supreme Court. It was contended in the Supreme Court that under the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005 ('the ICMR 2005 Guidelines') the surrogate child is the legitimate child of its genetic parents. Paragraph 3.16.1 of the ICMR 2005 Guidelines in Chapter 3 entitled Code of Practice, Ethical Considerations and Legal Issues states:

> **'3.16 Legal Issues**
>
> **3.16.1 Legitimacy of the child born through ART**
>
> A child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance. Sperm/oocyte donors shall have no parental right or duties in relation to the child, and their anonymity shall be protected except in regard to what is mentioned under item 3.12.3.'

In accordance with the pleadings before the Supreme Court of India, when the matter first came before it on 14 August 2008, the Court by an interim order allowed the grandmother to take care of the baby until the legal wrangles were sorted out by the Court.

Ultimately, on 29 September 2008, the Supreme Court of India disposed of the writ petition filed by the grandmother with directions that, if any person has any grievance or complaint relating to the child, it can be vented in accordance with the Commission for Protection of Child Rights Act 2005. This was with regard to the allegations of the Jaipur NGO 'Satya' that the child was abandoned as neither the natural parents nor the surrogate mother were taking care of the child.

In relation to the grievance of the grandmother that the permission to travel to Japan including issuance of a passport to the child was under consideration of the central government and that no orders had been passed in that regard, the Supreme Court directed that if a comprehensive application as required under law is filed, it was to be disposed of expeditiously. All proceedings pending in the High Court relating to the matter which had been dealt with stood disposed of by the Supreme Court order of 29 September.

Following the directions of the Supreme Court, the Regional Passport Office in Jaipur on 17 October 2008 issued an 'Identity Certificate' to the baby allowing her to travel to Japan to meet her father Ikufumi Yamada. However, the baby's citizenship status still remained unclear. Reportedly, the baby Manji Yamada and her Japanese grandmother Emkio Yamada who had been looking after her left India to go to Japan on 1 November 2008.

The ICMR Guidelines say that the child born through surrogacy must be adopted by genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting that the child is not theirs. This is a legal parenthood option arising out of surrogacy arrangements. Paragraph 3.10.1 of the ICMR 2005 Guidelines in Chapter 3 entitled Code of Practice, Ethical Considerations and Legal Issues states:

> **'3.10 Surrogacy: General Considerations**
>
> 3.10.1 A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.'

However, it may be clarified that the legal process of adoption in India by any foreign parents is itself not possible since the Guardian and Wards Act 1890 permits guardianship orders only and adoption processes have to follow in the respective countries of the nationality or permanent residence of the proposed adoptive parents. Hence, no legal adoption can take place in India by foreign parents except those who are Hindus by religion and are governed by Hindu laws in this regard.

It may also be pointed out that the Indian law on the subject of adoption, entitled 'the Hindu Adoption and Maintenance Act 1956', is an Act to amend and codify the law relating to adoptions and maintenance among Hindus only. Likewise, 'the Hindu Minority and Guardianship Act 1956', is an Act to amend and codify certain parts of the laws relating to minority and guardianship among Hindus. These personal laws governing Hindus permit adoption as laid down in the said laws.

III VALIDITY OF GUARDIANSHIP PROCEEDINGS

The Indian law applicable in the present case is the Guardians and Wards Act 1890 (GWA) which is the legislation meant to consolidate and amend the law relating to guardians and wards in India. This is because under the Hindu Minority and Guardianship Act 1956 (HMGA) and under the Hindu Adoptions and Maintenance Act 1956 (HAMA) only those persons in India who are Hindu by religion can adopt or be appointed as guardians of Hindu minor children.

In the case of normal inter-country adoptions, to enable any foreign adoptive parents to take a Hindu child in adoption from India, such parents would be required to obtain a guardianship order from the Court of the Guardian Judge in the appropriate jurisdiction within India and thereafter obtain adoption orders in accordance with the law applicable to such foreign parents in the country of their nationality. The position therefore in this regard can be summed up as follows:

(a) In so far as the law in India is concerned, only persons who are Hindus by religion can adopt children in India since s 2 of the HAMA and s 3 of HMGA make it explicitly clear that the respective Acts are applicable only to those persons who are Hindus by religion.

(b) As per the provisions of the GWA applicable to all persons in India, the adoptive parents are permitted to be appointed as guardians of minor

children in India and are thereafter free to adopt them in the country of their nationality to which they are allowed to take the children for adoption by the Guardian Judge in India.

(c) It is relevant to quote and extract ss 7, 8, 9, 10, 11, 13, 17 and 26 of the GWA which are relevant in the present case as follows:

'7. Power of the Court to make order as to guardianship.

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property, or both, or
(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

8. Persons entitled to apply for order.

An order shall not be made under the last foregoing section except on the application of—

(a) the person desirous of being, or claiming to be, the guardian of the minor, or
(b) any relative or friend of the minor, or
(c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property, or
(d) the Collector having authority with respect to the class to which the minor belongs.

9. Court having jurisdiction to entertain application.

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where

the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

10. Form of application.

(1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the 1* Code of Civil Procedure (14 of 1882), for the signing and verification of a plaint, and stating, so far as can be ascertained—

(a) the name, sex, religion, date of birth and ordinary residence of the minor;
(b) where the minor is a female, whether she is married, and, if so, the name and age of her husband;
(c) the nature, situation and approximate value of the property, if any, of the minor;
(d) the name and residence of the person having the custody or possession of the person or property of the minor;
(e) what near relations the minor has, and where they reside;
(f) whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment;
(g) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and, if so, when, to what Court and with what result;
(h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;
(i) where the application is to appoint a guardian, the qualifications of the proposed guardian;
(j) where the application is to declare a person to be a guardian, the grounds on which that person claims;
(k) the causes which have led to the making of the applications; and
(l) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

(2) If the application is made by the Collector, it shall be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).

(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses.

11. Procedure on admission of application.

(1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing—

(a) to be served in the manner directed in the Code of Civil Procedure (14 of 882) on—

(i) the parents of the minor if they are residing in any State to which this Act extends,
(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,
(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and
(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given; and

(b) to be posted on some conspicuous part of the courthouse, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

(2) The State Government may, by general or special order, require that, when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the Court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.

(3) No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2).

13. Hearing of evidence before making of order.

On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.

17. Matters to be considered by the Court in appointing guardian.

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted

(5) The Court shall not appoint or declare any person to be a guardian against his will.

26. Removal of ward from jurisdiction.

(1) A guardian of the person appointed or declared by the Court unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general, and may be defined by the order granting it.'

A reading of the above provisions specifies the persons who are entitled to apply for guardianship, powers of the court to make an order for guardianship, the court having the jurisdiction to entertain the application, procedure on admission of application, leading of evidence before making of an order for guardianship and matters to be considered by the court in appointing a guardian. Likewise, the Guardian Court can permit the removal of the ward from its jurisdiction under s 26 of the GWA.

In relation to conventional inter-country adoption proceedings in India and following the landmark judgment of the Supreme Court of India in *Lakshmi Kant Pandey v Union of India*,[7] the Central Adoption Resource Agency (CARA) was established by the Ministry of Social Justice and Empowerment, Government of India, and guidelines were issued for adoption of children and for providing a uniform mechanism for processing cases of inter-country adoptions. With the Hague Convention on inter-country adoptions of 1993 coming into force in India with effect from 1 October 2003, it has been obligatory for CARA to produce guidelines on family adoptions. The process of inter-country adoptions in the CARA guidelines was streamlined in accordance with the requirements of the Hague Convention. Revised guidelines were accordingly laid down by CARA in 1995 which were again revised in 2006, 2007, 2008 and 2010.

However, in so far as the provisions of the GWA are concerned there is no change and the same provisions are still applicable. However, in view of the mandate of the Supreme Court of India in the above decision, adherence to the provisions of the CARA guidelines is compulsory in conventional inter-country adoptions from India. Hence, all clearances and permissions which have to be obtained under CARA besides adherence to the procedure for conventional inter-country adoptions must be followed strictly.

In so far as the guardianship proceedings are concerned, the Guardian Judge under the GWA is competent to make a decision on the guardianship application presented to him. Detailed provisions in this regard have been quoted above. Once permission has been granted by the Guardian Judge to take the child out of the country under s 26 of the GWA, and the guardianship order has been made by the Guardian Judge under the GWA in India,

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[7] All India Reporter 1984 Supreme Court 469.

thereafter, the competent foreign court would be empowered to make a decision in the adoption case before such court. This is because there can be no adoption application or order for adoption in India in respect of the foreign adoptive father. Hence, the courts in India in the present case will confine themselves to the guardianship proceedings only.

IV RIGHTS OF SAME-SEX COUPLES SEEKING PARENTHOOD IN INDIA

Israeli gay couple Yonatan and Omer Gher became parents in India on 12 October 2008 when their child was conceived with the help of a Mumbai-based surrogate mother in a fertility clinic in Bandra. It is reported that a 3.8 kg baby boy was born to them at Hiranandani Hospital in Powai (Mumbai).

Reportedly, Yonatan and Omer had been together for 7 years and had decided to start a family. But since Israel does not allow same-sex couples to adopt or have a surrogate child, India became their choice to find a surrogate mother. Yonatan and Omer first came to Mumbai in January 2008 for an IVF cycle when Yonatan is stated to have donated his sperm. Thereafter, they selected an anonymous 'mother'. Accordingly, the child was conceived with the help of a Mumbai-based surrogate mother in a fertility clinic in Bandra. After the child was born, the gay couple left for Israel with the child on 17 November 2008.

Even though homosexuality is an 'unnatural offence' under s 377 of the Indian Penal Code as Indian law criminalises homosexuality, there is no bar to gay couples hiring a surrogate mother to deliver children for them in India. Thus, there are reports in the media that there are numerous gay couples coming to India to look for surrogate mothers as India does not disallow such surrogacy arrangements.

V FACTUAL AND LEGAL POSITION FOR SINGLE OR GAY FOREIGN CITIZENS IN INDIA

One conclusion that can be made is that a single or a homosexual man can be considered to be the custodial parent of a child by virtue of being the genetic or biological father of the surrogate child born out of a surrogacy arrangement. The Japanese baby's case and relevant rules are relied upon in the following submissions which are made in support of this answer.

The answer above is straightaway supported by two recent examples of a single/homosexual parent (in both cases it was the father) in which the children were born by surrogate arrangements. In the case of Baby Manji Yamada, the Municipal Council at Anand in Gujarat had issued a birth certificate to the baby indicating the name of the genetic father. In the case of the Israeli gay couple mentioned above, India permitted the surrogacy arrangement which was

fathered with the sperm of Yonatan, the genetic or biological father of the child. These two instances, in which after their birth the babies were allowed to be taken away to Japan and Israel respectively, show that in India a single or a homosexual man can be considered as the custodian parent of the surrogate child by virtue of being the genetic or biological father of the child fathered by him and mothered by a surrogate mother through a surrogacy arrangement.

It may also be added that the Supreme Court of India, in its judgment in *Baby Manji Yamada v Union of India and Another*,[8] after discussing various forms of surrogacy arrangements held:

> '11. Alternatively, the intended male parent may be a single male or a male homosexual couple.'

A reading of the above and an analysis of the complete judgment of the Supreme Court of India, support the answer given above and confirms that a single or a homosexual man can be considered to be the custodial parent of a surrogate child.

The above conclusion is also supported by the ICMR 2005 Guidelines where in para 3.16.1 dealing with legitimacy of the child born through ART, it is stated that:

> 'A child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance. Sperm/oocyte donors shall have no parental right or duties in relation to the child, and their anonymity shall be protected except in regard to what is mentioned under item 3.12.3.'

Even though these guidelines are non statutory, but all the same they were the basis of the claim in the Supreme Court of India in Baby Manji Yamada's case. Hence, even under the prevalent guidelines, the claim can be made by the biological father to be considered as the custodial parent of the surrogate child as in the case of single male parent there will be no other spouse to stake any joint claim.

It is further important to supplement the above proposition with the draft Assisted Reproductive Technology (Regulation) Bill & Rules 2010, as in Chapter VII dealing with Rights and Duties of Patients, Donors, Surrogates and Children, in para 35(3), it is stipulated as follows:

> '35. Determination of status of the child –
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> (3)In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man.'

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[8] Judgments Today 2008 (11) Supreme Court 150.

From this, it is clear that a single parent or gay or lesbian parents who have contributed either the egg or the sperm in the birth of a surrogate child can stake their claim for custody on the basis of the legitimacy of their offspring born by surrogacy arrangements. Even though this law is still in the Bill stages, the fact remains that the Supreme Court of India in Baby Manji Yamada's case opined that commercial surrogacy medical procedures are legal in India and that the intended male parent may be a single male or a male homosexual couple. Hence, the above provision will have persuasive value even though it is still not declared to be statutory law. Thus, a single male can be the custodial parent of a surrogate child.

However, the issue of exclusive custodial rights of a foreign single parent in India may require a judicial verdict for determination of the parties' rights in a surrogacy arrangement. Hence, only in a petition for guardianship under the GWA and/or in a suit for a declaration in an Indian civil court can the exclusive custodial rights be adjudicated by a court of competent jurisdiction upon appreciation of the evidence and considering claims, if any, of other parties to such surrogacy arrangements.

The above process of adjudication by a court of competent jurisdiction in either or both of the two processes is in no way a bar for a single male or homosexual parent to be recognised as the biological or genetic father of the surrogate child. The Supreme Court of India in its judgment in *Baby Manji Yamada v Union of India and Another*[9] held that the medical procedure of surrogacy is legal in India. Hence, it can be safely concluded that a single male or homosexual parent who is the biological or genetic father has clear rights to be recognised in such a capacity.

As a note of caution it may also be clarified here that any single male or homosexual foreign parent who has fathered a child in India by virtue of a surrogacy arrangement can only claim guardianship of such a child under the GWA. The adoption process can only take place in the foreign parent's country of nationality or permanent residence as the case may be. This is because the HMGA and HAMA do not allow any adoption proceedings to non-Hindus and any foreign parent who is a non-Hindu cannot invoke the above personal laws for carrying out adoption proceedings in India. Therefore, any single male or homosexual foreign parent can by virtue of having been appointed a guardian under the GWA claim exclusive custody and leave of the Court to remove the ward to the country of his nationality or his permanent residence for adoption in accordance with the laws of such country by virtue of being the biological/genetic father.

The ultimate right of a single male or a homosexual biological or a genetic parent of adopting a child born from a surrogacy arrangement will have to be determined in accordance with the adoption laws of the country of the nationality or the permanent residence of such single parent. Also, the weight

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[9] Judgments Today 2008 (11) Supreme Court 150 at para 5, pp 152 and 153.

which the foreign court will give to a guardianship order and exclusive custody rights granted in India under GWA will have to be determined in accordance with the laws and procedures of the foreign country.

In case of Japanese baby Manji Yamada, from a reading of the judgment of the Supreme Court of India, it appears that no custody proceedings were taken out either by the biological father or the surrogate mother. On the contrary the NGO by the name of Satya had invoked the jurisdiction of the High Court of Rajasthan by claiming that the child was abandoned as neither the natural parents nor the surrogate mother were taking care of the child. However, the Supreme Court of India observed that no complaint had been made by anybody relating to the child and permission was granted to any person with a grievance to vent it before the Commission for Protection of Child Rights. The grandmother who had petitioned the Supreme Court of India challenging the orders of the Rajasthan High Court was granted interim custody and liberty to approach the central government for issuance of a passport and permission for the child to travel with her to Japan. These having been granted, the Regional Passport Officer in Jaipur issued an 'Identity Certificate' to the baby allowing her to travel to Japan with the grandmother.

An examination of the available documents and the judgment of the Supreme Court of India in Baby Manji Yamada's case shows that there was no court order by which the biological father was declined the custody of his daughter born out of the surrogacy arrangement. In fact it is borne out from the available information that the biological father returned to Japan before his visa expired. There is no record of any court proceeding by which the custody of his biological daughter was denied to him. Moreover, from what is seen from the available information, the fertilisation process by the biological parents was done in Tokyo and the fertilised embryo was brought to Ahmedabad to be implanted in the surrogate mother. Therefore, there must have been an agreement between the parties for some possible joint custody arrangement which was perhaps not possible to be executed since the biological parents had divorced when the child was born and the biological mother had disowned the child. In these circumstances it is difficult to comment as to why the Japanese father could not get the custody as there is no record available in the Supreme Court order of the father claiming or being declined the custody rights of the baby.

In Baby Manji Yamada's case, the custody ended up with the grandmother Emiko Yamada because she approached the Supreme Court of India to challenge the directions given by the Rajasthan High Court relating to production and custody of the baby. It is borne out from the judgment of the Supreme Court of India that the genetic father Dr Ikufumi Yamada had to return to Japan due to expiration of his visa. It is perhaps this situation which had prompted the NGO 'Satya' to file a habeas corpus petition in the High Court of Rajasthan seeking custody of the baby on the alleged ground that neither the biological parents nor the surrogate mother were allegedly taking care of the child. However, the Supreme Court of India did not accept any of

these allegations and granted interim custody of Baby Manji Yamada to the grandmother Emiko Yamada by an interim order on 14 August 2008. This position continued until the conclusion of the case on 29 September 2008 and until 1 November 2008 when the baby and the grandmother left the country for Japan after being permitted to do so.

Hence, if a single or a homosexual man who is the genetic father of the surrogate baby petitions the Guardian Judge under the GWA, then, upon presentation of relevant evidence to prove the genetic material, the father can stake his claim for guardianship of the surrogate child. The surrogate mother who can be arrayed as a respondent can certify this claim which can be established by genetic evidence. The surrogate mother can concede her custodial claim in favour of the genetic father and, if desired, this can also be done by the ovum donor. Upon a presentation of the total facts, the single male or homosexual parent can plead before the Guardian Judge that he should be appointed the custodial parent as a guardian of the child and be able to take the child out of the country for adoption in accordance with the laws of the nationality of his country or permanent residence as the case may be. Therefore, the above custodial rights can be enforced in a petition under GWA by the single male or homosexual parent in respect of his surrogate child.

A second conclusion that can be made is that the biological father is considered the legal parent of the children under Indian law by virtue of the surrogacy agreement executed between the parties. The following submissions are made in support of this conclusion.

The surrogacy agreement is a contract in terms of s 10 of the Indian Contract Act. Therefore, the surrogacy agreement dated 18 July 2008 is an enforceable and valid contract under Indian law. The validity of a surrogacy agreement in India has already been commented upon at length and hence it can be safely concluded that the terms and conditions of the said agreement between the parties legally confers all rights vested upon the parties as stated in the agreement. Therefore, the biological father as per the agreement is the legal parent of the proposed surrogate children as their genetic father.

An agreement between the parties and its terms and conditions are governed by Indian laws and the parties can agree to submit to the exclusive jurisdiction of the appropriate courts in India. Under Indian law the biological father would be entitled to enforce his rights as a legal parent of the children by virtue of the agreement between the parties.

An agreement between the parties can in no uncertain terms set out the stipulation that the surrogate mother agrees and undertakes cooperation before the government offices/authorities/local bodies and also appear before appropriate judicial authorities to give full effect to the agreement and to ensure that the intending father gets legal custody and rights of parentage of the child. This unequivocal statement by the surrogate mother is an admission of rights of the biological father. If this is in any way retracted, changed,

modified, withdrawn or resiled from by the surrogate mother, the biological father has a clear remedy in law by filing a suit for declaration and permanent injunction to enforce his rights as legal parent of the children.

An agreement between the parties can also contain clauses as follows:

- It is clearly understood and unequivocally confirmed that neither the surrogate mother nor her husband shall have any physical or legal custody of or any parental rights or duties with respect to the child born out of this surrogacy process and that the Intended father shall exclusively have such custody and all parental rights and duties from the moment of the child's birth.

- The surrogate mother will relinquish physical custody of the child to intended father upon birth. The surrogate mother will, however, cooperate in all proceedings, if so required, for legal custody of the child by intended father and getting her surrogate motherhood perpetually severed from and disassociated with the child. This will include but not be limited to legal agreements/documents that need to be presented to the court, legal bodies/official, and/or hospital prior to/after the delivery of the child.

- Notwithstanding the foregoing or any other provision of this agreement, it is expressly understood and agreed that this agreement does not warrant or condition payment of any compensation or any valuables to the surrogate mother for her handing over the child to the intended father together with relinquishment of her parental right, if any, over the child unto the intended father, since it is clearly understood and agreed by the surrogate mother pursuant to this agreement that the child genetically and contractually belongs to the intended father, who has the physical and legal custody of the child and it is in the best interests of the child that the child be brought up by the intended father only.

- The surrogate mother and/or her husband shall never assert any right over the child nor shall they or any one of them claim the custody of the child in any manner whatsoever nor make any attempt to form any parental relationship with the child.

- The intended father will take full custody of the child as soon as it is medically practicable following the child's birth and will bring up the child without any kind of interference from the surrogate mother and/or her husband. The surrogate mother and/or her husband shall be bound to take any further lawful action, if and as may be necessary, to enable the Intended father to become the physical and legal custodian and natural guardian of the child.

- The surrogate mother shall have no right and waives the right to make any medical or other decisions regarding the child after birth. Medical or

other decisions regarding the child after birth will be made by the intended father or his designated representative.

- The birth certificate of the child given birth pursuant to this agreement shall bear the names of the intended father as the legal parent and natural guardian of the child. The surrogate mother and/or her husband shall have no say nor shall make any objection whatsoever to the issuing of birth certificate of the child carrying the name of the intended father as the parent of the child. In order to ensure issuance of the birth certificate of the child in the aforesaid manner, the surrogate mother will take whatever steps necessary to have the names of the intended father recorded as legal parents and natural guardian of the child.

In view of what is stated above, it is established beyond doubt that the surrogate mother will relinquish, surrender, give up, waive and not assert any rights in respect of the surrogate child as also that the exclusive parental rights of care custody and control will vest in the biological father for all intents and purposes. Hence, in terms of the conclusive contract between the parties, there is no doubt that the biological father would be the legal parent of the child in terms of the surrogacy agreement between the parties.

At the cost of repetition, it may be stated that, if any terms, conditions or stipulations between the parties are violated, infringed or contravened, the biological father has clear legal remedies to seek necessary relief. Additionally or optionally, the biological father is at liberty to invoke the provisions of the GWA through a guardianship petition for being appointed as the sole legal guardian of the child and for being granted permission to take the child out of India for the purposes of adoption in the country of his nationality of permanent residence. Therefore, in any eventuality, the biological father under Indian law can exercise his legal rights as the sole parent of the child born to him by surrogacy.

An agreement can also be duly supported by an affidavit of the husband of the surrogate mother by which he fully agrees that since he is not the biological father of the children, he shall not assert any parental or custody rights whatsoever in respect of the said child and that he will assist his wife in fully implementing in terms of the agreement. This fortifies the agreement made by the parties and reinforces the rights of the biological father as the sole legal parent of the surrogate children.

In addition to the contractual terms and agreement between the parties, under the permissible medical legal procedure of commercial surrogacy, the biological father has full legal rights over his surrogate child. In the judgment of the Supreme Court of India in Baby Manji Yamada's case, the legality of the medical procedure of commercial surrogacy is accepted and, alternatively, the intended parent may be a single male or a male homosexual couple. This shows that, even otherwise, the biological father under Indian law would be considered to be the legal parent of the children.

Both under the ICMR 2005 Guidelines and under the draft Assisted Reproductive Technology (Regulation) Bill & Rules 2010, the fact of the legal rights of the biological father as the legal parent of the child born out of surrogacy arrangement are recognised irrespective of whether the father is a single or a homosexual man. In practice, the case of Japanese Baby Manji Yamada born on 25 July 2008 and the child born to the Israeli gay couple on 12 October 2008 bear testimony to the fact that in such instances parental rights have been enforced in relation to children born out of surrogacy arrangements.

Thus, under Indian Law, be it the law of contract or the GWA, the biological father has clear remedies in law to enforce the contract, seek a declaration of his rights as a single parent and obtain guardianship orders in this regard. Hence, under the existing legal position, the father has clear and unequivocal rights which can be established by invoking the judicial machinery in India.

In enforcing the biological rights as a father, reliance can be placed upon genetic evidence to establish the rights of the biological father. Aided and abetted by relevant medical data and genetic details, the father can establish his biological rights as the father. This is permissible under the medical procedures of legal surrogacy in India. Hence, viewed from any angle, the biological father has clear rights as a legal parent of his unborn child which he can establish upon their birth in India.

VI SPEED BREAKERS ON THE ROAD TO SURROGACY

(a) Burgeoning surrogacy industry is propelled by absence of cohesive legislation and mushrooming IVF and ART clinics wantonly advertising services for providing wombs for rent

The unregulated reproductive tourism industry procreating surrogacy is booming, with India being the first country proposing to legalise commercial surrogacy. Whilst, the new Assisted Reproductive Technology (Regulation) Bill & Rules 2010, are still in the womb, the non-statutory ICMR 2005 Guidelines rule the roost. The Indian entrepreneurial industry spirit has catapulted the business of providing 'wombs for rent' to a whopping trade valued at rupees 25,000 crores. Despite legal, moral and social complexities that shroud surrogacy, economic necessity stimulates women to shake off their inhibition and fear of social ostracism to be lured by agents or corporate surrogacy consultants for international markets. Free availability of a large pool of women willing to be surrogates, a good medical infrastructure, fractional costs, less waiting time, close monitoring of surrogate mothers by over 200,000 in vitro fertilization (IVF) clinics and no check of any law restricting single, gay or unmarried couples becoming parents by surrogacy, has made this unethical trade in India skyrocket to spiralling heights.

(b) New Indian medical visa regulations will cap surrogacy

However, soon, the business of surrogacy will plummet and boomerang. Under the latest and new Indian visa regulations, effective 15 November 2012, onwards, all foreigners visiting India for commissioning surrogacy will be required to apply for 'medical visas' and cannot avail of simple tourist visas for surrogacy purposes. The Ministry of Home Affairs, by a letter of 9 July 2012, has stipulated mandatory conditions for such medical visas, which, if not fulfilled, will lead to visa rejection. These new medical visa regulations stipulate that a letter from the embassy of the foreign country in India or its foreign ministry should be enclosed with the visa application stating clearly that such country recognises surrogacy and that the child to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child of the couple commissioning surrogacy who will undertake to take care of their surrogate child. The treatment will be done only at registered ART Clinics in India recognised by the ICMR and the foreign commissioning couple must produce a duly notarised agreement between them and the prospective surrogate Indian mother.

After the surrogate baby is born, an exit permission for a commissioning couple before leaving India will be required from the Indian Foreigners Regional Registration Office (FRRO) to verify issuance of a certificate from the ART Clinic confirming discharge of liabilities of the Indian surrogate mother and ensuring custody of the child with the commissioning parents. Clearly, the safeguards, checks, balances besides moral and ethical dimensions, which to date remain unaddressed through any legislation, have been administratively put in place to aptly regulate the surrogacy industry. The dam built with the strong bricks of the conditions of medical visas will prevent the gushing flow of unrestricted, pouring and muddled surrogate waters which had polluted India by becoming a bane for women's health, their basic dignity and human fundamental rights.

(c) Medical visa regulations will harmonise with existing Indian and foreign law of countries of commissioning parents

Commercial surrogacy is illegal in the United Kingdom, though permissible under British law, on payment of reasonable expenses to the surrogate mother. In most US states, compensated surrogacy agreements are either illegal or unenforceable. In some Australian states, arranging commercial surrogacy is a criminal offence and surrogacy agreements giving custody to others are void. In New Zealand and Canada, commercial surrogacy is illegal, although altruistic surrogacy is allowed. In Italy, Germany and France, commercial or other surrogacy is unlawful, in Israel, commercial surrogacy is illegal and the law only accepts the surrogate mother as the real mother. India, in total contrast, accepts commercial surrogacy and no law declares it illegal. The Supreme Court on 29 September, 2008, in *Baby Manji Yamada v Union of India and*

Another,[10] observed that 'Commercial Surrogacy [reaching] industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms: wombs for rent, outsourced pregnancies or baby farms.' However, the new Indian Medical Visa Regulations by disallowing Indian visas to foreigners whose countries prohibit surrogacy will ensure that we harmonise and fall in tandem internationally with those foreign nations whose overseas citizens wish to wrongfully patronise surrogacy in India. Of our own, we have banned foreign single, unmarried or gay parents by restricting surrogacy to couples constituted by a foreign man and woman only who have been married for at least 2 years. Operations of unethical, unregistered and unrecognised ART shops cannot be availed of any more.

(d) Reactions and responses of foreign governments

Most foreign embassies have indicated on their websites that the Indian government now requires medical visas for foreigners coming to India for surrogacy. Besides, stringent DNA tests are already in place to establish genetic connections for parentage and foreign nationality. Indian consulates overseas and Visa Facilitation Services (VFS) have also notified that foreign nationals must ascertain beforehand whether their country permits surrogacy and that they cannot enter India for surrogacy purposes by tourist visas. The British High Commission, New Delhi, in advance preparation, by its letter of 30 October 2012 to the Indian High Commission, London, states that the British government recognises surrogacy and makes provisions for commissioning couples for children born overseas through surrogacy. The UK Human Fertilization and Embryology Act 1990 is cited in support. It allows surrogacy if one parent is genetically related to the surrogate child and no money other than reasonable expenses is paid in respect of the surrogacy arrangement. Alternatively, the letter uses the UK Human Fertilization and Embryology Act 1990 for providing parental orders to commissioning parents. This letter is stated to be a request for entertaining applications for medical visas for purposes of surrogacy in India as per the requirements of the new Indian Medical Visa Regulations.

VII CONCLUSION

Rather than the Indian Parliament catching up to make a law to regulate the unscrupulous surrogacy trade, the new Medical Visa Regulations have stepped in to do what the law ought to have done. Rather than permitting surrogate children to be born in India with the risk of being stateless persons and being denied entry into foreign countries where their commissioning parents reside, it is apt and necessary that such unethical practices leading to such disastrous situations must be pre-empted and prevented. The Indian government in its administrative wisdom has stepped in at a time when the regulatory law is nowhere near the horizon. Recent instances of surrogate children from

[10] All India Reporter 2009 Supreme Court 84.

Germany, Japan and Israel born in India and leaving upon court intervention should well make legislators think of enacting a strict surrogacy monitoring law. The Assisted Reproductive Technology (Regulation) Bill & Rules 2010 itself has legal lacuna, lacks creation of a specialist legal authority for determination and adjudication of legal rights of parties, in addition to falling in conflict with existing family laws. These pitfalls should not become a graveyard for a law which is yet to be born. Surrogacy needs to be checked and regulated by a proper statutory law. Until then, the much needed medical visa regulations will provide succour and relief. What cannot go on must not be allowed to be carried on if there is no law.

Ireland

CONSTITUTIONAL RECOGNITION OF CHILDREN'S RIGHTS AND PARAMOUNTCY OF WELFARE

*Maebh Harding**

Résumé

En 2012, les irlandais ont voté en faveur de l'inclusion dans leur Constitution d'une reconnaissance explicite des droits des enfants. Le *children's rights amendment* oblige désormais l'État irlandais à défendre ces droits. Il clarifie également le critère juridique permettant l'État d'intervenir dans les familles afin de protéger les enfants. Cet amendement est une étape importante dans la promotion des intérêts des enfants en Irlande et permet aux enfants nés en mariage d'être adoptés plutôt que de rester longtemps dans des familles d'accueil.

Toutefois, la réforme ne résout pas les problèmes rencontrés par les juridictions dans la recherche d'un équilibre entre les intérêts des enfants, les droits des parents et la protection de l'unité de la famille issue du mariage. Jusqu'alors, la protection constitutionnelle des droits parentaux amenait les tribunaux à préférer de simples présomptions quant à l'intérêt supérieur de l'enfant, plutôt que des rapports d'expertise. L'amendement contraint le juge à résoudre les conflits entre les droits des parents et ceux des enfants en privilégiant toujours l'intérêt supérieur des seconds.

L'amélioration de la protection des intérêts des enfants par cet amendement dépendra de la manière dont les tribunaux irlandais vont relever ce défi et de la réalité de l'alignement des droits de enfants sur ceux des parents.

I INTRODUCTION

In November 2012, the Irish voters approved an amendment[1] to the Irish constitution to promote children's rights and to allow marital children to be adopted in the same circumstances as non-marital children. The amendment was passed with a 58% majority.[2] The constitutionality of the referendum has

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1 Thirty-First Amendment of the Constitution (Children) Bill 2012.

2 www.rte.ie/news/2012/1111/345146-live-childrens-referendum/ (accessed June 2013).

now been challenged[3] and an appeal to the Supreme Court was permitted in December 2012. If the challenge is unsuccessful, art 42A will become part of the Irish constitution and will make some major changes to the Irish child law.

Previous legislative attempts to prioritise the best interests of children have failed in Ireland because arts 41 and 42 of the Irish constitution require the courts to prioritise the integrity of the marital family and autonomy of married parents. As a result, the Irish courts assume that it is in the best interests of children to uphold the decisions of their parents and for children to remain in the marital family unless the parents have failed in their constitutional duties towards the child. What is objectively in the best interests of children is subject to a gloss that upholding the integrity of the marital family is nearly always best.

The new art 42A requires the state to recognise, uphold and vindicate the rights of children and makes some changes to the standard to which marital parents will be held before they are considered to have failed in their parental duties. The express recognition of children's rights at a constitutional level could change the hierarchy of constitutional rights which must be balanced when the Irish courts are interpreting a welfare-based legislative framework.

This chapter will trace the importance given by the Irish courts to the rights and interests of children where parents seek to enforce their rights. It will then examine to what extent the new art 42A will allow existing assumptions about what is in the best interests of children to be challenged. It is argued that this hybrid approach of balancing rights while simultaneously prioritising welfare may serve to hide the underlying judicial assumptions about what is best for children behind a fiction of upholding their abstract rights.

II THE PRE-1937 IMPORTANCE OF PARENTAL RIGHTS

Before the framing of the Irish constitution no concept of children's right existed in Irish law. Under the Custody of Children Act 1891, both married parents had equal rights of custody over their children.[4] The court was required to enforce this right unless the parent had abandoned or deserted the child or had conducted himself in such a way that the court felt that enforcement of the right would be inappropriate.[5] Welfare operated as a counterweight to the general assumption that the best interest of the child generally coincided with parental interests.

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3 *Mark McCrystal v The Minister for Children and Youth Affairs, The Government of Ireland, Ireland and the Attorney General* [2012] IESC 53; D O'Connell 'Ireland: children's rights now protected in Constitution, constitutional amendment subject to legal challenge' [2013] *Public Law* 423–424.

4 Equal rights of custody were given to the mothers of legitimate children under the Guardianship of Infants Act 1886. See *In Re Kerr* [1889] 24 LR IR 59.

5 Custody of Children Act 1891, s 1.

The judiciary had considerable discretion under the Custody of Children Act 1891 to determine whether custody should be refused, but a general rule emerged that the best place for a child was with its parents. In *Re O'Hara,*[6] a widowed mother sought the return of her child who had been informally adopted by a couple and had lived with them for 3 years. Fitzgibbon LJ held that as a general principle, the best place for a child is with its parents. Custody should only be refused in exceptional cases. It did not matter if the enforcement of parental rights was not in the best interest of the particular child in the particular case as long as it was not harmful.[7]

In *The State (Kavanagh) v O'Sullivan*,[8] a Protestant father sought the return of his children from a Catholic industrial school. The father had placed the children in the school after his wife had been committed to a mental institution. The court returned the children holding that a father's right in law to custody of his children as against third parties can only be restricted in exceptional cases.

However, where a custody dispute arose between two third parties, the Irish courts were not curtailed by obligation to uphold parental rights and so more child-centred decisions were made based solely on a determination of the best interests of the child. In *Re O'Connor*,[9] a custody dispute arose between the Catholic grandmother of some orphaned children and a Protestant couple who had helped to raise the children and in whose custody the children were. On her deathbed, the mother had expressed a wish that the children should be raised as Catholics. The Court of Appeal held that it was in the children's best interests to remain with the Protestant couple and that a mother's parental right to determine the religion of her children did not last beyond her death.

III PARENTAL RIGHTS UNDER THE 1937 IRISH CONSTITUTION

The text of the Irish constitution creates an express hierarchy of rights in cases involving the marital family. Under art 41, the state is obliged to protect the marital family in its constitution and authority from attack. Article 42 imposes an inalienable right and duty on married parents to provide for the religious and moral, intellectual, physical and social education of their children. Article 42.5 permits state interference with the marital family in exceptional cases, where married parents have failed in their duty towards children for physical or moral reasons. Where this threshold is met, the state is obliged to supply the place of the parents. Article 42.5 acknowledges that children have natural and imprescriptable rights and the state must give these rights due regard when substituting for the child's parents. It is clear that the drafters of

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6 [1900] 2 IR 322.
7 Ibid 241.
8 [1933] IR 618.
9 [1919] 1 IR 361.

the 1937 constitution considered art 42 to protect the rights of married parents to the custody of their children, as well as a right to choose their education.[10]

Initially arts 41 and 42 had no effect on custody and guardianship cases which continued to be governed by legislative tests and judicial discretion. In such cases, the courts were primarily concerned with enforcing adult rights.[11] The welfare of the children was only a concern where enforcing parental rights would be highly detrimental to the children[12] or where both parties to the dispute had equal rights of custody. Slowly but surely art 42 became relied on to give enhanced legitimacy to these decisions.

In *Re O'Brien*,[13] the 1891 Custody Act was reinterpreted to reflect the constitutional importance of parental rights. In this case, a marital child was placed with a grandmother after its mother died and its father became ill. Later the father remarried and sought custody of his child from the grandmother. The child had been with the grandmother for 6 years at the time of the application and the father had a history of domestic abuse. In the High Court, Davit P held that, while the child would probably be happier if it remained with the grandmother, a real imperative needed to be shown why the father's right to custody should not be enforced and this had not been satisfied.

In the Supreme Court, O'Byrne J held that the constitutional hierarchy was of primary importance in such cases. Articles 41 and 42 guaranteed the sanctity of the marital family and the enduring existence of parental authority. As a constitutional presumption, the best interests and happiness of the child would be served by being a member of the parental household. Article 42.5 provided the only basis for a refusal to enforce parental rights. Section 3 of the 1891 Act must be interpreted in this manner.[14] This decision reduced the court's discretion to withhold custody from marital parents on a 'best interests of the child' basis. The constitutional rights of the child to have its welfare protected were not considered.

By the end of the 1950s it was clear that, although the 1937 constitution did expressly refer to the constitutional rights of the child, the courts had continued to view welfare as a counterweight to the general obligation to enforce adult rights. Article 42.5 bolstered marital parents' rights to custody as against third parties and reduced the discretion that the courts had previously enjoyed under the 1891 Custody Act to refuse to enforce custody on welfare grounds. Parental rights to custody were prioritised. Welfare was a secondary concern.

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[10] Donal K Coffey *Irish Constitutional History 1936–1937* (Thesis (PhD), University College Dublin, 2010) 307.

[11] *In the Matter of Derek Joseph Williams* [1940] IR 421.

[12] *Re M* [1946] IR 334.

[13] [1954] IR 1.

[14] See also *Re Doyle* (Unreported Supreme Court judgment, 21 December 1955).

IV THE WELFARE OF CHILDREN UNDER THE GUARDIANSHIP OF INFANTS ACT 1987

The Guardianship of Infants Act 1964 changed Irish legislation governing custody and guardianship disputes. Under s 3, the welfare of the child is to be the court's first and paramount concern in matters relating to the upbringing of children. The Guardianship of Infants Act gives a parent a prima facie right to custody which can be enforced against a third party unless the parent had abandoned or deserted the infant or engaged in other conduct which mean that the court could exercise its discretion not to enforce custody.[15] This legislative provision quickly became meaningless in favour of enforcing the constitutional rights of married parents.

By the final stages of the Bill it was clear that the welfare principle would only operate in a dispute between equal constitutional rights holders.[16] Assurances were given that in only the most exceptional and necessary cases would the courts interfere with the natural right of the parents in respect of their children.[17] Nothing in the Guardianship of Infants Act would interfere with this. The Dáil debates show a genuine belief that the best interests of children were preserved by their parents. It was argued that the adoption of a pure best interests test would give rise to social engineering, as the courts would be permitted to place children with the person best equipped to care for them, who might not be a parent in order to ensure the child's best interests. There was no consideration of scenarios in which parental rights to custody and best interests of the child might be at odds.

A pure approach to ensuring the paramountcy of a child's welfare would allow any interference with the rights of parents or the integrity of the marital family unit to be justified in a particular case if this result was in that child's best interest. The requirement to uphold constitutional inalienable rights means that less emphasis is given to achieving the best result for a particular child in a particular case. A pragmatic result may be sacrificed to uphold an abstract principle.

Although the Guardianship of Infants Act promised that the welfare of all children would be the court's main consideration, the pre-established constitutional framework ensured that s 3 had limited effect. As a result of the constitutional protection of the rights of marital children the courts had to interpret the Guardianship of Infants Act 1964 differently in cases involving marital children as opposed to cases involving non-marital children. The general approach was to enforce parental rights unless welfare clearly mandated an alternative result. A pure welfare approach was only taken in

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15 Guardianship of Infants Act 1964, s 14.

16 Dáil Eireann Deb 19 January 1964 vol 207, col 138–144, Charles J Haughey. Dáil Eireann Deb 18 February 1964 vol 207, col 1145–1150, Charles J Haughey.

17 Dáil Eireann Deb 15 February 1964 vol 207, col 1449–1454.

cases where the parent had no constitutional rights to custody or where a dispute arose between two parents with equal constitutional rights.

V PARENTAL RIGHTS AND THE USE OF THE WELFARE PRINCIPLE IN CASES INVOLVING NON-MARITAL CHILDREN

Unmarried parents do not have rights as a constitutional family under art 41 of the Irish constitution and the art 42.5 test does not apply to state intervention into the non-marital family. It might therefore be assumed that the Irish court would be able to apply an unvarnished best interests test to custody disputes involving the non-marital family. However, adult constitutional rights have been prioritised.

The rights of fathers were first considered in *State (Nicolau) v An Bord Uchtála*.[18] In this case an unmarried father sought to overrule an adoption order that had been made without his knowledge. By the time of the action his child had been placed with an adoptive family by the mother and had remained there for 3 years. In the High Court Murnaghan J acknowledged that the child had some relevant rights under art 40 of the Irish constitution. However, the father had no rights under arts 41 or 42 because he was not part of a marital family. The father in this particular case was not considered to have any rights under art 40 of the Irish constitution because he was not an Irish citizen.[19] Arguments relating to the rights of the child or the rights of the mother were expressly excluded by Murnaghan J as neither party was represented.

Teevan J and Henchy J based their judgments on the rights of the unmarried father to custody that had existed before the introduction of the Irish constitution. Teevan J held that while the father had a right of custody against third parties unless waived by conduct or welfare concerns this was not equal to that of the mother.[20] Therefore the child should remain with the adoptive parents as the court would be upholding the decision of the unmarried mother relating to custody. Henchy J held that putative fathers were only ever given custody pre-1937 if this was objectively proved to be in the best interests of the child. Therefore the father could not be said to have a statutory or common law right to custody as against a third party or the mother.[21] Both of these approaches are inconsistent with pre-1937 case-law. *Re Kerr*[22] clearly holds that an unmarried father had a right of custody as against third parties unless forfeited by conduct or welfare concerns. In all previous cases where a parent had sought the return of a child from adoptive parents the question of custody

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18 [1966] IR 567.
19 Ibid 591.
20 Ibid 604.
21 Ibid 621.
22 [1889] 24 LR IR 59.

had been framed as a decision on whether to enforce the right of parent to custody as against third parties.[23] This ruling was upheld by the Supreme Court.

Although the ruling determined whether or not an unmarried father has constitutional parental rights in Irish law, Henchy J and Teevan J's judgments were primarily motivated by a desire to preserve the rights of the unmarried mother.[24] The recently passed Guardianship of Infants Act reinforced equality between married parents as constitutionally mandated. The obiter statement by Walsh J in the Supreme Court that an unmarried mother had constitutional rights under art 40.3 to the custody of her child was later relied on in many cases and is now unchallengeable.[25]

The rights of unmarried mothers were expressly outlined in *G v An Bord Uchtála.*[26] Here, an unmarried mother had changed her mind about putting her child up for adoption before the final order. At this stage in the process consent could be dispensed with on the application of the adoptive parents. The adoption order had been made. In the High Court, Finlay P held that both the mother and child had conflicting constitutional rights under art 40.3. In balancing the rights, the interests of the mother should be preferred.[27] The adoption order was quashed. This was upheld by the Supreme Court in a 3:2 split.

This is a highly influential case on children's rights in Ireland but the judges did not agree on whether constitutional rights of the child or mother actually existed, where they were found or how they should be balanced. Three Supreme Court judges, O'Higgins CJ, Walsh J and Parke J acknowledged the existence of children's rights under art 40.3 but prioritised the mother's constitutional rights. They followed the obiter dicta in *Nicolou* that the unmarried mother had constitutional rights of custody and then treated the unmarried mother's rights in a similar fashion to the rights of custody of marital parents. The majority in *G v An Bord Uchtála* held that a mother had constitutional rights to custody under art 40.3 which must be upheld unless it would be highly detrimental to the child's welfare. This approach is far removed from putting the welfare of the child first as mandated by s 3 of the Guardianship of Infants Act. In contrast, following *Nicolau,* the foreign unmarried father has no rights under art 40.3.

Henchy J attempted to prioritise the interests of children holding that the constitution had no bearing on rights and duties in relations to custody of non-marital children. While non-marital children had the same rights under art 40.3 to religious, moral, intellectual, physical and social education as marital children, the rights of unmarried parents were very limited. A

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[23] *Re O'Hara* [1900] 2 IR 322; *In the Matter of Derek Joseph Williams* [1940] IR 421; *Re M* [1946] IR 334.

[24] *State (Nicolau) v An Bord Uchtála* [1966] IR 567, 604.

[25] *State (Nicolau) v An Bord Uchtála* [1966] IR 567, 644.

[26] [1980] IR 32.

[27] Ibid 45.

unmarried mother's legal right to custody was only constitutional insofar as it was necessary to promote the child's constitutional rights.[28]

The Status of Children Act 1987 was introduced to abolish the distinctions in Irish law between legitimate and illegitimate children. The Act gave the non-marital child equal rights to maintenance and intestacy. The unmarried father was given a legislative right to apply for guardianship which would be awarded on a best interests basis.[29] The Act did not, however, change the framework of parental constitutional rights.

In *WO'R v EH*,[30] a natural mother and stepfather applied to adopt a child. The natural father of the child had applied for guardianship but only been granted access rights. The father reapplied for guardianship to block the adoption, fearful that his access rights would be ended. The Supreme Court held that a pure best interests test should be applied under s 3 and the court should consider the possibility that the father would use guardianship to block adoption.

Barrington J gave a dissenting judgment holding that the understood difference in constitutional rights of unmarried mothers and fathers stemming from *Nicolau* was flawed. A coherent code of rights in relation to non-marital children and their parents could not be developed while that judgment stood. He emphasised that art 42 of the Irish constitution clearly makes the rights of children predominant. However, these rights and the welfare of the child have to be reconciled with the rights of parents.[31]

In spite of the welfare focus of s 3 of the Guardianship Infants Act, the parental rights of single mothers are upheld unless there is detriment to the welfare of the child. While constitutional rights of non-marital children have been identified as stemming from art 40.3 of the constitution, they are generally assumed to accord with the rights of the unmarried mother. A pure best interests test is only used where the rights of the unmarried father are in question.

VI THE PRIORITY OF PARENTAL RIGHTS OVER THE INTERESTS OF MARITAL CHILDREN

Two lines of case-law have emerged when balancing the interests of marital children against the rights of their parents. The rights of married parents were enforced against third parties unless the provisions of art 42.5 were satisfied. Only in cases where the two parents were in dispute or the dispute was between

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28 Ibid 87.
29 *K v W* [1990] 2 IR 437; *Keegan v Ireland* [1994] 18 EHRR 342; *J McD v PL* [2010] 2 IR 199.
30 [1996] 2 IR 248.
31 Ibid 282.

two third parties could the courts use s 3 of the Guardianship of Infants Act to weigh up what result would promote the best interests of the child in the particular case.

Article 42 gave married parents a right to custody as against third parties subject to art 42.5.[32] Where parental rights conflicted with an assessment that the child in the particular case would be better off with a third party or state care, parental rights to custody would be upheld except in extreme cases where the child's welfare was subject to long-term detriment.[33] The conflict between the paramountcy of the welfare of children under s 3 of the Guardianship of Infants Act and the inalienable nature of parental rights under art 42 was resolved by the continuation of the legal presumption that it is in the best interests of a marital child to remain in the marital home, unless the parents have failed in their duties under art 42.5. For example, in *Re J*[34] an unmarried mother placed her child for adoption. Later, the mother married the father of the child and sought custody of the child who was living with the potential adopters. Henchy J expressly applied the constitutional framework holding that the child and its parents were a family within the meaning of art 41. The only way that the marital family's rights could be supplanted was if the test of art 42.5 was satisfied.

In cases where the child would not be returned to an intact marital family, the application of the welfare test depended on how the question of custody was framed. The Irish court preferred a constitutional rights-based approach to cases where parents sought to enforce their custody rights against third parties, but where the case was framed as one between two equal constitutional rights holders, the welfare of the child was paramount.[35] The result of a dispute between parents was often to deprive one parent of custody and their right to educate the child.

In *Jeffrey v Daniels, Nugent & Wall*,[36] the mother died and the father sent the children to live with their aunts. The father later remarried and sought custody of his children. The Supreme Court held that the children should remain with their father as guardian unless the case was exceptional and the welfare of the child would be harmed by return. In a dissenting judgment, Kenny J tried to uphold the spirit of s 3 holding that the decision to grant custody was purely a welfare-based judgment. While as a rule of prudence, the child is best off with a parent but this is not a legal presumption. Kenny held that art 41 had nothing to do with the case as it only applies to the family as a unit and not to disputes within families.

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32 In *G v Uchtála* [1980] IR 32, 85.
33 *In Re J* [1966] IR 295.
34 [1966] IR 295.
35 *B v B* [1975] IR 54; *MacD v Mac D* (unreported Supreme Court judgment, 5 April 1979).
36 (Unreported Supreme Court judgment, 22nd June 1977); *In Re O'Brien* [1954] IR 1.

However, in *JJW v BMW*,[37] the placement of children with a third party by one of the parents was treated as an exercise of the parental right to custody. Here, a married couple were living in the United Kingdom when the mother ran off with another man. The father returned to Ireland and left his three children in the care of grandparents. Two of the children were later placed in a school for children of broken homes. The mother sought custody of her children. Instead of framing this case as whether the court should enforce the right of mother to custody as against a third party, the court held that they must weigh the father's right of custody against the mother's right of custody. As the Supreme Court was balancing the rights of equal rights holders, a pure best interests test was used and it was held that children were best off where they were.

The legitimacy of this distinction between cases where parental rights were enforced and those in which the pure s 3 test was used was challenged in *PW v AW*.[38] In this case, the child had been placed with an aunt when her parents' marriage broke up. At the time of the dispute, the child was 6 and had resided with aunt most of her life. Both parents sought custody from the aunt. Ellis J followed the dissenting judgment of Kenny J in *Jeffrey v Daniels, Nugent & Wall* and held that parents did not have a constitutional right to custody, merely a constitutional right to guardianship. Giving parents custody was just a pragmatic starting point when determining welfare. Ellis J reasoned that, if a parent's rights under art 42 were not infringed where one parent lost custody to the other parent but retained guardianship, then similarly no rights would be infringed if custody was given to a third party but the parent retained guardianship. In this case the child's constitutional rights under art 42 were best preserved by leaving her where she was. There was nothing in the constitution to say that parental rights should be given primacy in a conflict. Under Irish law, marital parents have automatic guardianship which they can only lose through adoption. This approach differentiated between adoption cases and private childcare disputes and would have allowed a pure best interests test to be used in a private childcare case.

The child rights-approach of Ellis J was overruled in *Re JH v An Bord Uchtála*.[39] In this case, unmarried parents had placed a child for adoption and later married. The adoption order was quashed and the parents sought custody from the adoptive parents. Expert evidence was submitted that the child would be at risk of long-term harm if custody was transferred to the natural parents. In the High Court Lynch J was heavily influenced by s 3 of the Guardianship of Infants Act and felt that transferring custody could cause long-term psychological harm.[40] He left the child with the adoptive parents and ordered access for the natural parents. He made no attempt to reconcile this decision with parental rights under art 42.

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37 (1971) 110 ILTR 49.
38 Unreported, High Court, Ellis J, 21 April 1979.
39 [1985] IR 375.
40 Ibid 389.

In the Supreme Court, Finlay CJ was clear. The state cannot supplant the parents by making custody orders unless the art 42.5 test is satisfied. A pure welfare test is not permitted in cases where married couples seek to enforce rights of custody against third parties. In such cases, the welfare of the child is best preserved in the marital family unless there are compelling reasons within the meaning of art 42.5.[41] When the case was returned to the High Court, Lynch J ordered the transfer of custody but worried about the consequences for the child. He consoled himself by reasoning that it was no more traumatic than a parent dying which many children would unfortunately have to deal with.[42]

Re JH has cast a long shadow in Irish child law. It ensures that all custody disputes between private parties involving marital children are treated as state intervention into the constitutional family which can only be justified under art 42.5. The test was later extended to any dispute over the wishes of marital parents. In cases involving the adoption of marital children a particular interpretation of the art 42.5 test was codified in a particular way by the Adoption Act 1988.

VII THE EXTENSION OF ART 42.5 RIGHTS TO INCLUDE ALL PARENTAL DECISION MAKING

Re Article 26 and the Adoption (No 2) Bill 1987[43] paved the way for the art 42.5 test to be extended to all cases where the autonomy of marital parents are in question, not just those relating to custody or education. Finlay CJ held that the duty of the state under art 42.5 to supply the place of the parent applied not only where the parent had failed to educate but also where the parent had failed to cater to other personal rights of the child.[44] The corollary of this is that the state can only intervene in such cases if art 42.5 is satisfied.

Initially, art 42.5 did not pose a great barrier to interfering with the autonomy of marital parents when it came to upholding a decision that was shown by credible evidence to be in the best interests of the child.[45] The position changed in *North Western Health Board v HW and CW (PKU)*[46] where parents did not want their child to undergo a PKU test to screen for a treatable genetic condition. All professional opinion was against them. The Health Board sought an injunction to allow the test to go ahead to fulfil the Health Board's obligations to promote the welfare of children under the Court (Supplemental Provisions) Act 1961. In the High Court, McCracken J held that art 42.5 allowed the state to intervene with parental authority only where parents fail in

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41 Ibid 396.
42 Ibid 399–400.
43 [1989] 1 IR 656.
44 Ibid 663.
45 *A and B v Eastern Health Board* [1998] 1 IR 464.
46 [2001] 3 IR 622.

their duties for physical and moral reasons. In this case the benefit to the child did not override the rights of his parents.[47]

The Supreme Court agreed that the state could not interfere with parental autonomy except in exceptional circumstances but disagreed on when such interference should be allowed. Hardiman J held that the art 42.5 test should be satisfied in all cases.[48] Murray J appeared to set an even higher test of immediate threat to the child deriving from exceptional dereliction of duty.[49] Denham J held that court could intervene with parental wishes to protect the constitutional rights of the child under art 40.3 but only intervene in extreme cases.[50] Murphy J set a similarly flexible test.[51]

Keane CJ in a dissenting opinion placed the consideration of children's rights at a much higher level in the constitutional hierarchy and held that there was no constitutional right to parental autonomy. He held that the child has inalienable and imprescriptible rights both as a member of the family and as an individual under arts 40.3, 41 and 42.[52] In the majority of cases it could be safely left to parents to protect children's rights. However, the court is not required to uphold parental wishes but merely give them proper emphasis in the balancing act.[53] The court should support the party with the most indisputable legitimate interest in a child's welfare. He held that the parents' objections to medical treatment could be upheld on the basis of the child's best interests if there was conflicting medical evidence but in this case there was not.[54]

The test to be satisfied when interfering with the autonomy of marital parents was reconciled in the *Baby Ann N v HSE and others*,[55] with the court holding that unless there are compelling reasons why welfare cannot be upheld in the family or parents have failed within the meaning of art 42.5 the court must give effect to the constitutional presumption that the welfare of the child is found in the marital family and uphold the decision of the marital parents. This decision drastically reduces the ability of the court to give meaningful consideration to the child's best interests.[56]

In *Temple Street v D*,[57] the Irish High Court made an order allowing a blood transfusion to a 3-month-old baby. His parents were Jehovah's witnesses and opposed the transfusion on religious grounds. The belief of Jehovah's witnesses to avoid taking blood products was protected by the right to freedom of

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47 Ibid 635.
48 Ibid 756–757.
49 Ibid 741.
50 ibid 722–727.
51 Ibid 733.
52 Ibid 689–690.
53 Ibid 705–706.
54 Ibid 707.
55 [2006] 4 IR 374 (Baby Ann).
56 Ruth Kelly '"Baby" Ann's constitutional rights' [2007] *Irish Journal of Family Law* 3–11.
57 [2011] 1 IR 665.

religion under art 44.2 of the Irish constitution.[58] However, the constitutional rights of parents to raise their children in accordance with their own religious views is subject to the limits imposed by art 42.5.[59] Hogan J was in absolutely no doubt that the court could intervene in this case. The art 42.5 test was satisfied, the parent had failed in their duties towards the child and the child's life, general welfare and other vital interests were at stake. He noted that the term 'failure' was unfortunate as the parents were acting in accordance with their own deeply held religious views. However, the art 42.5 test was objective and judged by the secular standards of society in general and of the constitution in particular, irrespective of the subjective religious views of the parents.[60]

The art 42.5 test is also used where the courts are asked to enforce the constitutional rights of children to have their needs provided for by their parents by ordering particular conduct by the parents. In *Dowse,* the court ordered adoptive parents to make financial provision for a child they had abandoned.[61] In *Fitzpatrick v Ryan v FK*,[62] Abbott J in an ex parte judgment overrode a mother's objects to a blood transfusion holding that a child's constitutionally protected rights including the right to be nurtured and reared by its mother took precedence over the mother's constitutional rights to autonomy, self-determination and free practice of her religion.[63]

VIII ADOPTION OF MARITAL CHILDREN UNDER THE ADOPTION ACT 1988

The Adoption Act 1988 allowed marital children to be adopted while their parents were still alive. In order for marital children to be adoptable their parents would have to have failed in their duties within the meaning of art 42.5. The Act set out a four-part test to determine if failure had occurred. The legislative test was more strictly worded than the requirements of art 42.5 which merely required the parents to have failed in their duty towards children for physical or moral reasons. Under s 3, marital children could be adopted where their parents had failed in their duties towards that child for a period of not less than 12 months for physical and moral reasons. It must also be shown that the failure would continue without interruption until the child attained the age of 18 and the failure must constitute an abandonment of all parental rights. Finally it must be shown that the state should supply the place of the parents and that adoption would be in the best interests of the child.

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58 Ibid [24].
59 Ibid [35].
60 Ibid [37].
61 *Dowse v An Bord Uchtála* [2006] 2 IR 507; *Fitzpatrick v Ryan v FK* [2009] 2 IR 7.
62 [2009] 2 IR 7.
63 Ibid [101]. In the later High Court hearing, Laffoy J held that Ms K did not have capacity to make a valid decision to refuse a blood transfusion in the first place so whether the child's rights outweighed the mother's rights so as to entitle the state to interfere with the mother's decision was moot. Ibid [29].

The constitutionality of the Adoption Act 1988 was upheld in *Re Article 26 and the Adoption (No 2) Bill 1987*.[64] This removed all discretion from the courts when interpreting the art 42.5 test in the context of adoption and prevented any future constitutional challenge to this interpretation of the Act on the basis of children's rights. The court considered that by requiring a failure in duty *and* clear abandonment of parental rights the Act paid particular regard to the rights of the child to be part of a marital family.[65] What was not considered was whether the requirement for both failure and abandonment set the burden of proof too high to protect the child's constitutional right to have its welfare protected by the state. Several later cases showed the reality of this test and how difficult it was for marital children to be adopted. While local authorities are required to safeguard the welfare of children under s 3 of the Child Care Act 1991, this understanding of welfare must respect the constitutional rights of parents under art 42. Where marital children are taken into care they were destined to spend long periods in foster care.[66]

In *Western Health Bord and An Bord Uchtála*,[67] a married couple had broken up and the wife was seeing another man. Her husband returned to the marital home on one occasion and raped his wife. Initially the mother thought the child was extra-marital and placed it for adoption. Later DNA testing showed that her husband was the father and so the adoption could only go ahead if the criteria of the 1988 Adoption Act were satisfied. In the High Court, it was held that the mother had failed in her parental duties and abandoned her constitutional rights. However, the marital father had not abandoned his rights but merely failed in his parental duties as he had objected to the adoption.[68] The Supreme Court agreed that the adoption could not go ahead.

The twin tests of failure and abandonment were satisfied in *Southern Health Board v An Bord Uchtála*[69] where a toddler had been severely beaten by his marital parents and tied up with twine. He developed post traumatic stress disorder and child psychiatrists recommended that he should not have contact with his parents again until the age of 25. In this case the failure of parental duties was considered enough to satisfy the criteria for the abandonment of parental rights.[70]

In *Northern Area Health Board v An Bord Uchtála*,[71] where a mother had to be institutionalised due to severe schizophrenia, McGuinness J held that both

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64 [1989] 1 IR 656.
65 Ibid 665–666.
66 Geoffrey Shannon 'Editorial' [2012] *Irish Journal of Family Law* 85–86.
67 [1995] 3 IR 178.
68 Ibid 191.
69 [2000] 1 IR 165.
70 Ibid 179.
71 [2004] 4 IR 252.

failure and abandonment had been satisfied even though the mother had objected to the adoption.[72] She referred back to the wording of art 42.5 to support the decision.[73]

In *N v HSE and others*,[74] a child, Ann, was put up for adoption by her unmarried mother. The mother later withdrew consent and married the birth father. The married parents sought custody of Ann. In the High Court, McMenamin J noted that art 42 establishes a private realm of family life and sets the standard for state intervention. Welfare is to be found by keeping the child in the marital family due to the constitutionally mandated status of the family demonstrated in art 41.3. However, the constitutional right of the child to welfare also occupies a high place in the hierarchy of constitutional rights. McMenamin J refused to cancel the adoption, holding that the court is also required to uphold the personal rights of the child which must be weighed against the rights of the parents.[75]

At the Supreme Court level, it was ruled that the child should be returned to her birth parents as no failure of duty or abandonment of rights had been shown. McGuinness J expressed dissatisfaction with the constitutional hierarchy of rights but stated that until the constitution was changed the court had no choice but to return the child.[76]

Hardiman J took quite a different approach holding that the presumption in favour of the marital family was just common sense.[77] If the presumption in favour of married parents were not the case, the court would become a proxy for the views of social workers on what solution was in the best interest of children.[78] This harkens back to the debates over the introduction of the Guardianship of Infants Act 1964 that a child-centred approach will lead to state control of the family and the potential for social engineering.

IX THE PLACE OF CHILDREN'S RIGHTS IN THE IRISH CONSTITUTIONAL HIERARCHY

All Irish children are considered to have similar constitutional rights regardless of the marital status of their parents. These rights stem from art 42.5 for marital children and from art 40.3 for non-marital children. The state is under a duty to uphold these rights where parents have failed in their duties. However,

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72 Ibid [276].
73 Ibid [272].
74 [2006] 4 IR 374 (baby Ann).
75 Ibid [277], [281], [344].
76 Ibid [79], [84]–85]. See also McGuinness *Kilkenny Incest Investigation: Report presented to Mr. Brendan Hawlin T.D., Minister for Health, by South Eastern Health Board* (Dublin: Stationery Office, 1993) 96.
77 Ibid [97].
78 Ibid [104].

the content of these rights is rather vague in Irish constitutional jurisprudence. To be effective the content of children's rights must be clear.

It is also unclear whether the rhetoric of rights actually promotes individual children's best interests. The court has made references to a constitutional right of a child to have its welfare upheld by its parents.[79] This allows the court to use the constitutional rights of the child to uphold parental decisions that are not in the objective best interests of the child.

There is also a clear difference in treatment in the relative weight given to the best interests of marital children as opposed to non-marital children where there is an apparent conflict with the parental rights. The incursion of the art 42.5 test into all decisions relating to parental autonomy renders the best interests of a child a secondary concern in both private and public law cases relating to marital children. There is no child-centred method to determine what is the best interests of the marital child in Irish law. It is assumed to coincide with the wishes of marital parents unless there are exceptional circumstances. The only circumstances in which a neutral, factual determination of best interests is used is where married parents are in dispute with each other.

The rights of the unmarried mother will be enforced unless there is good reason to the contrary. While the strict art 42.5 test does not apply to such cases, factual determination of welfare is a secondary concern. In cases where the unmarried father seeks guardianship or attempts to enforce a right of custody the court weighs up all possible outcomes and chooses the solution that is objectively in the best interests of the particular child taking into account the relationship the child has with the father and how this might impact on the relationship the child has with other guardians.

The test of when it is appropriate to intervene into the family to uphold children's rights is different depending on the marital status of parents. Although the Guardianship of Infants Act 1964 proclaims that the best interests of the child should be the court's paramount concern when making decisions regarding the upbringing of children, the constitutional hierarchy requires the court to give effect to parents' rights except where to do so would be highly detrimental to the child or where parents have failed in their duties.

Married parents will only be considered to have failed in their duties where art 42.5 is satisfied. Marital children can only be adopted where the provisions of the 1988 Adoption Act are satisfied. A more flexible approach is taken where parents are unmarried allowing voluntary adoption and intervention in less extreme cases.

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[79] *Fitzpatrick v Ryan v FK* [2009] 2 IR 7; *G v An Bord Uchtála* [1980] IR 32; *North Western Health Board v HW and CW* [2001] 3 IR 622.

Proponents of the protection of parental autonomy such as Hardiman J argue that it is common sense to follow the views of the marital family. Otherwise the court merely becomes a rubber stamp for the recommendations of childcare professions.[80] This simplifies the role of the court into a stark choice between following the wishes of the marital family or, rather alarmingly, allowing the state to determine how children should be raised. However, the best interests of the child is a legal test and the courts should weigh up all the evidence and choose the best solution for the child in the particular case before it. This evidence may include both parental wishes and the recommendations of child professionals as well as the court's own determination of the issues. It is true that in most cases parents are best placed to make the decision over the upbringing of their children. Most will act in the best interests of their children and their decisions will promote children's rights. This means that in most everyday situations the court would follow parental wishes on a pure best interest analysis but these are not the cases that come to court.

The balance between parental rights and children's rights is crucial in hard cases which are far removed from the ideal marital family. These are cases in which parents have been abusive, neglectful or wish to act in such a way that is potentially harmful to their child thinking it is the best option. In such cases, the married parents have not acted in the objective best interests of their child. The current hierarchy of the Irish constitution protects the decisions of such parents on the justification that, as the marital family generally provides the best care for children,[81] the decisions of this particular marital family should not be lightly overturned. The result of upholding abstract ideals about the marital family has meant that in some cases the court has been required to make an order that is objectively harmful to the child.[82]

The effectiveness of the art 42.5 test to safeguard children depends on the willingness of judges to find that parents have failed in their duties. But it is the requirement to find failure on behalf of the parent before a best interests solution can be substituted by the court that renders Irish law inadequate to safeguard the rights and interests of children. The general desirability of remaining with birth parents and upholding parental wishes could be encompassed in a pure best interests test.

X THE EFFECT OF THE CHILDREN'S RIGHTS AMENDMENT

The children's rights amendment makes a substantive change to Irish adoption law that must be welcomed. Adoption of any child will be permitted where the parents have failed in their duty toward the child for a period of time as

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80 [2006] 4 IR 374, [103].

81 Mairead Enright 'Interrogating the Natural Order: Hierarchies of Rights in Irish Child Law' [2008] *Irish Journal of Family Law* 3–9.

82 Eg *Re O'Brien, Re JH, N v HSE and others.*

determined by law and adoption is in the child's best interests.[83] All children can be voluntarily placed for adoption regardless of marital status.[84] This will change the test under Adoption Act 1988 and allow marital children to be adopted in the same circumstances as non-marital children.

The amendment also makes three general promises which are designed to render Irish law more child-centred in approach. The state must now recognise the rights of all children and protect them as far as practicable. The state will be permitted to intervene into the family, whether marital or non-marital, where the safety or welfare of children is prejudicially affected. Legislation providing that children's best interests will be paramount in all child law disputes is constitutionally mandated. It is argued that these three promises will do little to ensure that the court chooses the objective best solution for a child in each case. In addition, these aspirational statements may further complicate child law in Ireland by creating a complex hierarchy of conflicting constitutional rights and then requiring the courts to balance the rights using a best interests approach.

A clear constitutional statement in favour of children's rights is a positive step but it does little to clarify the content of these rights. As examined above, children's constitutional rights have been recognised by the Irish courts for many decades, but these rights have been subjugated to other interests. It has been hoped by many that the constitutional amendment could be interpreted by the courts to give effect to children's rights as outlined in the UN Convention on the Rights of the Child.[85]

The real effect of the express constitutional recognition of children's rights on the interests of child will depend on how children's rights fare when weighed up against other competing interests. The amendment makes a major change to the circumstances in which the state can interfere with parental rights. The art 42.5 test is removed. Under art 42A.2.1, the state will be able to intervene in exceptional cases where parents fail in their duties toward their children to the extent that the safety or welfare of their children is prejudicially affected. The new test allows for more emphasis on the effect on children of parental neglect when assessing whether parents have failed in their duties and will allow for a more robust approach to child protection.[86]

Article 42A.2.1 will apply regardless of the marital status of the parents although the constitutional protection of the marital family remains

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[83] Article 42A.2.2.

[84] Article 42A.2.3.

[85] Children's Rights Alliance *Recognising Children's Rights in the Constitution: The Thirty-First Amendment to the Constitution (Children)*, (October 2012), 23. Available online at: www.childrensrights.ie/sites/default/files/submissions_reports/files/AnalysisChildrenAmendment1012.pdf (accessed June 2013).

[86] Geoffrey Shannon 'Editorial' [2012] *Irish Journal of Family Law* 85–86.

unchanged. Corbett argues that this will allow the constitutional assumption that the best interests of the child are in the marital family to continue but this will become more easily rebuttable.[87]

The change to the art 42.5 test is the most controversial provision of the children's rights amendment. Opponents have argued that it transfers authority for children from parents to the state and will pave the way for social engineering.[88] It has been argued that the new test for interfering with parental wishes will allow the state to intervene into families on a whim. Campaigners have highlighted Ireland's poor track record in protecting children in state care as evidenced by the Magdalen Laundries enquiry[89] and the *Report of the Independent Child Death Review Group*. However, this interpretation is rather alarmist. The inalienable right and duty of marital parents to provide for the religious moral, intellectual, physical and social education of their children is preserved by the amendment which leaves art 42.1–42.4 untouched. In spite of the claims in art 42A that the test for intervention will be the same regardless of the marital status of children, art 41 is retained. The state will still acknowledge the primacy of the marital family unit and uphold its constitution and authority.

The amendment only allows state intervention as 'provided by law'. It has been argued that this may limit the court's ability to grant emergency injunctions for blood transfusions as no legislation currently exists to allow the court to do so.[90] However, it is more probable that such injunctions can continue as part of the Irish court's common law, inherent jurisdiction. At legislative level, s 18(1) of the Child Care Act 1991 requires harm to be established before a child can be put into state care.

The new art 42A test is dependent on the court's determination of what an exceptional case is, when parents have failed in their duties and when the welfare of children is considered to be prejudicially affected. All of these determinations require the court to balance the individual constitutional rights of children and parents and to determine if the constitutional protection of the marital family is still relevant.

The amendment does not clarify how children's rights and interests should be balanced against conflicting parental rights and wishes. Article 41A.4.1

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87 Maria Corbett 'The Children's Referendum is a Game-Changer for Children's Rights in Ireland' [2012] *Irish Journal of Family Law* 95–101, 97.

88 Kathy Sinnott 'State's Yes agenda geared to rid children of real rights' *Irish Times*, 7 November 2013. John Byrne 'Proposed amendment not an issue of child protection' *Irish Times*, 31 October 2013. John Waters 'Parental rights for State will undermine family' *Irish Times*, 21 September 2012.

89 Department of Justice *Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries* (2013) available online at www.justice.ie/en/JELR/Pages/MagdalenRpt2013 (accessed June 2013).

90 Nykol O'Shea 'Can Ireland's Constitution Remain Premised on the "Inalienable" Protection of the Marital Family Unit Without Continuing to Fail its International Obligations on the Rights of the Child?' [2012] *Irish Journal of Family Law* 87–94, 91.

provides that provision will be made *by law* that the best interests of the child will be the paramount concern in all proceedings relating to the adoption, guardianship, custody or access of the children or in proceedings brought by the state for the purpose of preventing the safety or welfare of a child being prejudicially affected.

This amendment is not a promise that children's welfare will objectively be ascertained. Upholding abstract rights of constitutionally protected parties will continue to be a consideration in ascertaining what the child's best interests are in much the same way as it rendered s 3 of the Guardianship of Infants Act redundant in certain cases. The best interests of the child will now be determined within a constitutional framework made up of parental rights, children's rights and the protection of the marital family.[91] The meaning of best interests may continue to be obscured by abstract rights concerns based on presumptions about the family.[92] Unless the new amendment changes the hierarchy between abstract parental rights and pragmatic children's interests and separates the interests of individual children from the interests of the abstract family unit, this provision will do little to require the court to choose the best solution for a particular child in a particular case based on all the evidence available.

It is arguable that this amendment will require all the interests in a case to be identified: the abstract parental rights, abstract children's rights, abstract rights of the family unit and what is factually in the best interests of the child. How these should then be balanced will be open to judicial interpretation of the legislative requirement to make best interests the paramount concern and the constitutional requirement to protect children's rights as far as practicable. The creation of an extra layer of abstract concerns in the form of children's rights will render decisions even more complicated and give the judiciary more opportunity to rely on untested assumptions about what is best for children rather than objective evidence of what is the best solution for the child concerned.

XI CONCLUSION

The legitimacy of the children's rights amendment is still in question. The Supreme Court held that the Irish government had not explained the referendum to the public impartially. Instead the Irish Minister for Children had spent public funds on materials that promoted a yes vote and

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[91] Maria Corbett 'The Children's Referendum is a Game-Changer for Children's Rights in Ireland' [2012] *Irish Journal of Family Law* 95–101,97.

[92] Eoin Carolan 'The Constitutional Consequences of Reform: Best Interests after the Amendment' [2007] *Irish Journal of Family Law* 9–16. Ursula Kilkelly & Conor O'Mahony 'The Proposed Children's Rights Amendment: Running to Stand Still?' [2007] *Irish Journal of Family Law* 19–25.

misrepresented the effect of the referendum.[93] The challenge to the legitimacy of the amendment is due to come before the Irish High Court in April 2013.[94] Until this challenge is heard the application of art 42.5 is in limbo.[95]

A similar challenge was made to the legitimacy of the constitutional amendment which introduced divorce to Ireland in 1995.[96] In *McKenna v An Taoiseach and others*,[97] the government's yes campaign was declared unconstitutional as it had advocated a positive result. In *Hanafin* v *Minister for the Environment*,[98] the validity of the result of the divorce referendum was upheld as the Supreme Court held that the government's yes campaign had not materially affected the result of the referendum. The divorce referendum passed by 9,114 votes from a total poll of 1,628,570.[99] The children's rights referendum passed by 169,868 votes out of total poll of 1,061,594 so the task for the challengers of the referendum to show that the government's yes campaign materially affected the result of the referendum will be very difficult.

The replacement of the art 42.5 test with the new test under art 42A could provide for more child-centred determination of cases with a greater emphasis on expert evidence of what is actually in a child's best interest over constitutional presumptions as to what is generally in the best interest of children.[100] However, the effect of art 42A will depend on a number of factors which are left to the courts including the content of children rights, how they are weighed up against other constitutional interests and how this constitutional hierarchy will affect the determination of what is in a child's best interests.[101] Throughout the history of Irish child law, several judges have attempted to promote the interests of children over adult rights, but established social presumptions that the best outcome for children is generally to remain with their parents and follow parental wishes have prevailed. Irish child law is at a cross roads.

The amendment should be welcomed for the changes that it makes to adoption law and to child protection. It is true that no amendment could be a silver bullet that would solve all the problems faced by children in Ireland. However, it was reasonable to expect that this amendment would solve the problems that are caused by the skewed constitutional hierarchy of rights. The amendment could have made a clear commitment to upholding the United Nation

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93 *Mark McCrystal v The Minister for Children and Youth Affairs, The Government of Ireland, Ireland and the Attorney General* [2012] IESC 53, [67]–[69].

94 *Jordan v Minister for Children and Youth Affairs*.

95 This has lead to the adjournment of cases: Aodhan O'Faolain, Ray Managh '"Parents" challenge against children being placed in care adjourned' *Irish Times*, 25 March 2013.

96 Fifteenth Amendment of the Constitution Act, 1995.

97 [1995] 2 IR 1.

98 [1996] 2 ILRM 401.

99 Ward [172].

100 Catherine McGuiness 'Vote on children's rights a statement of our values' *Irish Times*, 9 October 2013.

101 Maria Corbett 'The Children's Referendum is a Game-Changer for Children's Rights in Ireland' [2012] *Irish Journal of Family Law* 95–101.

Convention on the Rights of the Child in domestic cases. It could have given clarity on how the conflicting rights of parents and children should be balanced. The opportunity should have been taken to create a child-centred legal system at a constitutional level that promotes the best possible solution for a child in each particular case. It could have removed the last traces of the stigma of illegitimacy from our system but yet again children's interests come second to the political will to uphold the special place of the idealised marital family.

Israel

THE DEVELOPING RIGHT TO PARENTHOOD IN ISRAELI LAW

*Rhona Schuz**

Résumé

Depuis que l'auteur du présent chapitre s'est intéressé pour la première fois à cette question dans le Survey de 1996, la jurisprudence israélienne reconnait de plus en plus l'existence d'un véritable droit d'être parent. En plus d'une analyse de la jurisprudence concernant le droit des prisonniers de fonder une famille, l'accès aux différentes techniques de procréation assistée et le droit de l'adoption, ce texte analyse les principales recommandations du Comité public sur l'encadrement légal de la reproduction en Israël, dont le rapport a été publié en 2012. Après avoir fait état des différents développements en la matière, le texte analyse les arguments de uns qui considèrent que le droit d'être parent est interprété de manière trop généreuse en Israël et des autres qui estiment qu'il faut aller encore plus loin.

I INTRODUCTION

My contribution to the 1996 *Survey of Family Law*[1] discussed recognition of the right to parenthood in the context of a dispute about frozen embryos in the leading case of *Nahmani v Nahmani*[2] and the new Israeli Surrogacy Law of 1996. During the 17 years which have passed since then, the right to parenthood has been recognised by Israeli courts in a variety of additional contexts. In addition, many of the recommendations of the Public Committee on the Legal Regulation of Reproduction in Israel, published in 2012 (hereinafter the 'Mor-Yosef Report' or 'the Report'), are expressly designed to increase realisation of the right to parenthood.[3] This chapter will examine these developments and their significance.

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1 R Schuz 'The Right to Parenthood: Surrogacy and Frozen Embryos' in A Bainham (ed) *The International Survey of Family Law* (Jordan Publishing Limited, 1996) p 237.

2 ACH 2401/95 *Nachmani v Nachmani* 50(4) PD 661.

3 Ministry of Health 'Recommendations of the Public Committee for Examining Legislative Regulation of Fertility and Childbirth in Israel' (May 2012) ('Mor-Yosef Report') available at www.health.gov.il/PublicationsFiles/BAP2012.pdf (Hebrew) (accessed June 2013).

Part II will start by discussing the source and scope of the right to parenthood in Israeli jurisprudence and then proceed to explain the various developments, categorised according to context. Parts III and IV will review and discuss briefly claims that insufficient attention has been paid to the harm caused to other important interests by an overly wide construction of the right to parenthood and, on the other hand, claims that the right is still too narrowly drawn in that it discriminates against particular groups, notably same-sex couples. Part V will draw some conclusions.

At the outset, it is necessary to point out that the right to parenthood is used in two main ways in Israeli legal discourse.[4] The first refers to a right to genetic or physiological parenthood, which is effectively an a priori right to bring into the world a child bearing a person's genetic material or to bear a child (hereinafter 'the procreation right'). This aspect of the right is usually referred to in the context of access to methods of artificial reproduction, but is also pertinent when discussing the right to parenthood of groups in relation to whom natural procreation may only take place with permission from state authorities, such as prisoners.[5] The second way in which the term is used is to refer to the right to recognition of legal parenthood (hereinafter 'the status right'). This issue may arise inter alia in relation to the status of the 'intended parents' of a child born as a result of gamete donation or surrogacy and to a request to adopt a child. In most cases, the right in question seems to be an ex post facto right to be accorded the status of parenthood in relation to a child who already exists. However, ex hypothesi, in cases where the child was born through artificial reproduction, the question of the status of the 'intended parents', who may not be related to the child genetically or physiologically, will only arise if those persons are allowed access to that method of artificial reproduction in the first place. This chapter will refer to both aspects of the right to parenthood and will distinguish between them where necessary.

Any analysis of the developing right to parenthood in Israeli law must take into account the relevant social and cultural background. Israel enjoys the highest rate of assisted reproductive technologies (ART) intervention in the world as well as the highest rate of infertility therapy per capita coverage[6] and, as will be seen below, most of these treatments are funded by the state. Various explanations have been advanced for the centrality of procreation in Israeli

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4 It is also sometimes used to refer to the right of parents to raise their child, for example in the context of termination of parental right disputes, see e g per Justice Cheshin in ACH 7015/94 *Plonit v A-G* 50(1) PD 48, 102.

5 Similarly, enforced sterilisation or use of contraception by persons who may lack mental capacity.

6 C Shalev and S Goldin 'The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations' (2006) 12 *Nashim: A Journal of Jewish Women's Studies* 151; E Waldman 'Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel' (2006) 16 *Health Matrix: Journal of Law-Medicine* 65, 81, available at ssrn.com/abstract_id=918802 (accessed June 2013); According to the Ministry of Health Statistics, approximately 4% of births in Israel result from IVF, available at www.health.gov.il/UnitsOffice/HR/ITandINFO/info/Pages/IVF.aspx (Hebrew) (accessed June 2013).

society and the corresponding pro-natalist policy.[7] These include religious,[8] political,[9] historical[10] and security reasons.[11] Thus, the approach of the courts, legislature and others to the right to parenthood is likely to be informed, not only by human rights considerations, but also by wider policy reasons for encouraging birth of children, which may not be relevant in other jurisdictions.

II THE DEVELOPMENTS

(a) Basis, nature and scope of the right to parenthood

Israeli courts have recognised the right to parenthood as a fundamental constitutional right deriving from nature and the centrality of procreation in human life, as well as from the right to human dignity. In a much quoted passage, Justice Cheshin describes the right to parenthood as 'at the foundation of all foundations, at the infrastructure of all infrastructures, the existence of the human race, the ambition of man' and the basis of that right as 'the profound need to have a child which burns in the soul … man's instinct of survival … the necessity for continuity'.[12] Thus, in the hierarchy of constitutional human rights, the right to parenthood and to family is very near the top, after the right to life and bodily integrity.[13]

It is perhaps ironic that, whilst the right to parenthood is based on nature, it is usually relied upon in cases where nature has failed or in an attempt to replace nature. Whilst some would limit access to ART to those who are unable to have children for medical reasons, or at least to give preference to them,[14] there is nothing in the way in which the right to parenthood has been defined to distinguish between such persons and others who are unable to have children

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7 R Landau 'Religiosity, Nationalism and Human Reproduction: The Case of Israel' (2003) 23 *International Journal of Sociology & Social Policy* 64, 68; Waldman ibid.

8 The first religious commandment in the Bible is to 'be fruitful and multiply' (Genesis 1:28) and the importance of reproduction is a recurring theme in the Old Testament and later Jewish sources, e g Rachel's plea 'Give me children, or else I die' (Genesis 30:1) (quoted frequently in the cases concerning the right to parenthood of infertile couples) and the comment of Rabbi Yehoshua Ben Lev in the Babylonian Talmud that: 'any person who does not have children is considered dead' (Tractate Niddah, p 64(2)). See generally, Waldman (n 6) 70–71. Reproduction is also important in Muslim tradition, see Mor-Yosef Report (n 3) 4.

9 Zionist ideology and demographic reality require a high rate of childbirth among the Jewish population in order to ensure that there remains a Jewish majority in the Jewish state, Waldman (n 6) 73–74; Landau 'Religiosity, Nationalism And Human Reproduction' (n 7).

10 The need to replenish the Jewish people after the massacre of 6 million Jews in the Holocaust, Waldman (n 6) 72; Landau ibid.

11 The need to replenish those who fell in the many wars and terrorist attacks and to provide soldiers who will continue to defend Israel from those who seek its destruction, Landau ibid.

12 HCJ 2458/01 *New Family v Approvals Committee for Surrogate Motherhood Agreements, Ministry of Health*, 57(1) PD 419 (author's translation).

13 HCJ 4293/01 *New Family v Minister of Labour and Welfare* (24 March 2009) available at elyon1.court.gov.il/files/01/930/042/r07/01042930.r07.htm, para 18 (Hebrew) (accessed June 2013).

14 See per Rothschild J in FamC 26140/07 *Plonit and Ploni v State Attorney's Department – Central District* (unreported, 15 February 2010) para 50.

naturally[15] because they have passed the age of natural fertility, because they are single or because of sexual tendency.[16]

Despite the Israeli courts' widespread recognition of the fundamental nature of the right to parenthood, it still treated as a relative right, which is in fact a negative freedom and so does not oblige third parties to act. In other words, it is the right to prevent others putting obstacles in the way of a person becoming a parent rather than a positive right requiring others to act to promote realisation of this right.[17] However, it may not always be clear what is the nature of the right being claimed. For example, in a case in which adoptive parents challenged the maximum age limit for adopters,[18] Justice Procaccia took the view that they were claiming a positive right to receive state assistance, which was necessary to complete the process of adoption. In contrast, Justice Rivlin points out that if there were no state restrictions anyone could adopt a child[19] and thus the petitioners' claim was a negative one, viz that the state not prevent them from adopting on the basis of their age.

Despite the relative and negative nature of the right to parenthood, it is widely accepted that the right should not be restricted unless there are weighty reasons for doing so.[20] Accordingly the debate focuses mainly on the legitimacy and strength of alleged countervailing interests.[21] Those who take the view that the right to parenthood should be interpreted narrowly consider that these countervailing interests have been perceived too narrowly and been accorded insufficient weight. On the other hand, those who favour a wide interpretation of the right to parenthood argue that the restrictions on the right to parenthood in the current law are too wide and do not ensure equality between different populations. These competing claims will be considered in Part III below.

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15 Indeed, the Mor-Yosef Report (n 3) 57 takes the view that there is no reason per se to prevent the creation of parenthood which could not be created naturally. However, one of their reasons for not extending commercial surrogacy to single men and male couples is that this would prejudice women who needed to resort to surrogacy because of a medical defect (at 61).

16 Cf countries which deny access to ART to such persons, see IG Cohen 'Regulating Reproduction: The Problem with Best Interests' (2011) 96 *Minnesota Law Review* 423, 450–452.

17 This position taken in the *Nachmani* case (n 2) has been adopted in subsequent case-law; see e g per Cheshin J in *New Family v Approvals Committee* (n 12) 448–449, explaining that the petitioner is not claiming that the state is obliged to ensure that she can have a child through surrogacy, but that the state is obliged not to forbid her to do so because of her status.

18 *New Family v Minister of Labour and Welfare* (n 13) para 5 of Justice Rivlin's opinion, discussed at Part II(f)(i).

19 As indeed happened in relation to intercountry adoption before it was regulated in the 1996 Amendment to the Adoption Law.

20 Eg per Justice Rubenstein in HCJ 4077/12 *Plonit v Ploni*, (14 November 2011) available at elyon1.court.gov.il/files/12/770/040/t06/12040770.t06.htm, para 27 (Hebrew) (accessed June 2013).

21 Justice Rubenstein, ibid at para 23 also explains that whether a particular consideration is defined as an interest or right does not determine whether it will override a competing consideration. Rather it is necessary to consider the relative weight of the two considerations in the particular case.

In the current context, it should be pointed out that the strength of the countervailing interests required to override the right to parenthood may vary depending on the aspect of the right to parenthood in question. In this respect, Justice Rubenstein has distinguished between the nuclear right to procreate and other peripheral rights to make choices in relation to reproduction, such as with whom to have a child.[22] The latter rights do not protect the fundamental value of becoming a parent, but rather other values such as privacy and autonomy.[23] Thus, although they are protected by the Basic Law: Dignity and Freedom of Man they are weaker and more easily overridden by countervailing interests.[24]

For example, in principle the right to parenthood includes the right to have as many children as the parent wishes.[25] However, the High Court of Justice has held that the fact that intended parents already have more than two children is a relevant factor to be taken into account when deciding whether to approve a surrogacy agreement because it changes the balance between the interests involved.[26] Similarly, whilst the right to choose the person with whom one has a child is clearly recognised,[27] this interest may well not override competing interests, such as the right of a sperm donor to renege.[28]

Finally, the interests of a parent to have his legal parenthood recognised in a particular way, for example without the need for legal proceedings or by declaration or parenthood order rather than by adoption, would seem to belong to the category of peripheral rights.[29] As will be seen below,[30] an Israeli court has recognised the interest of intended parents to children born of foreign surrogacy to be recognised as legal parents on the basis of medical documents without the need for genetic testing and for the intended mothers of such children to have their parentage declared without having to adopt them. The reason for recognition of the intended parents' interest in these cases seems to be that it coincides with the interests of the children, as perceived by the court, and does not violate the interest of any other person. The policy of

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22 Ibid para 29.

23 Ibid.

24 In relation to the right to choose the sex of the newborn, it should be noted that pre-implantation genetic diagnosis (PGD) is not allowed for this purpose, unless there are medical reasons, apart from in exceptional cases authorised by a multidisciplinary ethics committee according to strict guidelines, Circular of the Director of the Health Ministry 21/05 (9 May 2005).

25 HCJ 625/10 *Plonit and Ploni v The Approvals Committee* (26 July 2011) available at elyon1.court.gov.il/files/10/250/006/p08/10006250.p08.htm (Hebrew) (accessed June 2013); cf D Statsman 'The Right to Parenthood: An Argument for a Narrow Interpretation' (2003) 10 *Ethical Perspectives* 224.

26 HCJ 625/10 ibid.

27 Eg the Attorney-General's guidelines on insemination (see below at Part II(c)(ii)) are based on the applicant's right to have a child from her deceased partner.

28 See HCJ 4077/12 (n 20); see detailed discussion at Part II(d)(i).

29 Although where there is a risk that his parenthood will not be recognised at all it could be argued that the nuclear right of being numbered among the group of parents is engaged.

30 At Part II(e)(iv).

discouraging unregulated surrogacy abroad is considered insufficient to override the common interest of parents and child.[31]

(b) Prisoners

The issue of the right of prisoners to become parents was addressed by the High Court of Justice in the highly publicised case of Yigal Amir, who was convicted of murdering Prime Minister Yitzhak Rabin and sentenced to life imprisonment. After Amir's request to be granted the privilege of engaging in marital relations with his new wife within prison was refused, he applied for permission for a sample of his sperm to be taken from the prison for the purpose of inseminating his wife. The granting of this request caused uproar in some quarters and two members of the Knesset (the Israeli Parliament) applied to the High Court of Justice for judicial review of this decision.[32]

That court upheld the decision of the prison authorities on the basis that the right to become a parent is one of the most important constitutional human rights protected by the Basic Law: Dignity of Man and Freedom.[33] Since human rights, other than those which are inherently intrinsic in imprisonment, do not stop at the walls of the jail, prisoners should not be denied the right to have children unless this is necessary for the public interest or some other appropriate purpose. The High Court rejected all the arguments raised against allowing Amir to become a parent. In particular, the court rejected the claim that denying the right to parenthood should be used a means of additional punishment in the light of the severity of the offence and the prisoner's lack of remorse.[34] In addition, the court held that it could not be assumed that the fact that the child would be brought up in a one-parent family would be detrimental to his welfare and so justify not allowing him to be born.[35] The liberal approach of the Israeli executive and judicial authorities can be compared with that of the English authorities, whose policy is only to allow artificial insemination in exceptional cases.[36] The latter approach was upheld by the majority in the ECtHR case of *Dickson v United Kingdom*,[37] rejecting a petition brought by an English prisoner against the refusal of the Secretary of State to allow insemination of his wife with his sperm, inter alia on the basis of the wide discretion given to state authorities and the risk to the welfare of the resulting child.[38]

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31 Cf states which take the view that recognising the status of the children born abroad through surrogacy will simply encourage more such surrogacy arrangements, B Stark 'Transnational Surrogacy and International Human Rights Law' (2012) 18 *ILSA Journal of International & Comparative Law* 369, 373.

32 HCJ 2245/06 *MK Neta Dovrin v The Prison Service*, (20 march 2006) available at elyon1.court.gov.il/files/06/450/022/R02/06022450.r02.htm (Hebrew) (accessed June 2013).

33 Ibid para 12 of opinion of Justice Procaccia.

34 Ibid para 10 of Justice Jubran's opinion.

35 Ibid para 17 of opinion of Justice Procaccia.

36 *R v Secretary of State for the Home Department* [2001] 3 WLR 533, para 67.

37 *Dickson v United Kingdom*, (App no 44362/04) ECHR 18 April 2006.

38 See discussion on the welfare of the child claim below at Part III(a)(i).

(c) In vitro fertilisation/insemination

Even in the many cases where there is no need for gamete donation, any ART procedures which require medical intervention can be limited by state regulation.[39] Thus, various aspects of the right to parenthood have arisen in relation to the use of IVF and insemination after death.

(i) Status of the intended parents

The Public Health Regulations 1987 provide that infertility treatment can only be given to a married person together with that person's spouse. However, courts have given permission for IVF even where the man is still married to someone else. The majority of the Mor-Yosef Committee recommends that the marital status of the parties should not be a basis for restricting access to IVF and that there should not be any requirement to inform the spouse of a married party that she or he is receiving treatment with another partner.[40]

(ii) Insemination after death

In 2003, the Attorney-General published guidelines governing the removal of sperm from a deceased man, or one about to die, and the use of that sperm. Under these guidelines, which were based on practice developed in a number of cases, use of sperm to inseminate the deceased's partner, at her request, should be allowed where it could be assumed that this would be in accordance with his wishes. Use of the sperm needs to be approved by a court, after receiving a social report. The guidelines specifically refer to the right to parenthood of the deceased's partner and to the social norm that couples wish to have children together. However, they specifically state that there is no right to have a grandchild and thus the deceased's parents will not be allowed to make use of the sperm, in cases where he did not have a partner or that partner does not wish to use the sperm.

Nonetheless, the Krayot Family Court[41] gave permission for use of the sperm of a deceased, who had deposited his sperm prior to undergoing chemotherapy and died without a partner, at the joint request of an unrelated single woman and the deceased's parents. The court was satisfied from evidence given by the deceased's parents that there was a reasonable chance that the deceased would have wished for his sperm to be used. Furthermore, weight was given to the

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[39] M Garrison 'Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage' (2000) 113 *Harvard Law Review* 835, 916; in relation to funding, see below at Part III(c)(ii).

[40] Mor-Yosef Report (n 3) 26, In the case of a married woman seeking to have her eggs fertilised with the sperm of another man, this recommendation is subject to making arrangements that the biological father can be registered as the father of the child, which is currently not possible where the mother is married to someone else. In relation to the minority opinion, see below at Part III(b)(iv).

[41] FamC 13530/08 *New Family v Rambam Medical Center*, Nevo 6 December 2009.

interest of the woman in having a child from a known man rather than an anonymous donor and the interest of the child in knowing his genetic origins and his paternal grandparents.

However, the majority of the Mor-Yosef Commitee supports the position taken by the Attorney-General, restricting insemination after death to the wife or stable partner of the deceased.[42] In other cases, use of the sperm should not be allowed unless the latter left express instructions for such use because it cannot be assumed that he would have wished to have children.[43]

(d) Gamete donation

(i) Sperm donation

The use of sperm donation is regulated by Public Health Regulations of 1979 and by the Rules as to the Administration of a Sperm Bank and Guidelines for Performing Artificial Insemination issued by the Director-General of the Health Ministry. Courts have rarely been called upon to consider issues arising out of donor insemination.[44] In particular, there has not been any decision determining the status of the husband of the mother. The Mor-Yosef Report recommends that the husband of the mother should be treated as the child's legal father without the need to obtain a parenthood order.[45]

A recent petition to the High Court of Justice raised expressly the scope of the right to parenthood.[46] The case concerned a single woman who had given birth to a child after insemination by sperm from the sperm bank. She also reserved further sperm from the same donor, so that she would later be able to have another child who would be a full genetic sibling to her first child. However, in the meantime, the sperm donor, who had become religious, retracted his consent and the sperm bank refused to release the sperm. The woman's petition for judicial review of this refusal was rejected on the basis that her interest in producing a genetically identical sibling to her child was overridden by the donor's interest in not becoming a parent against his wishes.

Under the current regulations, all sperm donation is anonymous. The Mor-Yosef Report recommends setting up an alternative track for sperm donations, under which the child will be able to reveal the identity of the donor

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42 Mor-Yosef Report (n 3) 45–46.

43 For discussion of minority opinion, see below at Part III(b)(iii).

44 For discussion of the limited case-law that does exist, see R Schuz and A Blecher-Prigat 'Israel: dynamism and schizophrenia' in E Sutherland (ed) *The Future of Child and Family Law* (Cambridge: Cambridge University Press, 2012) 175, 183–184.

45 Mor-Yosef Report (n 3) 76, but a minority opinion of two members considers that it should be necessary to obtain a parenthood order. There is logic in the latter view, since in all other cases persons without a genetic or physiological link to the child are required to obtain a parenthood order. It is not clear whether the Report's recommendation includes the mother's cohabitee. If so, the need for certainty also supports the requirement for obtaining a parenthood order. The counterargument seems to be the breach of privacy of the parents, in view of the fact that they may not wish others to know that the child was born as a result of sperm donation.

46 HCJ 4077/12 (n 20).

when he reaches 18.[47] However, it was decided to retain the anonymous track in order to protect against a drastic reduction in sperm donations and to preserve the right of the mother to decide whether the donor would be able to play a part in the adult life of her child.

The Report also recommends limiting the number of women who can be inseminated from the same donor to seven and setting up a central register which will enable this restriction to be enforced.[48] However, perhaps surprisingly, there is no reference to setting up a databank which will enable a person born from donor insemination to check that he is not genetically related to his intended spouse.[49]

(ii) Egg donation

The Egg Donation Law 2010 regulates donation of eggs in Israel. Prior to this law, eggs could only be donated by women who were themselves undergoing fertility treatment and so there was a scarcity of available eggs. This law provides for eggs to be donated to women up to the age of 54 who are in medical need of an egg and states expressly that the donee will be considered to be the mother of the child for all purposes.[50] At the same time, the law provides that a confidential databank shall be set up to be managed by the Adoptions Registrar. At the age of 18, anyone wishing to know if he or she was born from an ovum donation will be able to inquire at the registry. The registrar will provide only a positive or negative answer regarding the use of a gamete donation without divulging the identity of the donor. Couples wishing to marry, where one of the partners was born from a donated ovum, will be able to inquire from the registrar whether there is a genetic family connection between them.

It should be noted that ironically the Egg Donation Law's requirement that there has to be a medical need for the egg donation precludes use of egg donation by lesbian partners who want to have a child together, by implanting the fertilised egg of one in the womb of the other.[51] Such practice was allowed in the past by the Health Ministry. In one such case,[52] the Family Court held that both of the women were considered to be legal mothers of the child and that there was no need for the genetic mother to adopt the child, as claimed by the state.[53] This decision was based on that women's right to parenthood[54] and the welfare of the child.

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47 Mor-Yosef Report (n 3) 35–36.

48 Ibid 36–37.

49 As exists in relation to egg donation, see Part II(d)(ii) below.

50 Section 42.

51 A petition challenging this requirement has been submitted by a lesbian couple to the High Court of Justice, HCJ 5771/12 *Liat Moshe v approvals Committee for Surrogate Motherhood Agreements, Ministry of Health* (21 November 2012) available at elyon1.court.gov.il/files/12/710/057/s06/12057710.s06.htm (Hebrew) (accessed June 2013).

52 FamC 60320–07 *TZ and others v A-G*, Nevo 4 March 2012.

53 On the basis that only the woman who gives birth to the child is the legal mother.

54 The reference is of course to her status right.

(e) Gestational surrogacy

(i) The surrogacy scheme in Israel

Israel was the first country in the world to regulate surrogacy by legislation.[55] The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn Law) 1996 (hereinafter 'the Surrogacy Law') legalised gestational surrogacy agreements which fulfilled the conditions set out in the Surrogacy Law and received approval from a Statutory Committee (hereinafter 'the Approvals Committee), set up under that law.[56] In addition, the Law provided for the making of parenthood orders which gives the intended parents full legal parental status in relation to the child. The Surrogacy Law specifically allows for payments to be made to the surrogate mother to compensate her for her time and suffering and thus surrogacy in Israel is commercial. Whilst the payments have to be approved by the Approvals Committee, in practice this Committee does not interfere with the sums agreed which are determined by market forces. Owing to the stringent requirements of the Surrogacy Law[57] and the Approvals Committee's guidelines,[58] there is a dearth of suitable surrogate mothers.

Over the years, various challenges have been made by potential intending parents to the restrictions imposed by the Surrogacy Law and by the Approvals Committee. In all these cases, the petitioners claimed that these limitations violated their right to parenthood.

(ii) Challenges to the restrictions in the Surrogacy Law

The first challenge was brought by a single woman, who wished to have her eggs, which had been fertilised by donor sperm, implanted into the womb of a surrogate mother. Her application was rejected in limine because of the statutory requirement that the intending parents be a heterosexual couple and that the sperm be that of the intending father. The High Court of Justice, whilst accepting her claim that the statutory requirements discriminated against single women, rejected her petition on the basis that a decision to allow surrogacy for single women had to be made by the legislature in the light of the novel, delicate and complex nature of surrogacy.[59]

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55 For the background to this legislation see Schuz 'The Right to Parenthood' (n 1).

56 For detailed analysis of this Law, see R Schuz 'Surrogacy in Israel: An Analysis of the Law in Practice' in R Cook and SD Sclater (eds) *Surrogate Motherhood: International Perspectives* (Oxford: Hart Publishing, 2003).

57 For example, that the surrogate mother is not married.

58 For example, that the surrogate mother has already had a baby.

59 *New Family v Approvals Committee* (n 12); for detailed discussion of this case, see R 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 Limited, 2004) 247; a Committee set up in the wake of this decision recommended making no change in the law: Report of the Public-Professional Committee to Examine the Subject of Eligibility to Enter into an Agreement for Carrying Embryos available at www.old.health.gov.il/Download/pages/insler_internet.pdf (accessed June 2013).

More recently, a similar challenge brought by a homosexual couple[60] was withdrawn when the setting up of the Mor-Yosef Committee was announced. Yet, this committee, whilst recognising the right of homosexuals to parenthood, recommends that they should only be able to make use of altruistic surrogacy arrangements, in order to avoid competition with infertile heterosexual couples for the limited number of suitable commercial surrogate mothers and to prevent an undesirable expansion of commercial surrogacy.[61] In addition, it should be noted that their recommendations only provide for single men to enter into altruistic surrogacy arrangements. These men will be able to obtain a parenthood order,[62] but their partners will still have to adopt the child.

In contrast, the Mor-Yosef Report does recommend including single women in the commercial surrogacy scheme and allowing the use of donated sperm provided that the egg is that of the intended mother.[63] In other words, it is necessary that one of the intended parents is genetically related to the child. In order to widen the pool of suitable surrogate mothers to accommodate for this increased demand and to make altruistic surrogacy a genuine option, the Report recommends removing the restriction on married women and horizontal relatives of the couple[64] serving as surrogates.[65]

(iii) Challenges to the guidelines of the Approvals Committee

Two challenges have been brought to refusals of applications based on the Approval Committee's guidelines. In the first,[66] the refusal was based on the age of the parties, who were aged 58 (man) and 53 (woman) at that date of submission of the application, 4 years previously,[67] in accordance with the guideline requiring the Committee to take into account the parties' age where this is above that of natural fertility, i e 48 to 50. The Family Court held that the considerable weight which had been given to the age of the parties in this case was appropriate, balanced and in accordance with the objective of the Surrogacy Law.[68] This decision would have been different under the

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60 HCJ 1078/10 *Pinkas v The Approvals Committee for Surrogate Motherhood Agreements, Ministry of Health*, (30 June 2010) available at elyon1.court.gov.il/files/10/780/010/o06/10010780.o06.htm (Hebrew) (accessed June 2013).

61 Mor-Yosef Report (n 3) 60; See discussion below at Part III(a)(ii).

62 The Report does not explain why in cases of surrogacy arrangements, biological fathers need to obtain a parenthood order rather than a declaration of parenthood: see Schuz 'Surrogacy in Israel' (n 56).

63 Mor-Yosef Report (n 3) 63–64.

64 Ibid 64. Although a sister will not be able to be implanted with an embryo fertilised by her brother.

65 The removal of these restrictions was facilitated by the fact that, according to the Mor-Yosef Report (n 3) 24, the accepted Rabbinical view today is that the personal status under Jewish law of children born as a result of insemination or IVF is not impaired (i e they are not considered as *mamzers*), even where the carrying mother and the owner of sperm were forbidden to marry each other.

66 FamC 26140/07 (n 14).

67 Who had married for the first time only a few years previously and had one natural child following egg donation.

68 FamC 26140/07 (n 14) para 50.

recommendations of the Mor-Yosef Report, which propose to enact a maximum age of 54 (at time of application) for intending mothers.

The second challenge was to an in limine rejection by the Approvals Committee on the basis that the intending parents already had three joint children.[69] The High Court of Justice accepted the petitioners' argument that, since the Surrogacy Law did not limit the number of children of applicants, the Approvals Committee could not reject such an application in limine, even though their guidelines did state that applications from couples with two or more joint children would not be allowed. However, the court did accept the argument that the fact that the applicants already had three joint children was a relevant factor, together with all other factors, in exercising the discretion whether to give approval, after having considered all the documentation submitted. Again, the decision would be different under the recommendations of the Mor-Yosef Report to limit surrogacy to couples who do not have more than one child together and to single persons who do not have any children.[70]

(iv) International surrogacy

During the last few years, more and more Israeli couples have turned to foreign surrogacy. Some of these couples are homosexuals who, as seen above, are unable to use the Israeli surrogacy scheme. Others are heterosexual married couples, who see foreign surrogacy as a method of saving money and the long-winded bureaucracy involved in the Israeli scheme. The most popular countries among Israelis who turn to foreign surrogacy have been India,[71] Georgia and Armenia.

Since foreign surrogacy agreements are not governed by the Surrogacy Law, the Interior Ministry developed a practice to deal with these cases, which reflects their view as to the general principles of determining parenthood and their concern to prevent illegal trafficking in children. Under this practice, the intended parents have to produce documents evidencing the surrogacy agreement, its legality under the foreign law and the birth mother's consent to the child's removal to Israel.

In addition, the intended father of the child has to bring proof that he is the biological father of the child before the child can be allowed to enter the country. This involves obtaining a court order allowing paternity testing.[72] Then, a DNA sample (usually saliva) is taken from the child in the foreign country and sent to Israel to check that it matches the DNA sample of the

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69 HCJ 625/10 (n 25).

70 Mor-Yosef Report (n 3) 64. The main reason for this seems to be to limit the demand for surrogacy in order to compensate for allowing single women to make use of surrogacy services (at 62).

71 Although the new Indian Medical Visa Regulations 2012 have restricted the commissioning of surrogacy arrangements by foreigners to married couples, A Malhotra and R Malhotra *Surrogacy in India, A Law in the Making* (New Delhi: Universal Law Publishing, 2013).

72 Under the Genetic Information Law 2000, paternity testing cannot be carried out in relation to minors without a court order.

intended father. Once paternity is proven, the biological father is registered as the parent and can bring the child to Israel. However, the father's partner (whether this is his wife[73] or a homosexual partner) does not have any status in relation to the child until he or she adopts him. One of the problems with this procedure is that of time. The parent (or at least one of them) and the newborn child have to stay in the foreign country for a few weeks until paternity is proven. Even once the child comes into Israel, it can take more than a year for the adoption process to be completed.

However, during the past year, a number of challenges to the Interior Ministry's practice have been accepted by Israeli Family Courts. In one case involving heterosexual married parents,[74] the intended mother's claim that it was absurd that she would have to adopt her own genetic child was accepted. The Tel-Aviv Family Court, casting doubt on the rule that only the birth mother is treated as the legal mother, held that the genetic mother had a fundamental right to be treated as the legal parent of her child[75] and that it was not in the child's best interests that he have to be adopted by his own biological mother.[76] Thus, the court held that, if DNA testing showed that the wife was the biological mother of the child, she could automatically be treated as the mother of the child without the need to adopt the child. Recently, the same court has taken this approach a stage further, holding that there was no need for adoption even where the egg had been taken from a donor.[77] In the court's view, adoption was not the appropriate procedure because the father's wife had been party to planning the birth of the child. Accordingly, a court order of parenthood should be made, as in cases to which the Surrogacy Law applies.[78]

Moreover, in another case,[79] the same court accepted a challenge brought by the father of twins born of surrogacy in Georgia that he should be recognized as the parent of the twins born through surrogacy, without the need to undergo DNA testing, on the basis of the evidence which he had provided, which included medical documents in relation to surrogacy procedure, the Georgian birth certificate and evidence of Georgian law. The Family Court accepted that these documents were sufficient proof of biological parenthood. Moreover, the welfare of the infants required that no doubt should be placed on their biological connection with their parents and that the legal connection with the

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[73] This is based on the assumption that the birth mother and not the biological mother is treated as the legal mother of the child.

[74] FamC 10509–10–11 *YP and NP v A-Gl*, Nevo 5 March 2012.

[75] Ibid para 23. This decision appears to treat the intended mother more preferably than under the Surrogacy Law because the court order will be a declaration of her parenthood, whereas a parenthood order under the Surrogacy Law is constitutive.

[76] Ibid para 24.

[77] FamC 35043–06–12 *Almoni v A-G*, Nevo 14 March 2013.

[78] The court required a social services report before making the order, as under the Surrogacy Law. After this chapter was written, on 11 May 2013, the Attorney-General announced that until there is legislation in relation to foreign surrogacy, the homosexual partner of the genetic parent can obtain a parenthood order from the court and does not need to adopt the child born to a foreign surrogate, www.mako.co.il/news-law/legal/Article-30a15b7ee679e31004.htm&sCh=3d385dd2dd5d4110&pId=565984153 (Hebrew) (accessed June 2013).

[79] FamC 38–12 *Plonit v A-G*, Nevo 9 November 2012.

intended parents should be recognised as soon as possible, so that they could be brought back to Israel and be entitled to benefit from the parents' medical insurance. An appeal by the state is currently pending. In addition, the state is vigorously defending in the High Court of Justice a petition brought by a homosexual couple against the refusal of the state to register them both as fathers of the child on the basis of a birth certificate provided to them by US authorities in relation to a child born there through surrogacy.[80]

Finally, a homosexual couple successfully challenged the Interior Ministry's refusal to allow entry of a child born to a foreign surrogate following fertilisation of an egg with the sperm of both of them on the basis that the DNA testing showed that neither of them had any genetic connection to the child,[81] even though the foreign birth certificate recognised the couple as the legal parents of the child and the surrogate mother, who was not treated as the mother by the foreign law, consented to the child being brought to Israel. The Supreme Court granted the respondents' request for permission to bring the child to Israel temporarily, on the basis that their presence was necessary for the conduct of the legal proceedings in relation to the child's future and it was not appropriate for the child to be left abroad alone. Nonetheless, the respondents were required to deposit a large sum of money guaranteeing their undertaking to take the child out of the country if a court decision so required.[82]

The material presented to the Mor-Yosef Committee related not only to the issue of the status of the intended parents, which had arisen in the cases, but also evidence presented by the legal staff of the Interior Ministry relating to the exploitation of foreign surrogate women and the difficulty in relying on foreign documentation.[83] The Report makes a number of recommendations designed to improve the situation, whilst recognising the need for an international convention which will regulate international surrogacy arrangements.[84] The main recommendation is to set up an Inter-Departmental Committee to approve foreign surrogacy clinics which meet required standards. In relation to babies born in these clinics, the procedure for obtaining recognition in Israel would be made simpler. Thus, for example, it would no longer be necessary to obtain court authorisation for genetic testing and a parenthood order could be

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80 HCJ 566/11 *Tabak-Aviram v Interior Ministry* (10 April 2013) available at elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx (Hebrew) (accessed June 2013).

81 RFamA 7414/11 *A-G v Ploni*, Nevo 29 November 2011.

82 Although it is difficult to believe that the court will not allow the child to stay in Israel and to be adopted by the couple because any other solution will damage his welfare. Indeed, the English courts reluctantly made a parenthood order in relation to a child born as a result of a foreign commercial surrogacy arrangements, even though such arrangements are illegal under English law, *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

83 Mor-Yosef Report (n 3) 67–68.

84 Ibid 68–69; for details of the work of the Hague Conference on International Law on this issue, see 'The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, 2011–2013' available at www.hcch.net/index_en.php?act=text.display&tid=183 (accessed June 2013).

obtained in the same way as under the Israeli surrogacy scheme.[85] In addition, use of non-authorised clinics would be discouraged by making it a criminal offence to act as an agent for non-authorised clinics and by forbidding Israeli doctors from being involved in any way in these clinics.

(v) Use of eggs after death

The Mor-Yosef Report refers to a situation which might arise as a result of allowing altruistic surrogacy to single men and that is the use of eggs after the death of the woman from whom they were taken.[86] Their recommendation that such eggs can be taken from the dead woman, fertilised by the sperm of her partner and implanted into a surrogate mother,[87] at the request of that partner, mirrors their approach to the use of sperm after death.[88]

(f) Adoption

(i) Age of adoptive parents

Under the guidelines of the welfare services, parents wishing to adopt a child in Israel must not be more than 43 years older than the child.[89] Where a child is adopted from abroad, the maximum age difference is 48 years older.[90] The High Court of Justice accepted a challenge to the latter rule, holding that there was a requirement to consider whether the case was exceptional and justified departing from the general rule.[91] The majority did not give a definitive ruling in relation to the petitioners' claim that there is a constitutional right to adopt,[92] but their discussion does indicate a positive answer to this question. In particular, they point out that the fact that the welfare of the child is the paramount consideration in relation to adoption does not necessarily rule out the existence of a right to adopt because many rights can be overridden by conflicting interests and considerations.[93] However, of course this will mean that the right will be weaker. In addition, it should be noted that age limits for

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85 The Report was written before the cases cited above. Furthermore, since these cases are first instance cases, it is not clear that they represent the law.

86 The trigger for discussing this issue seems to be a case in 2011 in which a woman dying of cancer had her eggs fertilised with her husband's sperm and asked him to use them to produce a child after her death. He persuaded the Department of Health to release the embryos and had them implanted into a foreign surrogate, Y Hashiloni-Dolev *The Fertility Revolution* (Ben-Shemen, Modan Publishing, 2013) (Hebrew) 106.

87 Mor-Yosef Report (n 3) 49.

88 See discussion below at Part III(b)(iii).

89 *New Family v Minister of Labour and Welfare* (n 13) para 42 of Justice Procaccia's judgment.

90 Ibid.

91 Ibid; accordingly the Adoption Law should be interpreted such that the appeals procedure set up in relation to internal adoption should also apply to intercountry adoption, ibid para 8 of the opinion of President Beinish.

92 Cf Justice Procaccia ibid at para 28 who argues firmly against recognition of a right to adoption, citing in support decisions of the ECtHR and US courts and Australian legislation.

93 ibid, para 6 of the opinion of Justice Rivlin.

adoption do not in fact bar older persons from becoming parents through adoption, but simply limit their choice of adopted child to those over a certain age.

(ii) Single-sex couples

Whilst the Adoption Law expressly restricts adoption to married couples, the Supreme Court, through a creative construction of an exception allowing a single person to adopt in certain circumstances, allowed for second parent adoption of the natural child of a same-sex partner.[94] Following this decision, the Attorney-General issued guidelines, according to which the Adoption Law should be interpreted so as to allow single-sex partners to adopt children who were not related to either of them by means of each submitting an application as a single person in reliance on the exception in the Law, allowing such applications, where this was in the best interests of the child, and then unifying the applications.[95] Neither the decision nor the guidelines refer to the right of single-sex couples to parenthood and the latter do state that the sexual tendency of adoptive parents is a relevant factor in determining the welfare of the child. Thus, it is perhaps not surprising that, in placing the limited number of children available for adoption,[96] the Welfare Services give preference to heterosexual married couples as being in their view the best familial framework for children.[97]

III ARGUMENTS IN FAVOUR OF NARROWER INTERPRETATION OF THE RIGHT TO PARENTHOOD

(a) Welfare of resulting child

(i) General

The most common argument for restricting the right to parenthood is the welfare of the resulting child. Before considering some of the contexts in which this claim is heard, a distinction should be made between those contexts in

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94 CA 10280/01 *Yaros-Hakak v A-G*, 59(5) PD 64.

95 'Guidelines of the Attorney General regarding Adoption by Same-Sex Couples' available at www.justice.gov.il/MOJHeb/News/2008/imuz.htm (Hebrew) (accessed June 2013).

96 In this respect, the situation in Israel might be compared with that in the United Kingdom, where one of the reasons that the Adoption and Children Act 2002 forbade discrimination against same-sex couples wishing to adopt, despite opposition, was the recognition of the need to increase the number of suitable adopters: L Smith 'Clashing symbols? Reconciling support for fathers and fatherless families after the Human Fertilisation and Embryology Act' (2010) 22 *Child and Family Law Quarterly* 46.

97 Thus, in practice same-sex couples will only be able to adopt children with special needs, for whom it is difficult to find heterosexual couples. Israeli law does not per se place limitations on same-sex couples adopting children from abroad. However, adoptions from abroad have to satisfy the conditions for adoption under the law of the child's country of origin. Thus, it will be possible for same-sex couples to adopt children only from countries which allow same-sex adoption and in practice most of the countries with which the Israel adoption agencies work do not allow same-sex adoption: Schuz and Blecher Prigat (n 44) 201.

which consideration of the child's welfare is designed to ensure that the child is born in such a way as to minimise harm to the child[98] and those contexts in which welfare of the resulting child is used as a reason to prevent the child being born. In relation to the latter context, a difficult philosophical question arises and that is whether it is possible to determine whether it is better for the child to be born into the proposed situation or not to be born at all,[99] since no living person knows what non-existence is.[100] Thus, there is a logical defect in treating the welfare of the child as a basis for restricting the right to parenthood.[101]

Indeed, the Mor-Yosef Report[102] rejected the so-called 'minimalist approach'[103] under which access to ART is only refused where it would be better for the child not to be born and instead adopts the 'reasonable threshold approach' under which access to ART should be refused where there is high risk of significant harm to the child. In order to implement this approach, they recommend inter alia that those requesting ART treatments be required to declare any convictions for sexual offences or violence against children and whether children have been removed from their care.[104] Such cases, together with other cases where the clinicians involved have reason to believe that there is a risk of significant harm to the resulting child,[105] will be referred to a local committee which will decide whether to allow treatment.[106]

Whilst even this minimal screening might still be alleged to constitute eugenic selection and to be taking advantage of the fact that these parents need recourse to ART in order to conceive,[107] it can be argued that it is the responsibility of society to prevent the birth of children who are likely to suffer significant harm and that any consequential violation of the rights of the

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98 Such as requirements relating to the mental and physical health of the surrogate mother, see Schuz 'Surrogacy in Israel' (n 56).

99 This has been widely discussed in the literature. See e g E Jackson 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *Modern Law Review* 176 and sources quoted there.

100 P Shifman *Family Law in Israel* vol 2 (Jerusalem: Hebrew University Press, 1989) 156 (Hebrew), quoted with approval by Justice Rothshild in FamC 26140/07 (n 14) para 50, but her reference to the right of the child to grow up in a warm and complete family environment, at least until age of legal maturity, does not really solve the problem because this right is not absolute and so it would still seem to be preferable to be born and to lose one or both parents before the age of 18 than not to be born at all.

101 Cohen 'Regulating Reproduction' (n 16) 437; It should also be noted that the Israeli Supreme Court recently rejected a wrongful life claim, on the basis that it is impossible to prove that existence per se is harmful to a child, CA 1326/07 *Hamar and others v Amit and others* (28 May 2012) available at elyon1.court.gov.il/files/07/260/013/p34/07013260.p34.htm (Hebrew) (accessed June 2013). This decision reversed a 30-year-old Supreme Court decision which had accepted such a claim.

102 Mor-Yosef Report (n 3) 19.

103 The terminology is taken from the European Society for Human Reproduction and Embryology.

104 Mor-Yosef Report (n 3) 21.

105 Such as a background of substance abuse, Mor-Yosef Report (n 3) 21.

106 Mor-Yosef Report (n 3) 20–21.

107 See Jackson 'Conception and the Irrelevance' (n 99) 188.

parents is necessary and proportional. Thus, there is a relevant distinction with the situation of natural sexual reproduction, in which any attempt at preventing even the most obviously unfit parents from having children involves breach of basic rights of bodily integrity and sexual autonomy, which cannot be justified on the basis of proportionality.

On the other hand, there is no room to apply the stringent screening procedures used in selecting adoptive parents to those seeking access to ART. In relation to adoption, there is a duty to place an existing child in need of a home in the optimal conditions available; whereas there is no such duty in relation to a child who will be born as a result of ART. Thus, such an approach would indeed be eugenic selection and constitute a gross violation of the right to parenthood.

Finally, it should be noted that, whilst the Mor-Yosef Report rejected considering the welfare of the resulting child in every case,[108] it does state that all of its recommendations about general restrictions on access to ART take into account the welfare of the child.[109]

(ii) Non-traditional family

It is often argued that it is not in the best interests of children to be born into a single-parent family.[110] However, this argument has been repeatedly rejected by the Israeli courts.[111]

For example, in the Yigal Amir case,[112] it was claimed that being born into and raised in a one-parent family was against the interests of the child who would be born to the Amir couple. However, the court rejected this claim on the basis that in modern society one-parent families are a common phenomenon and there is no evidence that this family form per se causes any significant harm to children.[113]

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[108] Inter alia because of the difficulty of assessing parental ability in a vacuum, rather than in relation to an existing child, as is done where the question of terminating parental rights arises, Mor-Yosef Report (n 3) 20; but cf UK Human Fertilisation and Embryology Act 1990, s 13(5) which requires treatment providers to take into account the welfare of the child to be born, as amended by the Human Fertilisation and Embryology Act 2007, s 14(2); for discussion of the guidelines for carrying out this screening and criticism of this requirement, see A Alghrani and J Harris 'Reproductive Liberty: Should the Foundation of Families be Regulated' (2001) 18 *Child and Family Law Quarterly* 175. The original wording of this section which referred to 'the need of that child for a father' has been replaced by the Human Fertilization and Embryology Act 2008, s14(2) with the phrase 'the need for supportive parenting'; for discussion of the implications of this change, see Smith 'Clashing symbols'(n 96).

[109] Mor-Yosef Report (n 3) 18.

[110] See eg L Wardle 'Global Perspective on Procreation and Parentage by Assisted Reproduction' (2006) 35 *Capital University Law Review* 413, 444–446.

[111] It was rejected by Justice Strasbourg-Cohen in *Nachmani* (n 2) and Justice Cheshin in *New Family v Approvals Committee* (n 12).

[112] Discussed above at Part II(b).

[113] *Dovrin v Prison Services* (n 32) para 17 of Justice Procaccia's decision; cf the majority opinion in ECtHR in *Dickson v UK* (n 37), in which the fact that the child would be born into circumstances which were less than ideal (his father was serving a prison sentence for murder

Similarly, the Attorney-General relied on the welfare of the child when opposing an application to allow insemination after death, where the applicant was not related to the deceased.[114] This seems rather incongruous in the light of the fact that the Attorney-General's guidelines[115] governing insemination after death do not even mention welfare of child, even though ex hypothesi in all such cases a child will be born into a one-parent family. The court had no difficulty in dismissing the Attorney-General's argument on the basis that it is better for a child to be born from sperm of a known man into a family situation where the child will have loving grandparents and extended family. In any event, the logic of Attorney-General's argument would be to prohibit use of sperm banks to single women, contrary to the decision of Israeli High Court of Justice, forbidding discrimination against such women in relation to access to artificial insemination by donor (AID).[116]

Similarly, the Mor-Yosef Report roundly rejects the claim that it is not in the best interests of a child to be born into a non-traditional family[117] and expressly recommends that access to ART should not be restricted on the basis of the personal status of the intending parent(s), other than in relation to commercial surrogacy.[118] Thus, for example, the Committee recommends that single women be eligible for surrogacy services and that altruistic surrogacy be available to same-sex couples. In addition, whilst the Committee recognises the importance of a child born of AID having access to identifying information about the donor and accordingly recommends providing an option for non-anonymous sperm donation, it does not suggest prohibiting anonymous donations.

In the current author's view, this approach to 'new families' can be justified on the basis that there is no convincing evidence to support the proposition that the lives of children born into these non-traditional situations are not worth living,[119] or cause them significant harm, even if one accepts the view that the conditions in which they live are not ideal.

(iii) Age of intending parents

The second context in which reference has routinely been made to the welfare of the child to support restriction of the right to parenthood is where the

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and his mother did not have an immediate support network) was one of the reasons for not allowing the prisoner and his wife access to AI; for criticism of this reasoning, see E Jackson 'Prisoners, Their Partners and the Right to Family Life' (2011) 19 *Child and Family Law Quarterly* 239.

114 *New Family v Rambam Medical Center* (n 41) discussed above at Part II(c)(ii).

115 'Guidelines of the Attorney General regarding Adoption by Same-Sex Couples' (n 95).

116 HCJ 2078/96 *Vitz v Minister of Health* (unreported); *New Family v Rambam Medical Center* (n 41).data were quoted showing that in 2004, out of 320 donees of sperm at the Tel Hashomer sperm bank, 260 were single women.

117 Cf the Public-professional committee (n 3), which recommended continuing to restrict surrogacy to heterosexual couples on the grounds of the welfare of the child.

118 Mor-Yosef Report (n 3) 25.

119 Cohen 'Regulating Reproduction' (n 16) 472–474.

parents are above the natural age of child-bearing. Those in favour of restriction cite the potential effect on the child of parental illness and death before reaching maturity[120] and social and psychological implications of generational difference between the parents and those of the child's contemporaries.[121] Against this, it is argued that even young parents may become ill or die and that the significance of age is only statistical. According to this view, it is the health of the parents rather than their chronological age which should be relevant in determining whether they should be allowed access to ART.

The Mor-Yosef Report adopts a via media recommending that the age of 54 should be the maximum age of mother for all fertility treatments, subject to possibility of allowing older women in exceptional cases.[122] Significantly, there are two minority opinions. One takes the view that the age should be lower, between 45 and 50, because of the potential negative impact on the child of late parenthood.[123] The other takes the view that in the light of the increased life expectancy the proposed rule is an unjustified restriction on the right to parenthood and that, if there is to be any blanket restriction based on age, it should be higher.[124] Again, the difficulty with the restrictive view is that it is not based on any sound empirical evidence. Accordingly, it is important that comprehensive research be carried out into the impact on children of being born to older parents.

(b) Interests of others

(i) Surrogate mothers

One of the main reasons that most Western countries do not allow commercial surrogacy is in order to prevent exploitation of vulnerable women and to protect their human dignity.[125] When enacting the Surrogacy Law,[126] the Aloni Commission and the Israeli legislature took the view that these interests could be protected sufficiently by the safeguards provided in that Law and in particular by the need for approval of every surrogacy agreement.[127] After more than 15 years of experience of implementing the law, it might be expected that there would now be some concrete evidence on which to assess to what extent the opposition to commercial surrogacy is justified. However, no official

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120 The Mor-Yosef Report (n 3) 30.

121 FamC 26140/07 (n 14) para 16; see also the view of the American Society for Reproductive, Medicine (ASRM) quoted by Cohen 'Regulating Reproduction' (n 16) 453.

122 Mor-Yosef Report (n 3) 30.

123 Ibid 31.

124 Ibid 32; this view seems to reflect the view of the media in Israel, in which late motherhood is portrayed in a positive light, Hashiloni-Dolev (n 86) 141. It might also be noted that the Ministry of Health's policy of allowing and funding the freezing of eggs for women over 30 is also likely to encourage later parenthood (at 144).

125 Mor-Yosef Report (n 3) 71–74 .

126 See above at Part II(e)(i).

127 This view was also expressed by the current author, Schuz 'Surrogacy in Israel' (n 56).

data, other than the number of applications and approvals,[128] have been published about the operation of the scheme or about the surrogate mothers and the short and long-term impact of acting as surrogate mothers.[129]

A report published in 2010 by Lipkin and Samama,[130] based on field studies, brings attention to the potential harm caused to the interests of birth mothers. The authors highlight the physical and emotional risks involved for the surrogate mother. They point out that there are physical risks in pregnancy and that little is known about the long-term effects of hormone treatment.[131] Moreover, they claim that surrogate women have to make a great emotional effort to avoid becoming attached to the baby they are carrying and often develop emotional dependency on the intended parents.[132] Their studies also suggest, not surprisingly, that most surrogate women have a low income and that their motivation is economic.[133] They express concern that there is no method of ensuring that surrogates are adequately compensated because there is no minimum fee and that the unequal distribution of the payments (invariably more than half is given after the birth of the child) give the undesirable impression that the payment is for the child and not for their effort and suffering.[134] Moreover, surrogates who do not get pregnant or have a spontaneous abortion receive a minimal sum, which does not reflect their efforts and the risks to which they expose themselves.[135]

Lipkin and Samama recommend abolishing surrogacy in Israel or at least limiting accessibility thereto.[136] If surrogacy is retained, they make a number of practical proposals to reduce the risks to the surrogate mothers.[137] These include providing a standard contract, prescribing a minimum fee and making available insurance against harm caused by pregnancy. In addition, they suggest developing a 'para-financial' model, which guarantees the surrogate mother some relationship rights and in particular the right to receive information about the progress of the children to whom they give birth and to contact with them, if both sides are interested.

Whilst Lipkin and Samama's claims and conclusions are important, it should be noted that they do not contain any statistically valid empirical evidence. In addition, their arguments do seem to be somewhat one-sided. In particular,

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128 The figures from the coming into operation of the scheme until 2009 show a steady increase in the number of applications each year, see graph in N Lipkin and E Samama 'Surrogacy in Israel – Status Report 2010 and Proposals for Legislative Amendment' (2011) available at www.isha.org.il/upload/file/surrogacy_Eng00%5B1%5D.pdf, 9 (accessed June 2013). Overall until 2009, there were 655 applications of which 82% were approved.

129 Ibid 4.

130 Ibid.

131 Ibid10; see also Stark 'Transnational Surrogacy' (n 31) 375.

132 'Surrogacy in Israel – Status Report 2010' (n 128) 10–11.

133 Ibid14; cf studies in other countries referred to in Stark 'Transnational Surrogacy' (n 31) 376.

134 'Surrogacy in Israel – Status Report 2010' (n 128) 22–23.

135 Ibid.

136 Ibid 17.

137 Ibid 21–31.

little weight is attached to benefits which may accrue to surrogate mothers. For example, might not the long-term improvements to their physical and mental health, and that of their children, as a result of the extra income, outweigh the risks involved?

Accordingly, in the current author's view, the evidence available as to harm to the interest of surrogates is insufficient to override the right to parenthood of those who are currently eligible to use the scheme. On the other hand, the claims about potential harm to surrogate mothers do militate against any significant expansion of the current scheme, especially in view of the fact that any relaxation in the stringency with which surrogate mothers are vetted will certainly increase the risk of harm. In addition, it is necessary to make improvements, along the lines suggested by Lipkin and Samama, in order to ensure greater protection for surrogate mothers.

(ii) Women in general

It can be argued that a wide interpretation of the right to parenthood together with ready availability of fertility treatments funded by the state strengthens the message that the main role of women is to be mothers,[138] which creates social pressure on women to have children,[139] and in particular on women who have not succeeded in conceiving naturally to undergo fertility treatment.[140] Of course, there is an element of 'chicken and egg' here because the attitude of the law and those who make funding decisions is influenced by cultural and social pro-natalist attitudes. However, there is reason for concern that legal approval of and widespread funding of a wide range of ART 'confirm and perpetuate the view that a woman who fails to procreate is deeply deficient'.[141] Statsman claims that this is a view which has 'harmful psychological and social consequences' and cites sources which bring evidence of the 'negative physical and psychological costs' for women of ready availability of IVF.[142]

This view may seem extreme, but it is important to note that there is limited knowledge as to the long-term impact on the health of women who undergo

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[138] Lipkin and Samama 'Surrogacy in Israel' (n 128) 6. These authors also claim (ibid) that: 'The widespread accessibility of surrogacy harms the currently existing social perceptions of the importance of the relationship between the mother and the baby in her womb, and conveys a social message that this relationship has no actual emotional and legal significance. As the use of surrogacy increases, this message will become stronger, will undermine the concept of motherhood and will have a negative impact on the status of women in relation to their children.'

[139] In the context of insemination after death, it has been argued that routinely allowing this procedure is likely to result in young widows being pressurised into having a child with their deceased husbands' sperm, which may impair their ability to recover from their loss and start a new life, C Shalev 'Insemination After Death – Let him Rest in Peace' (2002) 27 *Refuah Vemishpat* 96 (Hebrew) 98.

[140] It should be noted that even where it is the man's fertility which is impaired, often the choice of treatment is IVF which effectively involves treating the woman.

[141] Statsman 'The Right to Parenthood' (n 25).

[142] Ibid fn 17 and 19 and accompanying text.

fertility treatments. It is essential that proper research be carried out into the short and long-term effects of various types of fertility treatment on women of different ages.

Although it may seem paternalistic to protect women against potential harm to themselves, their consent is not informed unless they are provided with adequate information in relation to the risks.[143] Moreover, whilst it might not be legitimate to prevent women from undergoing treatments in circumstances which involve more than a certain degree of risk,[144] it is legitimate to remove funding in these circumstances, which will have the effect of discouraging some women and may also influence public attitudes.

(iii) Deceased

It seems to be widely accepted that respect for the dead requires that the criterion for use of gametes of a person after his death should be the consent of that person, although it can be argued that after death a person does not have any interest whether his gametes are used or not. As seen above,[145] under current Israeli practice, approved by the Mor-Yosef Committee, it is assumed that married men or those with a fixed partner, who do not have children during their lifetime, would wish for their partner to have a child with their sperm, unless there is evidence to the contrary. Even though this assumption is not based on any scientific evidence, it does not seem unreasonable in the light of the cultural and social attitude to procreating in Israel.[146]

On the other hand, whilst logic dictates that it is less likely that deceased men without a fixed partner would wish for their sperm to be used after their death, it is difficult to make any informed decision as to the correct policy in relation to such men without any evidence. Indeed, the dissenting opinion of Professor Casher[147] takes the view that it can be assumed that even a man who died single would wish to have children and that therefore, subject to court approval, his parents should be allowed to find a suitable woman who is interested in becoming the mother of a child with the sperm of the deceased.

In the opinion of the current author, there is much to be said for the latter view and in any event, the door should be left open for courts to assess the wishes of the deceased. In addition, efforts should be made to bring to the attention of the public the possibility of men leaving express instructions about the use of

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[143] Similarly, researchers have expressed reservations about the policy of allowing (and funding) the freezing of eggs by women over 30, in order to preserve their fertility, both because of the experimental nature of the technology and because, whilst apparently increasing the reproductive autonomy of women, it might actually limit that autonomy if it is used by employers and others as a tool to pressure women into delaying motherhood, Hashiloni-Dolev (n 86) 144.

[144] Mor-Yosef Report (n 3) 30 states that the law should not interfere with the autonomy of the doctor to decide whether to give particular treatment to a particular woman.

[145] At Part II(c)(ii).

[146] See above at Part I.

[147] Mor-Yosef Report (n 3) 46–47.

their sperm if they die. Furthermore, empirical research should be carried out in relation to the attitudes of both single and married men.

As seen above,[148] the Mor-Yosef Committee recommends equality of treatment in relation to the use of eggs after the death of a woman. However, it seems far less clear that even a married woman would wish for her eggs to be implanted into a surrogate mother after her death, inter alia because of the controversial nature of surrogacy and because for women, bearing a child has traditionally been the hallmark of procreation. Thus, a woman may not perceive use of her eggs per se as a method of ensuring continuity.[149] Indeed, in the light of the different functions of the sexes in reproduction, a symmetrical approach to the use of male and female gametes after death is too simplistic. Thus, it is suggested that the use of eggs after death should be limited to cases where the woman expressly consented thereto. Again, there is a need for empirical research.

(iv) Separated spouses

As seen above,[150] the majority of the Mor-Yosef Committee recommended removing all restrictions on access of married persons to ART with their new partners. However, a minority opinion of five members of the committee took the view that in the light of the potential harm which may be caused to the spouse[151] and sometimes to the child, court permission should be required and that the spouse be informed and entitled to put his or her position to the court.[152]

(c) Public interests

(i) Normative

Some claim that allowing single parents and same-sex couples access to artificial reproduction techniques is against public policy as it gives legitimacy to these family forms and undermines the policy of encouraging heterosexual marriage, which they regard as the optimal family form, and which is the only family form approved by Jewish law. Accordingly, it is to be expected that the religious parties will vote against any new law, which expressly allows access to ART to single parents and same-sex couples. Indeed, the difficulty in passing legislation without the support of these parties is one of the reasons for the fact that many issues relating to ART, such as sperm donation, have been regulated by secondary legislation and administrative guidelines. Furthermore, it is clear that the only reason that the religious parties supported the Surrogacy Law was that it limited the use of surrogacy to married couples.

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148 At Part II(e)(v).

149 Hashiloni-Dolev (n 86) 110 also suggests that women are less likely than men to see any value in being genetic parents without being able to bring up their children.

150 Above at Part II(c)(i).

151 Eg if the parties are Muslims, the husband will be required to support the child, Mor-Yosef Report (n 3) 27.

152 Ibid.

However, as seen above, neither the courts nor the Mor-Yosef Committee see that there is any normative reason to restrict the right to parenthood of those living in non-traditional family forms. Nevertheless, there may well be considerable public support for giving preference to heterosexual couples, where there is competition between them and new families for the limited number of local children available to be adopted or for the limited number of suitable surrogate mothers.

Public policy is also invoked by those opposing commercial surrogacy on the basis that this form of surrogacy effectively involves trafficking in surrogate mothers and children. According to this view, commercial surrogacy is morally indefensible because it treats the body of the birth mother and the resulting child as a commodity which can be purchased for a price.[153] This is one of the reasons given for the outlawing of commercial surrogacy in the vast majority of Western countries, a fact which expressly influenced a few members of the Mor-Yosef Committee to advocate abolition[154] in Israel.[155]

However, others consider that this view is paternalistic and that commercial surrogacy is morally acceptable, provided that there is regulation to ensure that surrogate mothers act voluntarily and that they and the resulting child are protected.[156]

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[153] For development of the commodification argument, see e g C Fabre *Whose Body is it Anyway? – Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006) 196.

[154] Mor-Yosef Report (n 3) 71–74. This minority opinion also drew an analogy with donation of organs for transplant. Under Israeli law, it is forbidden to sell organs for transplant and only altruistic donation (with reimbursement of expenses) is allowed. In their view, a similar scheme should apply in relation to surrogacy.

[155] It should be noted that the minority opinion did express concern that the consequence of this proposal would be that more Israelis would turn to surrogacy in foreign countries, which generally provide considerably less protection for surrogate women and the children born than under the Israeli scheme. Nonetheless, they took the view that this was not a reason to allow the continuation of commercial surrogacy in Israel, but rather steps should be taken locally to discourage the use of unapproved foreign clinic and at international level to combat the abuses in other countries.

[156] Schuz 'Surrogacy in Israel' (n 56); see also E Scott 'Surrogacy and the Politics of Commodification' (2009) 72 *Law and Contemporary Problems* 109, explaining the rise and fall of the commodification argument in the United States.

(ii) Financial

Some have questioned the massive funding of fertility treatments[157] out of the health budget[158] in a situation of limited economic resources and called for a reconsideration of health funding priorities.[159]

IV ARGUMENTS IN FAVOUR OF WIDER INTERPRETATION OF THE RIGHT TO PARENTHOOD

Most of the arguments in favour of widening the right to parenthood are based on the principle of equality, according to which individuals should not be treated differently unless there is a relevant difference between them. It is argued that the current law violates the principle of equality in two main ways. First, individuals who are dependent on ART in order to become parents are subject to restrictions, which do not apply to those who can have children naturally. Indeed, the Mor-Yosef Committee states that one of its premises is to limit insofar as possible restrictions on access to ART, so as to minimise the interference with reproduction choices of those who cannot procreate naturally.[160] Thus, for example, it proposes abolishing restrictions based on personal status of the parties, other than the restriction of commercial surrogacy to heterosexual couples or single women.

However, this latter restriction constitutes a major limitation on the right to parenthood of a whole group of the population, for whom it is the main method of realising that right, and discriminates against homosexual men on the basis of gender and sexual tendency. Some will accept the reasoning of the majority of the Mor-Yosef Committee that this restriction is necessary because otherwise the disparity between increased demand and the limited supply of

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157 Under the Public Health Insurance Law 1994, Israeli women up to the age of 45 are entitled to fertility treatment until they have two children with their current partner and to help with funding an egg donation up to the age of 51 (Mor-Yosef Report (n 3) 29O); The law does not limit the number of rounds of treatment available, but medical practice does not allow more than 4–6 rounds per year, 'Information and Data on Fertility and Fertility Awareness'(Knesset Centre for Research and Information, 7 June 2012) available at www.knesset.gov.il/committees/heb/material/data/mada2012–06–18–01.doc (Hebrew) 3.

158 In 2010, 1.4% of the health budget was spent on fertility treatments funded by the State Health Funds. This does not include sums paid out by the Funds under Complementary Insurance Schemes, 'Information and Date on Fertility' ibid.

159 Shalev and Goldin 'In Vitro Fertilization in Israel' (n 6), examine the reasons for the failure of attempts to reduce the funding of fertility treatments. These include consumer demand, pro-natalist culture and interests of the medical profession. However, as these lines are being written, there are reports of a new initiative to reduce the maximum age for entitlement to funding for IVF treatment and to reduce the number of rounds of IVF treatment available to each woman. Instead older women and those who do not get pregnant after a few rounds of treatment will be offered funding for egg donation: I Gal 'Because of the cost, the State will limit fertility treatments' (30 April 2013) available at, www.ynet.co.il/articles/0,7340,L-4374162,00.html (Hebrew) (accessed June 2013). It should be noted that these proposals seem to be based on economic efficiency and discouraging women from having treatments which have very small chance of success, rather than a decision that fertility treatments have lower priority.

160 Mor-Yosef Report (n 3) 6.

suitable surrogate mothers is likely to lead to a substantial increase in prices and to an undesirable expansion in the practice of commercial surrogacy,[161] which was designed as a solution of last resort for a small number of infertile couples.[162] It should be noted that whilst the minority approach of completely banning commercial surrogacy avoids discrimination against homosexual men, it does not provide any solution for them.

Secondly, it is claimed that there is discrimination between those who need different types of ART. For example, a single mother who can carry a baby, but has no eggs is entitled to egg donation. However, if she has eggs, but cannot carry a baby she cannot currently make use of surrogacy services.[163] In addition, there are significant differences in funding available for different types of ART. Thus, whilst public funding is available to all women up to the age of 45 for IVF treatment and egg donation is subsidised up to the age of 51,[164] those who need surrogacy services do not receive any assistance with funding. Similarly, it should be noted that those wishing to adopt children from abroad have to bear the costs themselves. Any argument that this selective funding is a justifiable way of influencing individuals' reproductive choices[165] can be refuted on the basis that infertile couples may well not have any option as to which method to use to realise their right to parenthood.[166]

Furthermore, there are differences in recognition of legal status of the intended parents according to the type of ART used. Thus, for example, the intended mother of a child born to a surrogate mother is treated as the legal mother of the child only after she obtains a parenthood order;[167] whereas a mother who can give birth after egg donation is treated automatically as the legal mother of the child. One way to remove these distinctions is by adopting a scheme of legal parenthood based on consent.[168]

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[161] In the light of the evidence that only relatively few women are able to serve as surrogates without causing harm to themselves and their children, ibid 60.

[162] Ibid 57.

[163] This was recognised as discriminatory in the case of *New Family v Approvals Committee* (n 12) but the High Court of Justice held that any change had to be made the legislature and not by means of judicial review, see Schuz 'Surrogacy and PAS' (n 59).

[164] Above n 156.

[165] See Cohen 'Regulating Reproduction' (n 16).

[166] Even the claim that those who use surrogacy could choose to adopt locally, which is free, is problematic in the light of the stringent screening for adoption, the lower age limit and the long waiting list. In addition, it is not clear that adoption can be considered as a real alternative to surrogacy, in which there is a genetic link with at least one party.

[167] More anomalously, the intended father is also treated as the legal father only after obtaining a parenthood order, even though he is the biological father of the child. It is not clear why he should not be registered as a father on production of medical documents which show that his sperm was used to fertilise the eggs which were implanted into the surrogate mother. Indeed, it could be argued that the child's interests require that the father's parenthood be recognised without the need for him to obtain a parenthood order.

[168] See Y Margalit 'Towards Determining Legal Parentage by Agreement in Israel' (2012) 42 *Hebrew University Law Review* 835 (Hebrew); Y Margalit 'Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents' (2012) *Whittier Journal of Child and Family Advocacy* available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2041430 (accessed June 2013).

V CONCLUSION

In Israeli judicial rhetoric, everyone has a right to parenthood, irrespective of personal status and sexual tendency. In particular the welfare of the resulting child has not been used as a reason to restrict the right to parenthood of prisoners, single parents and same-sex couples. However, the current surrogacy legislation and social work practice in relation to local adoption still restrict the right of new families to become parents in comparison with heterosexual couples. It is likely to be only a matter of time before a challenge is made to the constitutionality of the practice of welfare authorities in giving preference to heterosexual couples when placing children for adoption. However, the courts may well avoid making a determination in relation to this sensitive issue on the basis that placement of children involves professional discretion, with which the court is not qualified to interfere.

In addition, it is to be expected that the challenge to the surrogacy legislation by a homosexual couple, which was withdrawn when the Mor-Yosef Committee was set up, will be revived, since the recommendations of the majority of that Committee still discriminate against men. If the court is not prepared to accept the argument that there is a relevant distinction between men and women in the surrogacy context, on the basis that women need surrogacy to overcome physiological defects, the solution is far from clear.[169] Since there is no support for expanding the commercial surrogacy market, and quite rightly so, the choice is between abolishing commercial surrogacy completely or continuing 'discrimination'.

It might be argued that this discrimination can be justified as being necessary and proportional, because it is the only way of protecting the right to parenthood of those currently entitled under the Surrogacy Law. Furthermore, the only other viable option, abolishing commercial surrogacy for everyone, would not do anything to help men to realise their right to parenthood. So, surely any change in the law which substantially restricts the rights of heterosexual couples who need surrogacy can only be justified on the basis that the current law causes real damage to countervailing interests. Yet, as seen above, there is insufficient concrete evidence of actual harm to the interests of surrogate women and the public interests arguments are equivocal. Rather, it is necessary to undertake wide-ranging methodical research into the short-term and long-term impact on surrogate mothers and their children. In the meantime, changes should be made to the practice of surrogacy in order to minimise the risks of harm which have been highlighted. The current author would agree with the conclusion reached by Elizabeth Scott that 'well designed regulation can greatly mitigate most of the potential *tangible* harms of surrogacy and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists'.[170]

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[169] This distinction is accepted in the Mor-Yosef Report (n 3) 61 and 71.

[170] Scott 'Surrogacy and the Politics of Commodification' (n 156) 146 (emphasis added).

In addition, it should be pointed out that allowing altruistic surrogacy instead of commercial surrogacy is not a panacea. Although altruistic surrogacy seems to avoid most of the normative problems associated with commercial surrogacy, it is not clear that it can provide an answer to the potential damage caused to the surrogate women. Is the risk of physical harm any less for an altruistic surrogate? Furthermore, it could be argued that there is a greater risk of lack of genuine consent in the case of altruistic surrogacy. In particular, in the altruistic situation, the initiative may well come from the childless couple and the potential surrogate mother may feel that she has no choice other than to agree out of family loyalty or friendship.[171] In contrast, while a commercial surrogate may be motivated by economic pressure, she is the one who initiates the process. Indeed, it might be argued that altruistic surrogacy is greater exploitation of the surrogate mother because she does not receive compensation for her efforts and the risks to which she exposes herself. Accordingly, a considerable expansion in the use of surrogacy, even if it is altruistic, is not problem-free. This is particularly so in the light of the importance of having children in Israeli society, which is likely to increase the pressure on women to agree to help to enable their friends or relatives to realise their fundamental right to parenthood.

Finally, it should be noted that whilst the premise of the Mor-Yosef Report is the right to genetic parenthood, it does also recommend widening recognition of legal parenthood (without the need to adopt), but only for partners of those who have a genetic/physiological connection with the child and usually only after obtaining a parenthood order.[172] Some would argue that this does not go far enough in giving recognition to the intentions of the parties and still places too much emphasis on genetic parenthood. However, there is logic in requiring a genetic connection with one parent[173] and with requiring a court order to confer legal parenthood. The solution to the obsession with and over-sanctification of genetic parenthood is not to blur the distinction between genetic and social parenthood but to change social attitudes which treat even legally recognised social parenthood as 'second class' and to reduce the obstacles which face those who wish to adopt.[174]

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[171] There is no guarantee that what might amount to emotional blackmail will always be picked up during the approval process.

[172] Except in the case of a married woman who gives birth after donor insemination.

[173] Because otherwise the child is being created for the purposes of adoption, Mor-Yosef Report (n 3) 62.

[174] In relation to restrictions on intercountry adoption, see generally, E Bartholet 'International Adoption: Thoughts on the Human Rights Issues' (2007) 13 Buff Hum Rts L Rev 151.

Japan

FAMILY LAW IN JAPAN IN 2012 – INTRODUCTION OF THE STOP SYSTEM OF PARENTAL AUTHORITY, AND THE STIPULATION OF CONTACT AND SHARING OF CHILD SUPPORT

Kayo Kuribayashi[*]

Résumé

Le droit de la famille japonais a connu d'importantes réformes en 2011. Les modifications au Code civil et aux lois connexes sont entrées en vigueur en avril 2012. Parmi celles-ci on retrouve de nouvelles règles en matière de déchéance de l'autorité parentale et de désignation d'une personne morale ou de deux, voire de plusieurs personnes comme gardiens d'un enfant. Les nouvelles dispositions touchent également aux modalités du droit d'accès et à la répartition des obligations alimentaires à l'égard des enfants. Ces nouveautés devraient permettre de mieux servir l'intérêt des enfants.

I INTRODUCTION

The amended family laws in the Japanese Civil Code have been in force since 1 April 2012. These amendments were made under the Law for Amendment of a Part of a Civil Code and Related Acts (Act No. 61 of 2011) on 3 June 2011. The purpose of these amendments was 'to incorporate measures such as establishing a new stop system of parental authority and enabling the assignment of a juridical person or two or more guardians for a minor with the aim of preventing child abuse from the viewpoint of protecting children's rights to property'.[1]

The stop system of parental authority was introduced in art 834–2 of the Civil Code's 2011 amendment. Contact and sharing of child support were stipulated in art 766 of these same amendments to the Civil Code, and the interests of a child that should be taken into consideration as a first priority were specified

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1 The Ministry of Justice 'The Law for the Amendment of a Part of the Civil Code and related Acts' at www.moj.go.jp/MINJI/minji07_00043.html (accessed June 2013).

during these determinations.[2] Besides, art 842 of the Civil Code, which stipulated that a single person must be a guardian of a minor, was deleted. So, it became possible to assign two or more guardians to a minor. In addition, a juridical person can become a guardian of a minor (clause 4, art 843 of the Civil Code). Furthermore, not only the Civil Code but also the Domestic Relations Trial Act, which is an adjectival law, was amended. In addition, as a new adjectival law, the Family Case Proceeding Act[3] has been in force since 1 January 2013, and the Child Welfare Act and Family Registration Act have been revised.[4]

This chapter considers the newly introduced stop system of parental authority, as well as contact and sharing of child support, which were stipulated in the family law amendments to the Civil Code.

II BACKGROUND TO THE AMENDMENT OF 2011

The increase in occurrences of child abuse may have led to the amendment of 2011. According to statistics from the Ministry of Health, Labour and Welfare, occurrences of child abuse have increased by approximately 50 times during a 20-year period. The number of consultations for child abuse occurrences was 1,101 in 1990, 17,725 in 2000 and 56,384 in 2010.[5] However, these numbers only include the number of consultations and do not necessarily reflect the actual number of child abuse occurrences.

Moreover, the Prevention of Child Abuse Act (Act No 82 of 2000) was in force in 2002, and a definition (art 1) and notification duty (art 6) of child abuse were specified in this Act. Therefore, the fact that these steps reveal the potential child abuse cannot be denied. An increase in the number of consultations for child abuse occurrences indicates that the actual number of child abuse occurrences is also increasing.

As a concrete procedure, when child abuse occurs, the abused child is placed in a child welfare institution, where the child is taken care of. When custodial parents object to this action, there should be a compulsory trial by a Family

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2 However, art 766 of the Civil Code is not the provision in the chapter regarding parental authority in the Civil Code, but rather a provision in the chapter regarding divorces. So, although contact and sharing of child support were stipulated, it seems that the processing of contact and sharing of child support are necessary only in cases of a divorce. To avoid this inconvenience, it is necessary to remember that the legal interpretation and judicial decisions regarding art 766 of the Civil Code presupposed that this article can also be applied to separations.

3 The Family Case Proceeding Act was enacted on 19 May 2011, and proclaimed on 25 May 2011 (Act No 52 of 2011). The Domestic Relations Trial Act was abolished by the enactment of the Family Case Proceeding Act.

4 The Ministry of Justice, above n 1.

5 Ministry of Health, Labour and Welfare 'The number of consultations related to child abuse in a child guidance center' www.mhlw.go.jp/stf/houdou/2r9852000002 fxos-att/2r9852000002fy23.pdf (accessed June 2013).

Court upon an application by a governor or a child guidance centre's director (art 28 of the Child Welfare Act). Furthermore, an application by a child's relative, public prosecutor, or child guidance centre's director can also result in a trial in which the parental authority over an abused child is terminated (art 834 of the Civil Code and art 33–7 of the Child Welfare Act).[6] However, the duration of the loss of parental authority is not stipulated. This is a rigid measure depriving parents of all authority over their child. Furthermore, this measure makes restoration of the relationship between a parent and child difficult in the future.[7] So, there are actually few applications for determining that parents should lose authority over their child. Even if an application is made, rulings regarding the loss of parental authority are rare. According to the 2011 judicial statistics, there were 127 cases involving a ruling on the loss of parental authority and rights for the administration of a child's property. Among these, 14 were admitted, 25 were dismissed, and 88 were withdrawn.[8] This demonstrates that, among the total of 637,854 domestic relations trials that occurred during that year, there were very few cases in which a ruling on the loss, or rescission of the loss, of parental authority and rights of the administration of a child's property was given.

Child abuse occurrences were rapidly increasing; furthermore, the loss of parental authority implemented under the Civil Code as a means of coping with child abuse is rigid and extreme. It can be said that its purpose was not truly achieved. To solve such a problem, a new stop system of parental authority was created in 2011.

III SYSTEM FOR STOPPING PARENTAL AUTHORITY

Before the 2011 amendment, as mentioned previously, the Civil Code provided for the loss of parental authority only as a means for combating child abuse (art 834 of the Civil Code), but did not stipulate the duration of the loss of parental authority. To alter this, the Civil Code provided an article that authorises a stop system of parental authority in 2011 (art 834–2 of the Civil Code). Now, parental authority can be stopped for a specific duration, but no longer than 2 years.[9] This system seems to delicately and flexibly consider the interests of a child.

Since the revised law has only been in force since 1 April 2012, the actual number of cases is not reflected in statistics. However, according to data from the Ministry of Health, Labour and Welfare, though details are unknown,

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6 It is possible to also make parents lose their right only over the administration of a child's property (art 835 of the Civil Code).

7 Shuhei Ninomiya *Family Law* (Tokyo: Shinsei-Sha, 2006) 232.

8 The Supreme Court 'Judiciary statistics of 2011' www.courts.go.jp/search/jtsp0010List2 (accessed June 2013).

9 Tomoyuki Tobisawa *Questions and answers regarding the amendment of the Civil Code of 2011 and related Acts, concerning a re-examination of the parental authority system toward child abuse prevention* (Tokyo: Shoji Homu, 2012) 21.

there have been seven applications to determine whether parental authority should be stopped in six self-governing bodies from April to June 2012, each of which was instituted by a child guidance centre's director.[10] There have been no cases involving both the loss of parental authority and the right of administration of the child's property since the law's amendment.

The concrete contents of the applications for a trial for a stop of parental authority are as follows.

In the first case, the stop of parental authority was in order to determine medical treatment required for the abused child. In this case, since a person who has parental authority did not consent to the necessary inspection or operation for the child who was temporarily taken care of by a medical institution, the stop of parental authority was ordered. In addition, the application of a temporary restraining order for an operation was made simultaneously with the application of the merits of the parental authority stop.

In the second case, an intellectually disabled child who was staying in a foster home and hunting for a job suffered physical abuse from a person who had parental authority. However, the person who had parental authority did not accept this child's intellectual disability, and did not consent to the child's inclusion in the Ryoiku-techo (a disabled person's notebook in which a governor publishes the names of those judged to have an intellectual disability; this is required when an intellectually disabled person receives social welfare services). An interruption to the job-hunting activities was expected from the person who had parental authority. So, the cessation of parental authority was ordered.

In the third case, a child ran away from home after suffering physical abuse from a person who had parental authority since childhood. While living in a friend's house, the child attended high school and paid his living expenses by working part time. However, the person who had parental authority did not allow the child to return home and also opposed his entering a foster home. Furthermore, the person who had parental authority prevented the child from continuing his part-time job; therefore, the stop of parental authority was ordered.

Although the law was revised in 2011 and in force in 2012, there are few recent cases in which the cessation of parental authority was ordered. However, the first case is a typical scene in which the relationship between a third party who protects an important interest of a child and parental authority becomes a problem. It seems that this is the main situation in which stopping parental authority will be used in the future.

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[10] Ministry of Health, Labour and Welfare 'The enforcement of a re-examination into the parental authority system (from April to June, 2012)' www.mhlw.go.jp/stf/houdou/2r9852000002 fxos-att/2r9852000002fy1w.pdf (accessed June 2013).

IV STIPULATION OF CONTACT AND SHARING OF CHILD SUPPORT

(a) Legal grounds for contact and sharing of child support

(i) Contact

Contact (also called 'visitation' or 'right of access') was stipulated in art 766 of the Civil Code's 2011 amendment. As an early example of a trial involving this issue, a mother who was not a custodial parent was permitted right of access to a child by the Tokyo Family Court on 14 December 1964. At that time, the legal theory was formed in a judicial precedent that took into consideration domestic relations practice and doctrine. A provision stipulating this right did not exist before the amendment in 2011; contact was therefore deduced by way of interpretation of art 766 of the Civil Code, which defines matters regarding custody of children after divorce. However, there is debate about the right nature and the legal character of right of access.

Regarding the right nature of access, one opinion is that access is not a 'right' of substantive law, but is only a right to apply for a trial. The reason is the high probability that a child's welfare will be affected by the child's conflict of loyalty (loyalty conflict) in cases in which access is contrary to the custodian's intention.[11] On the other hand, there is another opinion that access is a 'right' of substantive law. This opinion states that access should be limited solely when necessary from the viewpoint of the best interests of the child, if there is a conflict of a child's loyalty.[12] Completely denying that access is a 'right' from the start can possibly produce a result that becomes insufficient as a legal remedy.[13]

When the 2011 amendment stipulated contact, it was not written as a 'right' in terms of substantive law. This means that whether contact is identified as a 'right' or not is disputable.

According to the opinion that access is a right under substantive law, the legal character of the right of access has also been argued about. The opinions are that the right of access is a natural right generated from the status of the relationship between parents and a child,[14] a right relevant to custody,[15] a right relevant to custody although a natural right,[16] an aspect of parental

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[11] Tichi Kajimura 'Contact for Child' Case Study No 153 (Study group of domestic case, Tokyo, 1976) 92 and 93.

[12] Minoru Ishikawa *Rights of a child in family law* (Tokyo: Nippon Hyoron-Sha, 1995) 225–228.

[13] Ishikawa, above n 12, 225–228; Masayuki Tanamura 'Contact with a child by parents after divorce' (1997) 952 *Hanrei Times* (Tokyo: Hanrei Times-Sha) 59; Shuhei Ninomiya 'Obligation of parental visitation after divorce or separation' (2004) 298 *Ritsumeikan Law Review* (Ritsumeikan University, Kyoto) 334–335.

[14] Seiichi Moriguchi and Tsuneo Suzuki 'Contact with a child by parents who are not custodians' (1965) 314 *Jurist* (Yuhikaku, Tokyo) 75.

[15] Kazuo Akiyama 'Rights and duties on custody and education' in Fujio Oho *Commentary on Civil Code (23) relative* (Tokyo: Yuhikaku, 1969) 75.

[16] Tadahiko Kuki 'A note on the right of access – Comment on two decisions' (1967) 63 *Osaka*

authority,[17] a child's right,[18] or a child's right even though it is a parent's right and duty.[19] Although contact was specified to occur in the 2011 amendment of art 766 of the Civil Code, its legal character is still unclear.

Furthermore, these legal theories are premised on a parent's right of access, and grandparents or third parties other than parents are excluded. Wording defining parents was inserted in art 766 of the Civil Code by the 2011 amendment. Before this amendment, the right of access of grandparents or third parties was possible under an interpretation of art 766 of the Civil Code.[20] It is uncertain whether the new provision applies to grandparents and third parties, and whether art 766 of the Civil Code still operates only after divorce rather than separation as well gives rise to further uncertainty.

In recent years, reservations regarding the practicability of contact have attracted attention in terms of its theoretical aspect, such as the right nature and legal character and related matters. It aims at achieving continuous contact between a parent and child over a long term, and it is pointed out, for harmonious execution, that the parents' autonomous agreement is important.[21] In addition, if an agreement is made by mediation and trial, when contact cannot be performed, a performance recommendation (art 289 of the Family Case Proceeding Act and art 38 of the Personal Status Litigation Act) can be granted by the Family Court. In addition, although there is an argument, it is also possible to order indirect compulsory execution (art 172 of the Civil Execution Act).

Law Review (Osaka University, Osaka) 117; Aiichi Numabe 'Item 4 of Otsu Rui, Clause 1, Article 9' in Hideo Saito and Nobuo Kikuchi *Commentary on Domestic Relations Trial Act* (Tokyo: Seirin-Shoin, 1987) 366.

17 Masanori Yamamoto 'On the right of access' (1968) 18(2) *Hokei Gakkai Zasshi* (Okayama University, Okayama) 185; Yoshihiko Sato 'A civil case (right of access of parents who do not exercise parental authority after a divorce)' (1969) 110 *Doshisha Law Review* (Doshisha University, Kyoto) 55; Aiko Noda 'The right nature of right of access' in Supreme Court General Secretariat *Family Bureau Problems of Family Court*, Vol 1 (Tokyo: Hoso-kai, 1969) 208, 209; Jun Nakagawa 'Right of access' in Masao Yamahata and Hisao Izumi *Practice on Civil Code (relative and succession)* (Tokyo: Seirin-Shoin Sin-Sha, 1972) 261.

18 Takeshi Kokubu 'Restriction on right of access and Article 13 of Constitution' in Jun Nakagawa *Research on judicial precedent in Family Law* (Tokyo: Nippon Hyoron-sha, 1971) 149; Nobuko Inako 'The right of visitation as the right of child' (1980) 42 *Bulletin of Nihon Fukushi Daigaku* (Nihon Fukushi University, Aichi) 93–100.

19 Ishikawa, above n 12, 225–228; Michihiro Tanaka 'Legal character of right of access' (1991) 747 *Hanrei Times* (Tokyo: Hanrei Times-Sha) 323; Sadashi Yamawaki 'The contact between parent and child after divorce' Hogaku Seminar No 466 (Nipon Hyoron-Sha, Tokyo, 1993) 22; Tanamura, above n 13, 64; Ninomiya, above n 13, 337.

20 Kayo Kuribayashi *Contact in the interest of the child, from a viewpoint of the theory of visitation of France* (Kyoto: Horitsu Bunka-Sha, 2011).

21 Taichi Kajimura 'Reconsideration of "Contact for a child"' in *Law and family in 21 century, commemorative collection of treatises for Prof. Koji Ono on his 70th birthday* (Tokyo: Hogaku-Shoin, 2007) 231; Ninomiya, above n 13, 350–351.

(ii) Sharing of child support

There was no provision that clearly defines child support on the basis of a child's immaturity (minor and not independent) before the 2011 amendment; in fact, parents mainly paid for child support as a share of living expenses in the marriage (art 760 of the Civil Code). After a divorce, the problem of sharing child support was dealt with as a matter regarding child custody (art 766 of the Civil Code). Sharing child support was stipulated in art 766 of the Civil Code of the 2011 amendment. Furthermore, in theory, the child can also be provided with support from parents when the child requires it, as the child's own right, on the basis of a provision that enacts provisions about the aliment from relatives (art 877 of the Civil Code).

However, as mentioned later in this section, child support is not actually paid in many cases in spite of the legal grounds. Even if paid, it is never high.[22] It is considered that child support is not paid because no agreement for it is made at the time of a divorce. In addition, if an agreement about child support is made based on mediation and trial, in cases of non-payment, a performance recommendation (art 289 of the Family Case Proceeding Act and art 38 of the Personal Status Litigation Act) and order of performance (art 290 of the Family Case Proceeding Act and art 39 of the Personal Status Litigation Act) can be granted in the Family Court. If payments for child support are to be made periodically, under the 2003 amendment to the Civil Execution Act, when the non-payment of child support occurs once, the salary and other available monetary sources of an obligator of child support, not only in the present but also in the future, can be seized; thus, payment can be obtained (art 151–2 of the Civil Execution Act). The maximum amount of seizure is half of the salary and other standing monetary sources of an obligator of child support (art 152 of the Civil Execution Act). Furthermore, amendments to the Civil Execution Act made in 2004 enabled indirect compulsory execution in cases of non-payment (arts 167–15 and 172 of the Civil Execution Act).

(b) Existing state of contact and sharing of child support

According to 2010 vital statistics, the total number of divorce cases was 251,378; among these, a minor child was present in 147,120 cases. The number of minor children whose parents were divorced was 252,617.[23] When a minor

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[22] For the actual calculation of child support, a table is utilised widely in the practice of the Family Courts all over the country since study groups of child support and related matters, Tokyo and Osaka, proposed this table for calculating child support and marriage expenses: Study group of the child support and related matters, Tokyo, and Osaka 'Aiming at simple and quick calculation of child support and related matters, a proposal for the method and table of calculating child support and marriage expenses' (2003) 1111 *Hanrei Times* (Hanrei Times-Sha, Tokyo, 2003) 285. However, the question of the justification of this table for calculation has arisen in recent years. Michio Matsushima 'Problems on the simplified computation method of child-care payments by non-custodial parents and the child support system' (2012) 67 *Kurume Daigaku Hogaku* (Kurume University, Fukuoka) 192–194.

[23] Ministry of Health, Labour and Welfare 'Vital statistics of 2010' www.mhlw.go.jp/toukei/saikin/hw/jinkou/suii10/index.html (accessed June 2013).

child unfortunately encounters a situation in which their parents divorce, contact and payments of child support must at least be assured for the interests of the child.

However, statistics show that few divorce agreements include contact and child support arrangements. There is an agreement system in Japan in which a divorce comes into effect without a judicial decision. In 2008, 87.8% of divorces occurred according to this system.[24] As divorces by agreement do not involve judicial decisions, matters regarding a child, especially those regarding contact and child support, can be overlooked.

(i) Contact

According to a 2011 investigation by the Ministry of Health, Labour and Welfare regarding agreement about contact, in households consisting of a mother and child, 23.4% were reported to have a 'fixed' contact scheme, 73.3% were reported to have an 'unfixed' contact scheme, and 3.3% were reported to have 'unknown' details. On the other hand, with respect to divorced parents having a household consisting of a father and child, 16.3% were reported to have a 'fixed' contact scheme, 79.9% were reported to have an 'unfixed' contact scheme, and 3.8% were reported to have 'unknown' details.

Regarding the enforcement of contact, in households consisting of a mother and child, 27.7% were reported to be 'still performing contact', 17.6% were reported to 'have performed contact', 50.8% were reported to have 'not performed contact' and 3.9% were reported to have 'unknown' details. On the other hand, in households consisting of a father and child, 37.7% were reported to be 'still performing contact', 16.9% were reported to 'have performed contact', 41.7% were reported to have 'not performing contact' and 3.7% were reported to have 'unknown' details.[25]

(ii) Child support

Regarding child support, the problem of pauperisation of the household consisting of a mother and child after a divorce is especially pointed out.[26] In Japan, it is not rare that a woman gives up working and concentrates on childcare after marriage and childbirth. According to statistics, 70.5% of all Japanese women stay at home after giving birth to their first child. Furthermore, according to surveys about gender roles, 45% agreed that 'husbands should work outside and wives should concentrate on household chores'. Furthermore, 85.9% stated that 'a mother can concentrate better on

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[24] Ministry of Health, Labour and Welfare 'Statistics about the divorce of 2009' www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/rikon10/index.html.

[25] Ministry of Health, Labour and Welfare 'Report on results of nationwide survey on fatherless families of 2011' www.mhlw.go.jp/stf/houdou/2r9852000002j6es.html (accessed June 2013).

[26] Matsushima, above n 22, 224.

childcare without working before a child is 3 years old'.[27] In addition, as of 2008, 82.1% of mothers have parental authority after a divorce.[28] If the household consists of only a mother and child after a divorce and the mother retires at the time of marriage and/or childbirth, she may find a new job and work to care and provide for her children. However, it is also difficult for mothers who stay at home with their children to find an equivalent paying job upon trying to re-enter the workforce. In 2010, compared with the average yearly earning of a father of ¥3,800,000, the average yearly earnings of a mother was ¥2,230,000.[29] In addition, if child support is not paid, there is concern about a mother and child becoming impoverished. This is especially a problem for households consisting of a mother and child.

According to an investigation by the Ministry of Health, Labour and Welfare in 2011 regarding child support agreements, households consisting of a mother and child, 37.7 % answered 'it is still being decided', 19.7% answered 'still receiving child support', 15.8% answered 'received child support' and 60.7% answered 'never received child support'. In addition, even though child support is received, the average monthly amount paid for child support in the household consisting of a mother and child is ¥43,482.[30] It can never be said that this is a high amount.

(c) The future stipulation of contact and share of child support

On 2 February 2012, the Ministry of Justice, which received details of contact and the sharing of child support as was stipulated in art 766 of the Civil Code by the amendment in 2011, notified the directors of regional legal affairs bureaus throughout the country to change the form of notification of a divorce to a new form with a check section regarding the existence of an agreement for contact and child support (Ministry of Justice notification No 271).[31] According to the revised Civil Code, use of this new form of notification started on 1 April 2012.

Under the previous notification of a divorce form, agreement regarding a child considered only the person who should have parental authority after a divorce.[32] In Japan, it has to be decided which parent should have parental

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27 National Institute of Population and Social Security Research 'National survey on family of the 4th time' www.ipss.go.jp/ps-katei/j/nsfj4/nsfj4_top.asp (accessed June 2013).

28 Ministry of Health, Labour and Welfare, above n 24.

29 Ministry of Health, Labour and Welfare, above n 25.

30 Ministry of Health, Labour and Welfare, above n 25.

31 'Instruction/circular notice/response (5311) regarding the partial amendment of a standard form of a family register notification following the enforcement of the Law for the Amendment of a Part of the Civil Code and related acts' (Circular Notice of Director of Civil Affairs Bureau addressing Director of Regional Legal Affairs Bureau and Local Regional Legal Affairs Bureau, Min 1 of Ministry of Justice No 271 of 2 February 2012) Koseki No 867 (Teihan, Tokyo, 2012) 62–82.

32 In addition, the notification of a divorce is put on each municipality public office and is the notification of national unification. The party writes necessary information in the notification of a divorce, and presents the window of a municipality public office. Almost all of the

authority after a divorce, as required by the parental authority system (art 819 of the Civil Code). This agreement is required for the notification of a divorce to be accepted, and if not stated, the notification of a divorce will not be accepted. On the other hand, even if there is no statement about contact and child support in the new form of notification, the notification of a divorce can be accepted. This means that agreements about contact and child support are not required for the acceptance of the notification of a divorce. However, although there is no legal requirement for an agreement about contact and child support, as the existence of these agreements is well known, the new form of notification of a divorce can be expected to have some effect.

V CONCLUSION

In 2012, 'The subject of family law internationalization' was taken up as a theme at the symposium of the Japanese Association of Private Law. In family law academic circles, arguments regarding problems in the current family law are by and far the most prevalent. As seen above, there was an important change that revised the laws of part of the family law domain in the Civil Code that occurred in 2011 and in force in 2012. After the 'Outlines for Amendment to a Part of the Civil Code' was advanced in 1996, although the argument about the amendment of family law continued in family law academic circles, nothing happened for over 10 years. This was because neither Diet members nor journalists were interested in the amendments to the Civil Code in Japan. So, this time, the stipulation regarding contact and child support in the Civil Code is considered as an epoch-making event.

However, since the revised law has only just come into force, few cases regarding the stopping of parental authority exist, and the effect of this law is unknown. In addition, the effect of having stipulated contact and sharing of child support in the Civil Code is unknown. Although, from 2012, the Ministry of Health, Labour and Welfare determined to back up the activities relating to contact or child support, almost all self-governing bodies throughout the country took a prudent stand toward starting activities specifically for contact, which was reported in the press.[33]

Furthermore, although this chapter does not discuss the Family Case Proceeding Act, which was proclaimed on 25 May 2011 and in force on 1 January 2013, it will bring about changes that will be important for future family law studies. In the domain of family law, it is expected that the

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conventional items mentioned were related with the parties, such as a name, an address, and a registered domicile and related matters. Items related to a child were only about the person who has parental authority after divorce. At this time, the items mentioned about the contact and share of child support were added as being related with a child by administrative guidance of the Ministry of Justice.

[33] 'Contact between parent and child after divorce, self-governing body prudent stand' Yomiuri Press, morning paper of 5 May 2012, 26.

above-discussed amendment of the Civil Code and ancillary law will better protect a child's interests. Attention must be paid to future trends.

Kazakhstan

THE REFORM OF THE FAMILY LEGISLATION OF KAZAKHSTAN: EXPECTATIONS AND OUTCOMES

*Maria Baideldinova Dalpane and Federico Dalpane**

Résumé

La législation familiale du Kazakhstan a connu d'importants changements au début de l'année 2012. Le nouveau Code du mariage et de la famille remplace la Loi sur le mariage et la famille. Le Code introduit plusieurs nouvelles institutions et il clarifie certaines ambiguïtés de l'ancienne législation. C'est le chapitre sur l'adoption qui a fait l'objet des plus importantes modifications. Le législateur a en effet tenté d'harmoniser les règles avec celles de la Convention de La Haye dont la signature a fait l'objet de débats intenses au Kazakhstan. La gestation pour autrui a également fait l'objet d'une attention toute particulière, alors que les règles concernant les contrats de mariage, les pensions alimentaires ou les conditions du mariage n'ont été touchées que de manière accessoire. Toutes les innovations apportées ne sont cependant pas parfaites. Le présent texte analyse les aspects les plus importants de la réforme et les situe dans leur contexte historique et politique.

I INTRODUCTION

In early 2012 the family legislation of Kazakhstan underwent significant transformation – a reform, defined by the legislature.[1] A new Code on Marriage and Family replaced the previous Law on Marriage and Family. Apart from moving upwards in the hierarchy of legal acts[2] and apart from a few structural modifications, the new Code introduced several new institutions and clarified a few ambiguities in the regulation of pre-existing ones. The most significant transformation concerned the norms that regulate the adoption process; the legislature tried to harmonise these with the norms of the Hague Adoption Convention, the signing of which had been given intense

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1 Annotation to the Code of Marriage and Family, Paragraph database, accessed on 20 February 2013.

2 According to the Law of Kazakhstan on Hierarchy of Legal Acts, the norms of Codes prevail in their legal power over those of the Laws.

consideration by Kazakhstan over the last few years. Also the norms on surrogate motherhood were extensively spelt out, while some regulations on pre-nuptial contracts, payment of alimony, and the process of entering into marriage were modified to a lesser extent.

Some of the norms and newly created institutions, however, have imperfections. This chapter analyses the main issues with the latest reform of the family legislation of Kazakhstan and considers them in their historical and political context.

(a) Some history

Kazakhstan, as is known, became an independent state after the collapse of the Soviet Union in 1991. At that time, family relations in Kazakhstan were regulated by the Family Code of the Soviet Socialist Republic of Kazakhstan (KazSSR), which largely repeated the norms of the Soviet Family Code. Since independence, the Family Code of KazSSR was slightly amended several times. The necessity of a more significant transformation, however, was becoming ever clearer. The social, political and economic transformations, particularly the transition from a planned economy to a market economy, and the creation of a national legal system separate from the Soviet – and Russian – ones, led to the adoption in 1997 of the Law of the Republic of Kazakhstan on Marriage and Family. Similar to the recent reform, the adoption of the Law on Marriage and Family of that time was a reflection of the economic and social processes then occurring in the country. For instance, the Law on Marriage and Family introduced the institution of the marriage contract – an agreement that would regulate the property relations of spouses[3] and that can be regarded as revolutionary for that time. Unthinkable in Soviet times due both to the almost complete absence of private property and to an ideology hostile to private entrepreneurship and profit, at the right time the marriage contract could be introduced and become an organic part of the legal system of independent Kazakhstan.[4]

The Law on Marriage and Family, however, was not a perfect legal document[5] and was widely criticised by lawyers and the general public alike. So, rather soon Parliament started considering various possible amendments. On the one hand, the Law on Marriage and Family contained some ambiguities and gaps that had to be corrected and filled. On the other hand, there were certain

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[3] Actually, the norms that introduced the marriage contract into the family legislation of Kazakhstan were contained in one of the amendments of 1993 to the Law on Marriage and Family of KazSSR. The norms, however, only established the possibility to enter into a marriage contract, but did not specify the actual conditions, who could stipulate it and how. In fact, unofficial statistics (in absence of official ones) show that in the period between 1993 and 1997 no marriage contract was stipulated by the citizens of Kazakhstan.

[4] Baideldinova 'Matrimonial Property and its Contractual Regulation in Kazakhstan' in B Atkin (ed) *The International Survey of Family Law 2011 Edition* (Jordan Publishing Limited, 2011).

[5] Ibid.

positive tendencies in economics and politics, which allowed thinking not only about basic, but also about advanced guarantees for citizens. For instance, prior to the reform, Kazakhstan was among the countries that were net 'exporters' of children for international adoption.[6] This could have been excused by the economic crisis that afflicted Kazakhstan in the 1990s and from which the country started recovering only at the beginning of the new millennium. Under the previous family legislation, the procedures for international adoption, although time-consuming, were rather simple and flexible. The significant improvement of the economic situation and the hope of certain political stability induced the legislature to make the adoption process for foreign families more rigid, and to increase the number of requirements one has to meet to be eligible as a potential adoptive parent.

Among the proposals considered, but not accepted, by the Parliament, was the approval of polygamy, namely the possibility for a man to have more than one wife (but not vice versa); and a proposal to withdraw Kazakhstani citizenship from anyone who marries a foreigner. These proposals were not accepted for obvious reasons, as they would have contradicted the equality guaranteed by the Constitution and the general concept of human rights.

II THE MAIN ISSUES REFORMED

First of all, the new Code replaced the Law on Marriage and Family, which by itself is a change in both the legal status of this field of law and the legal force of the document. The new Code was divided into two parts, general and special, which was not the case for the previous Law.

There was a change in basic terminology. For instance, the word 'marriage' (*brak*) was replaced with its synonym (*supruzhestvo*). The reason for this, according to the annotation to the draft of the Code, was that the word *brak* has several meanings, 'including those not connected to family and marital relations'.[7] Some other terminological modifications also took place – some new terms were introduced, while some pre-existing terms were better defined and clarified.

The new Code limits the number of references to other legal acts, which simplifies the usage of the Code and makes the application of the norms easier and more efficient. The questions of adoption, including international adoption, and surrogate motherhood were addressed, accomplished with new

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6 Within the past 14 years 14,421 children were adopted in Kazakhstan. 38,068 children (80.3% of total adopted) were adopted by citizens of Kazakhstan, 547 children (1.2%) were adopted by foreign relatives of the children and 8,806 children (18.5%) were adopted by unrelated foreign citizens. (Zhakeev, В Казахстане сокращены сроки по усыновлению детей гражданами Казахстана (Kazakhstan has shortened the terms of adoption process for the citizens of Kazakhstan), 29 January 2013, Paragraph database, accessed on 7 February 2013.)

7 Annotation to the Code of Marriage and Family, Paragraph database, accessed on 20 February 2013. (The other meaning of the word *brak* is defect, flaw.)

details and, in general, improved. In particular, the institution of adoption agencies was introduced and the process of their legalisation (accreditation) was specified. The period of payment of alimony towards children who study in higher educational establishments was prolonged.

The special part of the Code, which was missing in the Law on Marriage and Family, both structurally and substantially, regulates the process of registration of various changes in the civil status of a person. Specifically, the special part contains the definitions and general description of acts of marital status (art 177), the terms of issuing of those acts (art 178), and procedures for annulment and modifying of the registrations. The Family Code Special Part describes in a detailed way also the registration procedures (reasons, necessary documents, process of application and terms) for birth, establishment of fatherhood, marriage, divorce, adoption, change of name of a person and death. Previously these procedures were only partially described in the Law on Marriage and Family, and were regulated by several separate laws and legal acts. These procedures were imported into the Family Code and some of them were modified.

This rather long list[8] of changes allows the legislature to refer to what occurred in the Family Law of Kazakhstan as reform. Below we comment on the most modified and conceptually changed issue, that is, adoption. Then, as another one of the most amended questions, we describe the news in the field of surrogate motherhood, and we end with a brief comment on some of the minor changes, as listed above.

(a) From the Law to the Code

The main conceptual change to Kazakhstan's family legislation is the change in legal status of the main legal act itself, which regulates this area of law. Previously, as mentioned above, it was the Law on Marriage and Family. Later it was replaced with the Code on Marriage and Family.[9] Being a Law, the previous Law on Marriage and Family was on the same level of legal force as, for instance, the Law on Social and Medical Correctional Support for Children with Limited Abilities or the Law on Family-like Children's Villages and Juvenile Houses. This did not make much practical sense, as the Law on Marriage and Family even at that time established the basics of Family Law, the principles of exercising parental rights, the fundamentals of relations between spouses and other family members. Because of its substantial

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8 In the list of changes we have not included the smaller technical changes and linguistic clarifications.

9 There is no particular difference in the process of creating legislation between a Law and a Code. Both are worked out and adopted by Parliament following exactly the same procedure. The amendments and changes to Laws and Codes are also made in the same way: they go through the parliamentary debate and vote, separately in both Chambers, after which they are signed by the President. The difference between the two types of legal acts lies in their place in the hierarchy of legal acts and their legal force.

coverage, the previous Law on Marriage and Family had already assumed supremacy over all other related acts, so it was a logical step to grant it the status of Code.

(b) Adoption

The background and reasons for the amendments introduced into the Family Code in the sphere of adoption are very likely connected to the ratification by the Republic of Kazakhstan of the Hague Adoption Convention, which occurred on 12 March 2010, shortly before the reform. Joining the Convention had been considered by the Parliament of Kazakhstan for several years, but only recently did this become possible due to the economic and social reasons mentioned above.

Adoption has always been one of the most disputed and problematic issues both in court practice and in doctrine. Law, state bodies, NGOs and private individuals involved in the process often had different views on the problem and different difficulties. The legal framework was represented by the Law on Marriage and Family and numerous sub-legal acts (rules, instructions, regulations), which sometimes were contradictory. The state bodies involved in adoption, including the courts, often had difficulties in the application of those contradictory norms. The life of the NGOs involved in the protection of the interests and rights of children was complicated by a lack of regulations on the one hand and a lack of transparency of the process on the other. Adopting parents suffered from excessive bureaucratic requirements, which were making adoption less popular.

The tasks of the new Code in the sphere of adoption were to harmonise the legislation of Kazakhstan with the norms of the Hague Convention, to codify the norms regarding the process of adoption, to clarify and specify the ambiguities and contradictions of those norms and to make the process of adoption less bureaucratic, but at the same time stricter and clearer, in order to maximise the guarantees for the adopted children. The codification and unification of the norms that regulate adoption were done by introducing the specifying norms into the Code and by inserting into the special part of the Code the norms that detail the process of application and registration of adoption. It turned out to be impossible to eliminate the relevant sub-legal acts completely, but the number of these acts was significantly reduced.

In order to ensure the consistent application of the norms of the Code regarding adoption and to provide the maximum legal protection for the children, the Family Code introduces the new institution of the accredited adoption agency. According to the Code, an adoption agency is 'a non-profit foreign company, which is involved in adoption activity in the country of its origin and is accredited in Kazakhstan in accordance with the Family Code' (art 1). The process of accreditation, as well as the requirements for the agency, its rights and responsibilities, the process of creation of the branch offices of

the agency and the reasons and process of termination of its activity are regulated in a separate chapter, specifically dedicated to this new institution.

The extension of the list of requirements for the potential adopters has been widely criticised both by lawyers and by the public. For instance, art 91(2) establishes that the adopters can be any person of age, except:

(1) people, who were recognised as limited in their dispositive legal capacity[10] or whose legal capacity was terminated by court decision;

(2) spouses, one of whom was recognised as limited in his or her dispositive legal capacity or whose legal capacity was terminated by court decision;

(3) persons whose parental rights were terminated or limited by court decision;

(4) persons banned from guardianship for failing to fulfil the corresponding legal obligations;

(5) ex-adopters, if the adoption was cancelled by the court on the basis of their fault;

(6) persons who cannot fulfil parental obligations due to health conditions;

(7) persons who do not have permanent residence;

(8) persons of non-traditional sexual orientation;

(9) persons who have by the time of adoption an extinguished conviction for commitment of a deliberate crime;

(10) stateless persons;

(11) males who are not officially married, except cases of guardianship *de facto* of the child for at least 3 years, due to the child's mother's death or termination of her parental rights;

(12) persons who at the moment of adoption do not have income sufficient for ensuring the legal minimum living standards;

(13) persons registered as alcoholics and/or as substance addicts and/or as psychiatric patients.

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[10] For more details see Kembayev and Baideldinova 'Family and Inheritance Law' in Z Kembayev (ed) *Introduction to the Law of Kazakhstan* (Alphen aan den Rijn: Kluwer Law International, 2012).

Article 92 of the Code establishes the minimum and the maximum difference of age between adoptive parent and an adopted child. They are respectively 16 and 45 years.

It would seem more correct, rather than trying to exclude all the possible inappropriate categories of adopters, to establish a fixed, short list of basic requirements (mental health, previously terminated adoption or terminated parental right due to adopter's fault, material possibilities) and to leave the rest to the consideration of the guardianship authority and the court. This might include some kind of professional psychological test, which would determine the capacity to bring up a child, the psychological stability and moral qualities. The characteristics not related to these capacities, such as the gender of the adopter and sexual orientation should not be taken into consideration, lest a constitutionally unwarranted discrimination be incorporated into the law.

To the fear that these measures might lead to a drop in the number of adoptions and hence to an increase in the number of children in orphanages, the officials of the country respond that this will not result in the decrease of adoptions in general.[11] The volume of adoptions will be maintained thanks to an expected increase in adoptions by local adoptive parents.

The considerations above allow the assumption that the introduction of the accredited adoption agencies might serve as part of the solution to the international adoption process, but it should be one of a series of protection measures. In fact, the main concern remains the execution of the legislation on adoption. The extension of the list of requirements for potential adopters does not seem appropriate neither in itself nor in its content. The application of some of those and even the lawfulness of others is doubtful. These norms of the Family Code have to be necessarily reconsidered, as proposed above.

(c) Surrogate motherhood

Surrogate motherhood is defined in art 1 of the Family Code as childbearing and giving birth to a child (children), including cases of premature birth, regulated by an agreement between a surrogate mother and spouses with the payment of compensation. The norms that regulate surrogate motherhood together with those on adoption were among those significantly reconsidered in the new Code.

In the new Code, surrogate motherhood is regulated by a separate chapter. This chapter contains norms which determine the form, content and terms of the surrogate motherhood agreement; requirements that the surrogate mother

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[11] Zhakeev, В Казахстане сокращены сроки по усыновлению детей гражданами Казахстана (Kazakhstan has shortened the terms of adoption process for the citizens of Kazakhstan), 29 January 2013, Paragraph database, accessed on 7 February 2013.

should meet; rights and responsibilities of the parties of such agreement; terms, conditions and legal consequences of the application of assisted reproduction methods and technologies.

The Code mandates the simultaneous entering into two different contracts: one between the surrogate mother and the couple, and another between the couple and the medical establishment that will be involved in the process. The first one is the contract of surrogate motherhood. According to the Code, the stipulation of such a contract presumes that upon the birth of the child the couple automatically receives parental rights. This means that, should the surrogate mother during the pregnancy decide to keep the child, this not only would be impossible, but might be prosecuted in accordance with the Criminal Code as kidnapping.

Articles 54–55 of the Code regulate the form and content of the agreement on surrogate motherhood. These articles, however, do not regulate the issue sufficiently. In particular, the most evident problem that needs to be urgently dealt with concerns the parties to the contract on surrogate motherhood. Article 1 defines the contract of surrogate motherhood as a written agreement, certified by a notary, between married persons who wish to have a child, and a woman, who agreed to childbearing and birth of the child. So, on one side of the agreement there are the intended parents and, on the other, the woman. According to art 56, the potential surrogate mother has to be between 20 and 35 years of age, have satisfactory physical, mental and reproductive health certified by a medical organisation, and have earlier her own healthy child. It is also not clear whether there is a requirement for the potential surrogate mother to have just one healthy child or whether she is allowed to have more than one. The other side of the contract, the couple who are the intended parents, appears to be even more problematic. First of all, the maximum age of the spouses who order surrogate motherhood is not defined.[12] While, for instance, the maximum age of a person who wants to adopt a child is indirectly established by the Code,[13] the intended parents in a surrogate motherhood can be of any, even more advanced, age. The Code does not exclude the possibility of using the donors' biological material (art 56(3)), so it means that either the intended father or mother, or even both may not be fertile. Supposing, then, that the biological material of both intended parents was substituted for the donor's, it remains unclear how in this case surrogate motherhood would differ from purchasing somebody else's child.

Many ambiguities and uncertainties remain about the modification, amendment, termination and invalidation of a contract of surrogate

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[12] The Code operates with the term 'order' and, aside from the word 'spouses', in the chapter on surrogate motherhood uses the term 'orderers', or 'purchaser', which was criticised by commentators. For instance, Mukhamedzhanov, К вопросу о субъектах договора суррогатного сатеринства в Республике Казахстан (On the question of the parties to the contract of surrogate motherhood in the Republic of Kazakhstan), Paragraph database, accessed on 14 February 2013.

[13] See above.

motherhood. Article 54(1) states that 'the contract on surrogate motherhood is to be executed … with the observance of the requirements of the Civil legislation of the Republic of Kazakhstan'. As no further article of the Family Code mentions the possibility and the process of modifications, amendments, as well as the termination of the contract and its invalidation, one supposes that all of those procedures are also regulated by the Civil Code. The Civil Code, however, does not take into account the specifics of the contract on surrogate motherhood, namely the interests of the child born by a surrogate mother. The child in this case is neither a subject of the contract nor an object; hence the interests of the child remain unprotected. The Civil Code provides several possibilities for unilateral termination of a contract.[14] Let us suppose that at a certain point the intended parents have the legal grounds to terminate the contract unilaterally. They stop paying maintenance to the surrogate mother at an advanced stage of pregnancy. The surrogate mother at this point might face the choice either to immediately terminate the pregnancy, if it is still possible, or to give birth to a child. If she decides to terminate the pregnancy she can claim damages in accordance with the Civil Code. The same happens if, because of the abortion, she definitely loses the capability of giving birth. But should she decide to give birth to the child, the child will remain an orphan. And even if the intended parents do not terminate the contract unilaterally during the pregnancy, according to art 59(3) of the Code they have the legal option of refusing to take the child. This does not result in any liability for the parents. The only guarantee of the rights of the child in this case is the possibility of inheriting from the parents (art 59(6)). But if the parents have unilaterally refused to fulfil the contract, this means that the parental rights of the intended parents over the child never exist. It is also unclear in this case whether parental rights go to the surrogate mother.

In this chapter we ignore the wider ethical considerations on the issue of surrogate motherhood. Certainly, in strictly legal terms, surrogate motherhood is regulated in the new Code in a much more detailed and complete way than before. The doubts expressed above, however, will necessarily create difficulties in the application of the norms and make further clarifications urgent.

(d) Other minor changes

(i) Entrance into marriage for people under 18

The new Family Code, like before, established the minimum marriage age for both men and women at 18 years. Under exceptional circumstances the marriage age can be reduced to 16. In the previous law the list of such circumstances was not exhaustive.[15] This frequently resulted in abuses of the norm. In the new Family Code the legislator limited the number of such cases

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[14] This, however, requires certain legal grounds and cannot be based purely on the desire of one party to dissolve the contract.

[15] Article 10 of the Law on Marriage and Family was formulated in the following way: 'Due to significant reasons the organs of registration of civil status may reduce the marriage age by no more than two years.'

by indicating only one reason: the pregnancy of the future wife. It remains open to question, however, whether this norm concerns only the marriage age reduction of a female minor, or if it can be applied also to the situations where both of the future spouses are minors or where only the male is a minor.

(ii) Age until which the alimony should be paid: parent towards children

The Law on Marriage in Family was very clear on the age until which parents are obliged to maintain the child. That age was established at 18, which is the age of majority. The new norm of the Code[16] still establishes the same age, indicating at the same time the possibility for parents to establish in an alimony agreement the maximum age of 21 for those children who study in higher educational establishments. There is, however, an observation to be made. Article 138 says:

> 'Parents are obliged to maintain their minor children. Process and form in which the maintenance is to be provided are determined by the parents independently.
>
> The parents have the right to make an agreement on maintenance of their minor children as well as their children come of age, who study on a full-time basis [in higher educational establishments] … until the age of twenty one …(alimony agreement).'

The meaning of art 138 is that the parents have an obligation to maintain the child up to the age of 18, while it is optional in regard to children from 18 to 21, and this can be regulated through an agreement.

At the same time art 141 establishes:

> 'Recovery of maintenance money for the children who study on a full-time basis in [higher educational establishments] up to the age of twenty one, in the absence of an alimony agreement, is done through the court procedure as a fixed sum of money.'

This means that, even if an alimony payer and alimony receiver did not make an agreement, according to which the alimony receiver has to be financially maintained until the child reaches the age of 21, the alimony receiver still has a possibility of recovering such alimony through the court. Thus, this new norm, albeit in a confused way, contains further guarantees for the alimony receiver.

(iii) Prenuptial contract

According to the previous norms regulating the marriage contract, a prenuptial agreement both could be created both during and before marriage. Many considered the definition of the marriage contract as an agreement between spouses or people who are entering into marriage as ambiguous, as it was not

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[16] Articles 138 and 141.

clear from which moment the prenuptial agreement could be signed. The Code defines the marriage contract in the same way, but specifies that the marriage contract can be signed only from the moment when the couple applies for the registration of marriage.[17]

III CONCLUSION

Assessing the results of the reform we can say that it has taken into account the criticisms that commentators had expressed with regard to the previous Law; it has corrected the ambiguities and clarified some details. It has addressed a few demands for improvement and clarification expressed by society at large, such as: making the adoption requirements for foreigners more stringent; bringing them into harmony with the Hague Convention; and elaborating on the institution of surrogate motherhood. At the same time, the outcomes of this round of reform of the family legislation of Kazakhstan are not yet satisfying. The amendments were made without prior public debate and without a developed mechanism for implementation of the new norms. While resolving a few issues in the previous Law on Marriage and Family, the Code has introduced new ambiguities. Clarification is urgent.

[17] Article 40(1).

Macedonia

THE EXERCISE OF PARENTAL RIGHTS AFTER DIVORCE IN MACEDONIAN FAMILY LAW

*Dejan Mickovik and Angel Ristov**

Résumé

Dans cet chapitre, les auteurs analysent la régulation juridique de l'exercice des droits parentaux après le divorce dans la législation macédonienne. Ils concluent que droit de la famille de la République de Macédoine ne contient pas de disposition précise qui prévoit que les parents peuvent continuer à accomplir en commun l'autorité parentale après le divorce. Cela provoque de graves problèmes dans la pratique, parce que le parent qui a obtenu la garde de l'enfant après le divorce dans la plupart des cas, apporte les décisions les plus importants pour l'enfant et ses droits et intérêts, et l'autre parent, habituellement le père, a seulement le droit de maintenir des contacts personnels avec l'enfant et l'obligation de payer une pension alimentaire. Les auteurs estiment qu'il est nécessaire de prevoir dans la loi de la famille une disposition précise par laquelle l'exercice conjoint de l'autorité parentale après le divorce serait un principe de base, et seulement si c'est dans l'intérêt de l'enfant le cour peux décider que les droits parentaux va accomplir un seul parent. Ceci est cohérent avec l'intérêt supérieur de l'enfant, ainsi qu'avec la Convention des Nations Unies relative aux droits de l'enfant et les tendances dans les legislations contemporaines.

I INTRODUCTION

In the past decades in all Western countries the number of divorces has dramatically increased,[1] which is one of the main reasons for the disruption of the existing family model and the emergence of pluralism of family forms.[2]

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1 In the countries of the European Union in 1960 only 170,000 marriages ended in divorce; in 1993 there were 636,000 divorces, and in 2006 the number of divorces increased to 1,040,000. See more: Spirovikj-Trpenovska, Mickovik and Ristov, *Family Law Act* (Blesok, Skopje,2013) p 54.

2 See more about the pluralism of family forms in: Mickovik, *Family in Europe XVI – XXI century* (Blesok, Skopje, 2008) pp 183–195. According to Castels nowadays there is no longer only one existing family model. In contemporary societies there is a diversity of family forms.

Seen from a legislative perspective, one of the most significant reforms in family law systems is the liberalisation of divorce.[3] In addition, all jurisdictions have been faced with the dilemma of how to regulate the exercise of parental rights and responsibilities after divorce. This question is extremely important because of the fact that many studies show that divorce causes severe and long-term negative consequences for children, and affects all aspects of their lives.[4]

Under the influence of changes in marital and family relationships, a significant transformation has been taking place in contemporary legal systems in the last few decades. Instead of protecting the marital relationship by prohibiting divorce, or providing that divorce is possible only in the case of the fault of one of the spouses, modern legislation protects the relationship between parents and children.[5] In most European countries there is a tendency for parents to continue to jointly perform parental rights after divorce, unlike before, when children were entrusted solely to one of the parents, in most cases to the mother.[6]

See more: Castels, *The Power of Identity* (Blackwell Publishers, London, 1999) p 227. In this sense, Judith Stacey states that conditions in the post-industrial society led to the creation of many different family models. See more: Stacey, *In the Name of the Family, Rethinking Family Values in the Postmodern Age* (Beacon Press, Boston, 1996) p 7.

3 According to Mary Ann Glendon, as opposed to the previous period when divorce was allowed only in exceptional cases, today it is possible to divorce by mutual consent of the spouses or by unilateral request by one of the spouses. See more in: Glendon, *The Transformation of Family Law Act: State, Law, and Family in the United States and Western Europe* (University of Chicago Press, Chicago and London, 1989) p 226. According to Patrick Parkinson, previously divorce was possible exclusively because of the fault of one or both marital partners, and today in most Western countries, a marriage can be dissolved by unilateral decision made by one of the spouses, even when the other opposes the divorce. Parkinson, 'Family Law Act and the Indissolubility of Parenthood', *Legal Studies Research Paper,* No 06/31, October 2006, University of Sydney, Sydney Law School, p 3.

4 According to Paul R Amato many studies show that the parents' divorce has negative consequences for the children when they grow up, including lower socio-economic status, marital problems and greater likelihood of divorce. See more in: Amato, 'The Consequences of Divorce for Adults and Children' (2000) 62(4) *Journal of Marriage and Family* 1279.

5 In this sense, Patrick Parkinson says that in contemporary societies the state, instead of proclaiming the indissolubility of marriage, foreshadows the indissolubility of parenting. Patrick Parkinson, above n 3, p 2.

6 Earlier, in 90% of the cases the mother had exercised the parental rights after divorce, and the father had only the right to maintain personal contact with the child. See in Meldeurs-Klein, *La personne, la famille et le droit, Trois décennies de mutations en occident* (Bruylant, Brussels, LGDJ, Paris, 1999) p 266. In recent years, the joint exercise of parental rights after divorce is widely accepted. In France, the Law of 2002 introduced the joint exercise of parental responsibilities by both parents as a basic principle, which means that the termination of the marital relationship has no effect on parental responsibility. In Germany, the legal changes from 1998 provide that after divorce the parents continue to jointly perform the role of providing parental care in relation to the child, without a decision by the court. In Sweden there is a general assumption that the joint performance of parental rights is in the best interest of children, so the court can decide that both parents exercise parental rights after divorce, even when one of them does not agree with the decision. In 2002, in Sweden in 97% of the cases, both parents continued to jointly exercise their parental rights after divorce. About the joint exercise of parental rights after divorce, read more in: Spirovikj–Trpenovska, Mickovik and Ristov, above n 1, pp 203–213. In Spain, in the autonomous region of Aragon, with the

The major changes in marital and family relationships, and the profound reforms in family legal systems, which are common to all European countries, are also happening in the Republic of Macedonia. However, due to its specific historical, cultural, economic and political conditions, family transformations in Macedonia took place much later in comparison with some other European countries. In this regard, it is interesting that the Republic of Macedonia, according to a survey conducted between 1990 and 2000, had the lowest rate of divorces in Europe.[7] The causes of this were numerous: the patriarchal relations, the strict customary and moral norms, the economic crisis as well as the high unemployment rate of 30%. However, in recent years the trend of a growing number of divorces is visible in Macedonia too.[8]

Divorce is connected with many legal consequences related to the spouses and the common children.[9] The most important consequences associated with divorce are closely related to the exercise of parental rights and responsibilities after divorce. In this sense, which of the spouses shall be entitled to raise the child, by what criteria the court will be guided in making its decision, as well as many other similar questions constitute very important issues that in the end, determine the proper physical and mental development of children.[10]

The authors of this chapter make a thorough analysis of the Macedonian family law which regulates the exercise of parental rights after divorce, in order to determine whether it is in accordance with the UN Convention on the Rights of the Child,[11] and with the legislative trends in other European countries concerning legal regulation of the exercise of parental rights after

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amendments of 2010, the joint exercise of parental rights has been given priority in cases when the partners cannot agree upon the exercise of parental rights after divorce. See more in Hayden, 'Shared Custody: A Comparative Study of the Position in Spain and England', *InDret, Revista Para el Analisis del derecho*, Barcelona, January 2011, p 4.

7 According to Matthijs Kalmijn, there were major differences in divorce rate among certain regions in Europe in the period from 1990 to 2000 (divorce rate indicates the number of divorces per 1,000 inhabitants). The divorce rate in Western Europe during this period was 2.24, in Northern Europe 2.36, in Central and Eastern Europe divorce rate was the highest – 2.93, and the lowest rate was registered in the South East Europe – 0.84. The divorce rate in the Republic of Macedonia in this period was only 0.38, and was significantly lower compared to other countries in the region. See more in Kalmijn, 'Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990–2000' (2007) 61(3) *Population Studies* 249.

8 According to the State Statistical Office, in the Republic of Macedonia there were 710 divorces in 1995, in 2005 the number was 1,552, and in 2011 the number of divorces increased to 1,753. See in Spirovikj-Trpenovska, Mickovik and Ristov, above n 1, p 54.

9 On the consequences of divorce for spouses and children in Macedonian law see more at: Spirovikj-Trpenovska, Mickovik and Ristov, above n 1, p 159–162; Hadzivasilev, *Family Law Act, Self-government practice* (Skopje, 1987) p 214–221.

10 On the exercise of parental rights in practice see more details in: Toshanova, Trajchovska and Jovanov-Trajkovska, 'The Exercise of Parental Rights, Termination of Parental Rights and Prolongation of Parental Rights', in Chavdar (ed), *The Family Legislation of the Republic of Macedonia* (Supreme Court of Macedonia, Skopje, 1994) pp 103–105.

11 For more about the level of harmonisation of national legislation with the Convention on the Rights of the Child see Davitkovski, Buzarovska–Lazhetikj, Kalajdziev, Mickovik and Gruevska Drakulevski, *Comparative Overview of Legislation in the Republic the Macedonia and the Convention on the Rights of the Child* (Ministry of Justice, Republic of Macedonia, Skopje, 2010).

divorce. The first part of the chapter briefly presents the legal framework that regulates the exercise of parental rights during the marriage. The second part is devoted to the analysis of norms governing the exercise of parental rights after divorce, in the case of divorce by mutual consent of the spouses, as well as in the case of divorce at the request of one of the spouses. The third part analyses the role of the Centres of Social Work and the Courts in the exercise of parental rights after divorce. In the fourth part, the authors present some proposals for amendments to the Macedonian family law in relation to the exercise of parental rights after divorce.

II THE EXERCISE OF PARENTAL RIGHTS DURING MARRIAGE IN THE REPUBLIC OF MACEDONIA

In the family law of the Republic of Macedonia the term 'parental rights' is used, but the authors consider that it would be more appropriate to replace this term with the term 'parental responsibility'.[12] According to the Family Law Act (FLA)[13] the parents exercise parental responsibility jointly and by agreement (art 76 FLA).[14] According to the principle of equality, the parents have equal rights and duties regarding their children. This provision is consistent with the principle of shared responsibility of parents, envisaged in Art 18 of the UN Convention on the Rights of the Child, according to which both parents have common responsibilities for the upbringing and development of children.[15] When children live with their parents it is assumed that there is an agreement among the parents concerning the exercise of parental rights. In the case of disagreement among the parents in exercising their parental rights, the Centre of Social Work is entitled to make a decision.

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[12] The term 'parental responsibility' is more appropriate, because it describes better the essence of the relationship between parents and children in modern legislation, in which parents have particular responsibilities and obligations to their children, and the rights of the parents towards the children are determined only to the extent which is needed to fulfil their responsibilities. The term 'parental responsibility' is used in the UN Convention on the Rights of the Child, as well as in numerous European jurisdictions. According to Stephen M Cretney, in Britain, at the time of enacting of the Children Act in 1989, it was considered that the words 'responsibilities' and 'obligations' better describe the interests of the parents, rather than the term 'rights', and, because of this view, the term 'parental responsibility' was adopted in the law. See more at: Cretney, *Family Law Act* (Sweet & Maxwell, London, 1997) p 168. Beside that, in Recommendation 974 (1979) of the Council of Europe it is highly recommended that the term 'parental right' should be replaced by the term 'parental responsibility'. On dilemmas over which term should be used in the French law see more at: Malaurie and Fuchiron, *La Famille* (Lextenso éditions, Paris, 2009) p 602.

[13] Official Gazette of Republic of Macedonia' n 80/92, 9/96, 38/04, 33/06, 84/08, 67/10, 156/10 and 39/12.

[14] Parental rights can be carried out by only one of the parents even though the other parent is alive. That will be the case when the other parent: (1) is prevented from exercising parental rights; (2) the place of habitude and residence is not known; (3) is deprived of parental rights, and (4) has lost legal capacity or has limited legal capacity.

[15] The equal status of the parents is also guaranteed in the Protocol 7 of the European Convention on Human Rights, which provides that spouses have equal rights and obligations in relation to their children for the duration of marriage and in the event of its termination.

The right of children to live with their parents is of utmost importance, and for that reason the UN Convention on the Rights of the Child prohibits the separation of the child from the parents against their will. The Family Law Act of the Republic of Macedonia provides that minor children have the right to live with their parents. In this regard, the separation of children from parents is allowed only exceptionally, when it is necessary and it is in the best interest of the child, followed by a decision of a competent national authority according to legally established procedures.[16]

The Family Law Act regulates the performing of parental rights when a child's parents do not live together, but the marriage is not yet ended by divorce.[17] In this case they should reach an agreement about which of them the child will remain living with[18] and in which manner the non-resident parent will maintain personal relations and direct contact with the child.[19] If the agreement is in the best interest of the children, the legislature expects its observance. If the parents cannot agree on these issues, or the agreement is not in the interests of children, then the Centre of Social Work is responsible for reaching the decision.

III PARENTING AFTER DIVORCE

Macedonian law provides three grounds for divorce: (a) by mutual consent of the spouses; (b) at the request of one of the spouses if the marriage relationship has been disrupted to an extent which makes common living unbearable; and

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[16] If it is necessary from the standpoint of the interests of the child, the parents can entrust the child to a third person or suitable institution (that would take care of child's upbringing). If the parents or the parent who solely exercises parental rights are deprived from doing so for a while, similarly in situations when for justified reasons the parent is absent from home for a longer period of time (and does not take the children with herself/himself), the children can be entrusted for their care and upbringing to a third person, only if the Centre of Social Work gives permission for this.

[17] Article 78 of the Family Law Act.

[18] 'In cases where the child's parents do not live together, they agree which of them the child will remain living with (and to be raised and cared for), and if they cannot agree or if their agreement does not meet the interests of the child, then the Centre of Social Affairs will make the decision. The Centre of Social Affairs, at the request of a parent or ex officio, will make a new decision on entrusting the child for care and upbringing, where that is required by the modified circumstances' (art 78 of the Family Law Act).

[19] 'In cases where the child's parents do not live together they should agree on the manner of maintaining personal relations and direct contact with the child. If the child's parents within two months do not agree on how to maintain personal relations and direct contact with the child, the Centre of Social Affairs will make a decision. While determining the child's personal relations and direct contacts with the parents, the Centre of Social Affairs shall inform the child about the ongoing procedure, and it shall take into account its views and opinions according to its age and level of development. The Centre of Social Affairs, on a request submitted by the parent, can decide again on the manner of maintaining personal relations and direct contact between parents and children, if that is required by the modified circumstances. The maintenance of personal relations and direct contacts of children with their parents may be limited or barred only temporarily for health reasons and other interests of the child' (art 79 of the Family Law Act).

(c) by factual termination of the common life at least for a year.[20] Therefore, the guilt of the partners has no importance in the grounds for divorce in Macedonian family law. Given the primacy that should be provided to the interest of the children, the legislation provides that, in the content of the judgment by which the marriage is dissolved, the Court will decide on guardianship, upbringing and maintenance of common children.[21] In addition, it should be noted that the Family Law Act does not contain specific rules that regulate the exercise of parental rights after divorce.[22] This means that after the divorce the parent to whom the children are not entrusted for upbringing and care does not lose parental rights.[23] But in practice the situation is different. In Macedonia it is common that the parent of the child entrusted by the court with the right of bringing up the child (guardianship and education are key elements of parental rights) is the one who exercises the parental rights and makes most decisions regarding the child. The other parent has the right to maintain personal relations with the child and has the obligation to pay child support. Due to the fact that the children after the divorce are usually entrusted to the mother, the fathers are isolated from the child's life and restrained from the process of making the most crucial decisions regarding child's interests.[24] Undoubtedly, this legal gap in the national legislation relating to the exercise of parental rights after divorce causes problems in practice and is contrary to the purpose of the legislature, which underlines that the child should be cared for, brought up and maintained by both parents, regardless of their status and mutual relations.

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[20] For more on the grounds for divorce in the Macedonian Family Law Act see Spirovikj-Trpenovska, Mickovik and Ristov, above n 1, pp 140–142.

[21] Article 80, para 1 of the Family Law Act.

[22] Unlike the Macedonian law, the Serbian law expressly predicts the existence of two types of parental rights – joint and individual exercise of parental rights. For this, see more details in: Panov, *Family Law Act* (Faculty of Law, University in Belgrade, Belgrade, 2010); Kovachek Stanikj, *Family Law Act: Partnership, Children and Custodial Law* (Faculty of Law in Novi Sad, Novi Sad, 2007) pp 310–318; Drashkikj, *Family Law Act and Children's Rights* (JP Official Gazette, Belgrade, 2009) pp 288–295; Pochucha, *Family Law Act* (University Chamber Academy, Novi Sad, 2010) pp 182–185. Such a solution is also provided in the domestic legislation of Republic Srpska. Guided by the interests of the child, the Court shall order single or joint exercise of parental rights. See more at Bubich and Traljich, *Parental and Custodial Rights* (Faculty of Law, University Sarajevo, Sarajevo, 2007) pp 176–182.

[23] The same view is expressed by Mile Hadzivasilev, above n 9, pp 220–221. For a similar view see Toshanova, Trajchovska and Jovanov-Trajkovska, above n 10, p 104.

[24] This practice in the Republic of Macedonia is contrary to the provision of art 76 of the Family Law Act which provides that parents perform their parental rights jointly and in agreement, and it is contrary to the UN Convention on the Rights of the Child. Furthermore, many studies show that the involvement of the father in the child's upbringing and socialisation is beneficial for the child's welfare after the divorce. According to an analysis of 63 studies that have investigated the relationship between the father and the children who did not live together after divorce, Amato and Gilbreht concluded that the proper exercise of parental responsibilities by the father is associated with the children's improved academic outcomes and fewer problems in their psychological development. See more at: Amato, above n 4, p 1280. According to one study, the intensity of contact with the child's father after divorce positively affects the financial contribution made by the father by way of child alimony. See more at: Juby, Le Bourdais and Marcil-Gratton, 'Sharing Roles, Sharing Custody? Couples' Characteristics and Children's Living Arrangements at Separation' (2005) 67(1) *Journal of Marriage and Family* 157.

(a) Divorce by mutual consent

The first ground for divorce envisaged in the Macedonian legislation is the mutual consent of the spouses.[25] According to the Family Law Act, the spouses should express their mutual consent for divorce in the proposal for divorce. Spouses are not required to state the reasons that led them to file for a proposal for divorce by mutual consent. Moreover, in the case of divorce by mutual consent of the spouses the Court is not obliged to determine the real causes for the divorce. Nevertheless, if the spouses have common minor children or adult children over whom the parental rights have been prolonged, along with the proposal for divorce, the spouses must submit an agreement about the exercise of parental rights, including the payment of alimony for the child. In providing this rule the legislature was guided by the belief that the parents know their family situation and therefore they are most competent to assess what will be best for their children. The agreement must be submitted in writing or must be given verbally in the record in front of the competent court. During the evaluation of the agreement the Court has an obligation to obtain an opinion from the Centre of Social Work on whether this agreement is in the best interest of the children. Practice shows that Centres of Social Work almost always respect the agreement reached by the parents. Otherwise, if the spouses have not reached an agreement on raising and bringing up their children after the divorce, the proposal for divorce by mutual consent will be rejected by the Court, so the married couple will not be able to divorce on this legal basis. If the spouses have reached an agreement for which the Centre of Social Work has given a positive opinion, the Court will make a decision on divorce by mutual consent, but only after it determines that the spouses gave their consent freely, seriously and unyieldingly.[26]

(b) Divorce by a lawsuit

Upon the request of one of the spouses the marriage can be dissolved: (1) if the marriage relations are disrupted to the extent that joint life is unbearable (art 40 of the FLA)[27] and (2) if the marital union has actually ceased for more than one year (art 41 of the FLA).[28] When marriage is dissolved on these grounds, guilt as a subjective factor is not subject to evaluation by the court. The guilt of

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[25] Article 39, para 1 of the Family Law Act.

[26] Article 39, para 3 of the Family Law Act.

[27] The disruption of relations, although it cannot be defined precisely, represents an objective condition which is determined on the basis of certain criteria on the environment in which the partners live, and based on generally accepted standards of human relations. An unbearable condition of living together undoubtedly is a subjective category, because it depends on the subjective assessment of each of the spouses of the situation and the circumstances that led to deteriorated relations. When it comes to divorce due to deteriorated relations between spouses, the court does not have an obligation to establish the fault for the disruption of marital relationships that led to divorce.

[28] It is mandatory for one of the spouses to file a lawsuit before the competent court asking for a divorce on the basis of actual cessation of marriage. Otherwise, the marriage remains formally valid, though the common life among the spouses actually ceased to exist in the legally prescribed term.

the spouses may be of importance only when the court is deciding on the request for spousal maintenance after the divorce.

In cited cases, as part of the divorce judgment the Court decides on the upbringing, education and maintenance of the children.[29] If parents have not reached an agreement or if their agreement does not meet the interests of the children, the Court will decide upon this question after obtaining an opinion from the Centre of Social Work and after examining all of the circumstances. Depending on this, the Court may decide from the following: (1) the children to stay for upbringing and education with one of the parents, (2) some children to remain with the mother, and some with the father and (3) all children to be entrusted to a third person or an institution.[30]

The parent to whom the children have not been entrusted for upbringing and education has the right to maintain personal relations and direct contact with them, unless the court decides otherwise in view of the interests of children.[31] If the changed circumstances so require, at the request of one of the divorced spouses or the Centre of Social Work, the Court may amend its decision on upbringing and education of the children and on the relations of the divorced spouses towards their common children.

IV THE ROLE OF THE AUTHORITIES IN DECIDING ON THE EXERCISE OF PARENTAL RIGHTS AFTER DIVORCE

In Macedonian family law the competence for deciding on the exercise of parental rights after divorce is entrusted to the Courts and the Centres of Social Work. The Court has the competency to decide on whom to entrust the upbringing and education of the common children to and on their maintenance after divorce, based on the opinion of the Centre of Social Work and after investigating all the circumstances of the case. The Centre of Social Work is responsible for arranging personal relations and direct contact between the non-resident parent and the children after the divorce. Under the Macedonian legal system the Centre of Social Work has very extended competences that are of direct relevance to the development of children, unlike the Court itself.[32]

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[29] The court shall decide on giving the care of the child to one parent when: (1) it makes a decision that the marriage does not exist, and (2) in disputes about filiation, paternity or maternity if the making of the decision about the dispute and circumstances of the case is possible and necessary (art 81, para 1).

[30] Article 80, para 2 of the Family Law Act.

[31] Article 80, para 3 of the Family Law Act.

[32] Unlike the Macedonian legislation, the situation in other countries in the region is significantly different. With the recent reform in Bosnia and Herzegovina and Croatia, the competences of the Centre of Social Work in the sphere of the exercise of parental rights are significantly reduced, and the courts have increased competences to decide on the exercise of parental rights after divorce. The law of the Republic of Srpska in only one case permits the Centre of Social Work to decide with which of the parents the child will live after divorce. In all other situations, such as when deciding on giving the care of the child's upbringing and education to one parent,

These competences of the Centre of Social Work are contrary to the Convention on the Rights of the Child, which clearly provides for judicial competence.[33] The legal regulation of the competences of the Centre of Social Work in terms of decision-making that resolves significant rights and interests of the child is also criticised by the Macedonian legal literature.[34]

(a) The Centre of Social Work

According to the Family Law Act, the Centre of Social Work has significant powers in the sphere of the exercise of parental rights during the marriage and after the divorce.[35] If parents fail to agree on the exercise of parental rights after divorce, or if their agreement does not meet the interests of the children, the Court, before making a decision, has an obligation to seek the opinion of the Centre of Social Work. The opinion of the Centre of Social Work regarding the upbringing and education of common children after divorce is prepared by its expert teams composed of psychologists, pedagogues, social workers and lawyers. The final decision on entrusting the children after divorce is delivered by the Court, but the practice shows that the Court in most of the cases accepts the opinions of the Centre of Social Work. The basic problem is that the Macedonian Family Law Act does not stipulate an obligation to consider the child's opinion in determining with which parent the child will live after the divorce. This is in direct contradiction to Art 12 of the UN Convention on the Rights of the Child, which stipulates that the child has the right to express an opinion in any judicial and administrative proceedings deciding on the child's rights and interests.[36] In an analysis of the harmonisation of national legislation with the UN Convention on the Rights of the Child one of the basic remarks refers specifically to this issue,[37] bearing in mind that the child's right to express an opinion, and to be considered, depending on the age and maturity of the child, is one of the fundamental pillars of the UN Convention on the Rights of the Child.[38]

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as well as for maintaining personal relationships and contact with the child, the court decides. See more at: Bubich and Traljich, above n 22, pp 176–182. Under Croatian law, the competence of the Centre of Social Work is reduced only when entrusting the exercise of parental rights in relation to the child's upbringing and education to another person. See more at: Alinčić, Hrabar, Jakovac-Lozić and Korać-Graovac, *Obiteljsko pravo* (Narodne Novine, Zagreb 2007) p 264.

33 Article 9 of the UN Convention on the Rights of the Child.

34 This point of view in the Macedonian legal literature is advocated by Borche Davitkovski, Gordana Buzarovska–Lazhetikj, Gordan Kalajdziev, Dejan Mickovik and Aleksandra Gruevska Drakulevski. See more in: *Comparative Review of Legislation in the Republic of Macedonia and the Convention on the Rights of the Child*, above n 11, pp 84–85.

35 For more about this see Petrushevski and Josifovska 'The Conciliation of the Spouses before the Centre of Social Work and the Participation of the Centre of the Social Work in the Procedure of Giving the Care of Children to One Parent', *Family Legislation of the Republic of Macedonia* (Supreme Court of Macedonia, Skopje, 1994) pp 252–260.

36 Article 12 of the UN Convention on the Rights of the Child.

37 See more at: Davitkovski, Buzarovska–Lazhetikj, Kalajdziev, Mickovik and Gruevska Drakulevski, *Comparative Review of Legislation in the Republic of Macedonia and the Convention on the Rights of the Child*, above n 11, p 108.

38 The absence of a legal obligation for taking into account the opinion of the child when

The primary interest of child is paramount when the Court decides with which parent the child will remain for guardianship and upbringing after the divorce, while other elements, such as guilt for causing the divorce or the financial situation of the spouses, are not decisive in assessing whether the child or children are going to be entrusted to one or the other parent, or will be entrusted to a third person or a guardianship facility. In this regard, the Court Skopje 1 held that the Centre of Social Work unlawfully awarded the child to the father, on the grounds that the family home was in his possession, despite the fact that the father committed domestic violence against the mother in front of the child's eyes.[39] Such a decision by the Centre of Social Work is completely unacceptable because the perpetrator of domestic violence was awarded custody over the child on the grounds that he was the owner of the family home and therefore had better housing conditions.

One of the most important issues that arises when parents are divorced is the right of the non-resident parent to maintain personal relations and direct contact with the child. Legislation provides the possibility for parents to settle this issue by an agreement. But if the child's parents within 2 months do not come up with an agreement regarding personal relations and direct contact with the child, the Centre of Social Work shall decide upon this matter. This situation is very common, as a result of the disturbed relations between parents after divorce, which negatively influences the child's development. In the Macedonian Family Law Act there is no legal provision which regulates the issue of the extent of personal contact between one parent and the child, if the parents do not live together. This important issue is at the discretion of the Centre of Social Work, and its decisions frequently cause conflict, which

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deciding which parent will be awarded custody of the child is a major omission by the Macedonian legislature, especially if we bear in mind that in the Family Law Act (art 79, para 2) it is provided that, when parents do not live together, the Centre of Social Work, when deciding on the arranging of personal relations and direct contact of the child with the parent, has an obligation to inform the child and is obliged to take into account the child's views and opinions, depending on the child's age and level of development. This means that the legislature stipulates an obligation to take into account the opinion of the child on maintaining personal contact with the parent with whom the child does not live, but does not provide an obligation to hear the opinion of the minor on a more significant issue such as the confining of the child's upbringing to one of the parents after divorce.

[39] After a conflict between the spouses happened the respondent was dragged by her hair down the stairs and literally was driven out of the apartment in which the family then lived. The respondent attempted to take the child away with her, but was prevented by the plaintiff. The respondent was forced to leave the child at home and go to her parents. The only reason according to which the professional team of the Municipal Centre of Social Work expressed the opinion that minor A should be entrusted for upbringing to the father was the better housing conditions, which was the only issue with the respondent that remained unresolved. But the court decided as stated in the text because it believed that the child's priority at this age was to be with the mother. This Court held that the act of expulsion of the mother from the home in front of the child's eyes was a violent act that the child will never forget, and will affect the formation of his conscience and subsequent understandings. If such violence, condoned by the Centre of Social Work, were subsequently acknowledged by the Court, in that situation the black image in the consciousness of the child would be complete – the child will realise that violence is beneficial, and that the mother's love is less important than having a children's room with a computer. Trial Court Skopje 1 – Skopje judgment 17.P1–862/11 from 4 January 2012.

negatively affects the children. Practice shows that the contact of the child with the non-resident parent (and it is usually the father) is very restrictively determined by the Centre of Social Work. This is contrary to the UN Convention on the Rights of the Child, which provides that a child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the best interests the child.[40] Therefore, we believe that, in the process of amending the existing family law, the issue concerning the extent and type of contact of the child with the non-resident parent must be precisely regulated, thus always keeping in mind the best interest of the child.

The Centre of Social Work has extremely wide powers in the supervision of the performance of parental rights, and maintenance of personal relations and direct contact with the child. In this sense, the Centre of Social Work can take the child from one parent, and entrust the guardianship and upbringing of the child to the other parent, or any other person or adequate institution, when parents or the parent with whom the child lives neglects the child in terms of upbringing and education, or when there is a serious danger to the child's proper development and upbringing.[41] Such a solution is contrary to the UN Convention on the Rights on the Child which provides a judicial review when decisions are made by which a child is separated from one or both parents. This solution is contrary to the Law on Non-Litigation Procedure of the Republic of Macedonia, which envisages that the Court, and not the Centre of Social Work, is authorised to revoke or restrict parental rights.

If the non-resident parent has not provided maintenance for the child for more than 3 months, the Centre of Social Work may decide to limit his right to maintain personal relations and direct contact with the child.[42] In a time of economic crises, when poverty and unemployment are common in Macedonian society,[43] this legal solution which gives priority to material values seems illogical and inhuman. This legal solution represents a sanction against the parent, but it is a punishment for the child as well, because the child has a right and interest to maintain personal relations and direct contact with both parents. In order to respect the interests of the child, the state should find other suitable solutions for providing alimony in cases where the parent does not pay child support, rather than envisaging bans on parents in maintaining personal contact with the child.[44]

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[40] Article 9, para 3 of the UN Convention on the Rights of the Child.

[41] Article 87, para 1 of the Family Law Act.

[42] Article 87, para 2 of the Family Law Act.

[43] Unemployment and poverty are the two biggest problems which Macedonia faces nowadays, due to the fact that almost 30% of the population is unemployed, and the same is the percentage of poverty in the country.

[44] A good example of a legal solution in cases when the parent is not paying for child support is found in the Bulgarian Law, where it is envisaged that in this case the burden of the child's support falls on the State Budget, which has the right to require execution against the property of the parent who has not paid the support. More on this can be seen at: Mateeva, *Family Law Act of Republic of Bulgaria* (VSU 'Chernorizec Hrabar' Sofia, 2010) pp 476–496; Cankova,

The Family Law Act provides other situations where the Centre of Social Work is authorised to limit contact of one parent with the child after divorce. The Centre of Social Work may make a decision to limit the right of the non-resident parent to maintain personal relations and contact with the child in cases where the parent has not respected the decision of the Centre of Social Work for more than three consecutive times without justification.[45] Thus, the legislation leaves a broad discretionary authority with the Centre of Social Work to determine if the reasons for which the parent has not respected the decision were justified or not, which nonetheless affects a child's right to maintain personal relations and contact with the parent. In practice, major problems are caused by the legal solution under which the Centre of Social Work may make a decision to limit or to ban the parent's right to maintain personal relations and contact with the child for a period of time, but no longer than 6 months, if the parent has not returned the child in the time scheduled by the decision, or if the parent has retained the child longer than the time specified in the decision.[46] So, the legislature opted to entrust very wide powers to an extrajudicial authority to limit the contact of the child with the non-resident parent.

Considering the above, it is necessary for the legislature to review the role and responsibilities of the Centre of Social Work, and to transfer its authorities concerning the exercise of parental rights after divorce to the court's jurisdiction.[47] Otherwise, instead of resolving the problems connected with the exercise of parental rights after divorce, the decisions made by the Centre of Social Work will continue to cause problems in practice, to the detriment of the interests of children.[48]

(b) The Court

When the Court reaches a decision about divorce, it must decide to which parent the children will be entrusted for guardianship and upbringing. When

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Markov, Staneva and Todorova, *Comments on the New Family Code* (IK 'Labour and Law', Sofia 2009) pp 420–421; Markov, *Family and Inheritance Law* (Sibi, Sofia, 2009) p 161.

45 Article 87, para 3 of the Family Law Act.

46 Article 87, para 5 of the Family Law Act.

47 Under the Croatian law, through the narrowing of the competences of the Centre of Social Work, the jurisdiction of the Non-Litigation Court has significantly increased. In this respect, the Non-Litigation Court is competent to decide with which parent the child will live, personal relations and direct contact and the manner and timing of their realisation, as well as the restriction and prohibition of such relationships. For this, see more at: Alinčić, Hrabar, Jakovac-Lozić and Korać-Graovac, above n 32, pp 267–280.

48 In the Republic of Macedonia, children after divorce are usually entrusted for upbringing and education to the mother. The competence of the Centre of Social Affairs to restrict the contact of the child with the father has serious negative implications for the proper development of the child. According to McLanahan, who did an overall analysis of several researches dedicated to the children's welfare after divorce, the lack of contact with the father after divorce is associated with achieving poorer results at school among observed male and female children, higher unemployment among boys and higher number of juvenile pregnancy cases among the girls. See Bauserman, 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements, A Meta-Analytic Review' (2002) 16(1) *Journal of Family Psychology* 91.

making the decision, the Court is guided by the best interests of the child, and thus takes into account all the facts and circumstances of the particular case. One fact or circumstance will not always by itself be determinative for the Court in reaching its decision. In this respect, the Supreme Court of the Republic of Macedonia reached a decision that the beneficial financial situation of one of the parents is only one of the touchstones, but not a sufficient criterion, for the award of the child to such a parent for upbringing, education and maintenance.[49] Fault for the divorce should not affect the decision to which parent the child will be entrusted for upbringing after divorce. In this regard, the Supreme Court of Macedonia has accepted the standpoint according to which fault for the disruption of marital relations by one of the spouses cannot be an obstacle for that spouse to be entrusted with the right to bring up and educate the child, if this solution is in the best interests of the child.[50]

The parent to whom the child is not entrusted for upbringing and education has the right to maintain personal relations with the child in a manner and extent agreed by the parents, or as has been decided by the Centre of Social Work. Considering that for normal psychological development the child needs both a mother and a father, modern family legislation introduces the concept of joint execution of parental responsibilities after divorce.[51] The concept of joint participation of parents in the care of the child is provided in the most important international documents related to the rights and interests of children.[52] Despite the fact that the child's custody is given only to one parent, the joint exercise of parental rights involves joint decision-making on all important issues related to the life, health, education, upbringing and representation of the child. The basic assumption for the joint exercise of parental rights by both parents after the dissolution of marriage is their willingness to make decisions that are in the best interest of the child.

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[49] See: Review of the Supreme Court of Republic of Macedonia 99/89 VSM III decision 28.

[50] See: Supreme Court of Republic of Macedonia Gzh 497/65, Zb VSM I decision 3.

[51] The joint exercise of parental rights after divorce is a general tendency in modern legislation. According to Patrick Parkinson, in many countries laws have been changed in order to allow the joint exercise of parental rights after divorce. In some countries, such as Sweden, the court may decide on the joint exercise of parental rights after divorce contrary to the will of the parents. See Parkinson, above n 3, p 8. In the Netherlands in 1997, 34% of parents decided on the joint execution of parental rights after divorce, and after legislative reform 93% of parents opted for the joint execution of parental rights in 2001. See Jeppesen de Boer, *Joint Parental Authority* (Intersentia, Antwerpen, Oxford, Portland, 2008) p 4. In Austria, after the reform of 2001, 50% of parents opted for joint execution of parental rights after divorce. See more in Kränzl-Nagl, *Joint Custody after Divorce: Austrian Experiences*, Policy Brief, November 2006, European Centre, p 3. According to Irène Théry the family does not cease after the divorce, but is only experiencing transformation. According to Théry 'divorce is a transition between the original family community and the reorganization of the family, which remains the community, but bipolar'. Irène Théry, 'The Interest of the Child and the Regulation of the Post-Divorce Family' (1986) 14 Int'L J Soc L 341.

[52] Article 5 and Art 9, para 1 of the UN Convention on the Rights of the Child; Recommendation on parental responsibilities of the Council of the Europe from 1987.

The parent who is not living with their children has the right to maintain personal relations and direct contact with them unless the court decides otherwise after taking into consideration the child's interests.[53] In this regard, the Supreme Court of the Republic of Macedonia reached the decision that the parent who has been given care of the child has authority to allow the other parent, despite regular weekly contact (one day per week), to take a child for a weekend once a month for a period of 2 to 3 days, and during the holidays, to spend 2 to 3 weeks with child.[54] At the request of one of the divorced parents or the Centre of Social Work, the Court may modify the decision on the upbringing of the children and the relations between the divorced parent and the children, if it is required by the changed circumstances.[55]

V EXERCISE OF PARENTAL RIGHTS IN MACEDONIAN FAMILY LAW DE LEGE FERENDA

In the Macedonian Family Law Act there is no precise legal provision under which the parents jointly perform parental rights after divorce. The joint performance of parental rights arises from the provisions laid down in art 45 of the Family Law Act,[56] as well as from art 76 of the Family Law Act.[57] Hence, the legislature has foreseen the joint exercise of parental rights as a basic principle in family law. However, there is a need to explicitly predict the joint exercise of the parental responsibilities after divorce. In real life in Macedonia the parent to whom the children have been entrusted for upbringing after divorce makes all the important decisions concerning the rights and the interests of the children, and the other parent is awarded only the right to maintain personal relationships with the children and the obligation to pay child support. This negatively influences that parent's willingness to engage in maintaining a personal relationship with the child, because he is practically excluded from the opportunity to decide on the matters that are crucial for the future of the child. The joint exercise of parental rights after divorce is in the mutual interest of the father, of the mother and of the children.[58] In this context, it is important to amend the Family Law Act and to provide that the

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53 Article 80, para 3 of the Family Law Act.

54 See: Supreme Court of Republic of Macedonia 1251/77, VSM II decision 149.

55 Article 80, para 4 of the Family Law Act.

56 According to art 45 of the Family Law Act: 'The parental right belongs equally to the mother and the father.'

57 According to art 76 of the Family Law Act: 'The parents carry out the parental right mutually and by agreement.'

58 According to Marjorie Lindner Gunnoe and Sanford L Braver the benefit for the father in the case of joint exercise of parental rights after divorce consists of feeling less emotional loss and depression, anger and discontinuity in performing the parental role. The benefit for the mother consists in a father's greater willingness to pay child support, more assistance in taking care of the child and more time for professional development. The benefits for the child are better relationships with both parents, better cooperation between parents in the exercise of parental responsibilities and better child adjustment after divorce. See more at: Lindner Gunnoe and Braver, 'The Effects of Joint Legal Custody on Mothers, Fathers, and Children Controlling for Factors That Predispose a Sole Maternal versus Joint Legal Award' (2001) 25(1) *Law and Human Behavior* 26, Special Issues on Children, Families, and the Law (February 2001).

joint exercise of parental rights after divorce should be a fundamental principle. The law should provide that the court may entrust the exercise of parental rights to one of the parents only if that is required by the interests of the child.

In addition, the law should be amended where it lists the competences of the Centre of Social Work in relation to the exercise of parental rights after divorce and the supervision over the exercise of parental rights. The Centre of Social Work has an extremely large competence when deciding about the exercise of parental rights after divorce. Under Art 6, para 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, in the determination of civil rights and obligations (including personal and family rights), everyone is entitled to a fair and public trial within a reasonable time by an independent and impartial tribunal established by law. Considering this, and the fact that court decisions provide a higher level of legal certainty, impartiality and flexibility in decision-making, we think that in the prospective amendments of the Family Law Act it needs to be underlined that the Court and not the Centre of Social Work should be competent to decide on issues related to the exercise of parental rights after divorce.

Mexico

FAMILY LAW REFORM IN MEXICO CITY: THE CONTEMPORARY LEGAL AND POLITICAL INTERSECTIONS

Graciela Jasa Silveira[*]

Résumé

La ville de Mexico (le District fédéral de Mexico) a entrepris de profondes réformes en droit de la famille, et spécifiquement dans le sens de l'égalité et des droits de la femme. Les changements entrainent des droits accrus pour les concubins, la création d'un contrat d'union civile et même du mariage et de l'adoption pour couples de même sexe, du divorce unilatéral ainsi que la dépénalisation de l'avortement. Ces réformes légales représentent un progrès important pour l'intégration du principe d'égalité dans la législation familiale.

Cependant, ces réformes ont été adoptées dans un contexte juridique et politique complexe. Ainsi, pour comprendre ces réformes, il est important de les replacer dans leur contexte.

I INTRODUCTION

The recent private law autonomy endowed on the Federal District (Mexico City) has marked a watershed for gender-equitable family law reform in Mexico. Among the changes have been almost full marriage rights for concubinage unions, the institution of civil unions, same-sex marriage and same-sex adoption, unilateral divorce and decriminalisation of abortion. The Federal District's family law reforms are notable not only for their radical liberal flavour but also because of the new federal context in which they arose; they are the fruits within a larger ideological, political and legal democratisation political project. They showcase two important Mexican family law issues: (1) the complex historical, legal and jurisdictional issues that are at play in family law changes given Mexico's system of federalism; and (2) the important implications that power over private law has in the Mexican family law reform landscape.

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Recently, scholars have described the different ways that women's rights have been influenced by jurisdictional politics. For example, scholars writing on federalism have noted the different state and federal boundary issues that family law reform has uncovered within the United States and Canada and the strong political components and jurisdictional questions at play behind a rights-based approach to family law reform.[1] Others have drawn attention to the different problems of 'interlegality' that have materialised from efforts to simultaneously unify family laws through adoption of international laws.[2] However, little is known of how the politics of that federalism and internationalisation have played out for women's family law rights in Mexico.

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[1] See generally Ann Laquer Estin 'Federalism and Child Support' (1998) 5 Va J Soc Pol'y & L 541 (provides a picture of family law as one constituted by multiple 'overlapping layers' or of 'state and federal authority', as opposed to one divided by the federal state division); Ann Laquer Estin 'Family Law Federalism: Divorce and the Constitution' (2007) 16 Wm & Mary Bill Rts J 381 (by way of divorce reform the author underscores the increasing nationalisation of family law through improved federal and state coordination); Ann Laquer Estin 'Sharing Governance: Family Law in Congress and the States' (2008) 18 Cornell JL & Pub Pol'y 267 (highlights the shift in the location of political and legal authority of the family in the states and its implication to US federalism); Judith Resnik 'Categorical federalism: Jurisdiction, gender, and the globe' (2001) 111 Yale LJ 619 (offers an reappraisal of what an unbounded federalism could mean for women); Judith Resnik 'Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism' (2007) 57 Emory LJ 31; Naomi R Cahn 'Family Law, Federalism, and the Federal Courts' (1993) 79 Iowa L Rev 1073 (examination of the effect that double stranded federalism has for women) and Jill Vickers 'A Two-Way Street: Federalism and Women's Politics in Canada and the United States' (2010) 40 Publius J Federalism 412 (comparison of how federalism has shaped abortion politics differently in the US and Canada).

[2] From a supranational law lens see generally Barbara Stark 'When globalization hits home: international family law comes of age' (2006) 39 Vand J Transnat'l L 1551 (showcases the different supranational sources influencing family law internationalisation and their effect on women and families); Adair Dyer 'The Internationalization of Family Law' (1996) 30 UC Davis L Rev 625–646ff (noting the top-down and bottom-up effect of family law internationalisation in the area of children's rights); from a supranational and federalism perspective, see Ann Laquer Estin 'Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States' (2010) 62 Fla L Rev 47 (draws attention to the hybrid nature of family law internationalisation and the different scales of governance it intersects in the area of children's rights); Merle H Weiner, 'Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States over the Last Fifty Years' (2008) 42 Fam LQ 619 (underscores the domestic laws that have developed at state and federal level in the United States to take into account family law disputes with transnational dimensions, that incorporate international laws into domestic family affairs, and the international forums created to address litigants' family law issues); Judith Resnik 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry' (2005) 115 Yale LJ 1564 (highlights the different ways international laws have made their way into the United States despite opposition to foreign and international law); from a legal pluralism perspective, see generally Sally Engle Merry 'Colonial and Postcolonial Law' in *The Blackwell Companion to Law and Society* (Oxford: Blackwell Publishing Ltd, 2008); Sally Engle Merry 'Anthropology and international law' (2006) 35 Ann Rev Anthropol 99; from a comparative law lens, see generally Keebet von Benda-Beckmann 'Globalisation and legal pluralism' (2002) 4 Int'l LFD Int'l 19 and Brian Z Tamanaha 'Understanding legal pluralism: past to present, local to global' (2008) 30 Sydney L Rev 375.

This chapter is divided into two main sections. First, Part II explores the political changes that took place in Mexico City between 1990 and 2000 that gave way to watersheds for gender-equitable family law reform in Mexico and the disparities between Mexican family law at state and federal level that Mexico City's family law changes have created. Secondly, Parts III–VI explore the legal changes that took place in Mexico City's family law[3] relating to concubinage, cohabitating partnerships, same-sex marriage and unilateral divorce.

II LEGAL AND POLITICAL CONTEXT AGAINST THE BACKGROUND OF MEXICO CITY'S FAMILY LAW REFORMS

Mexico is a country divided into 32 sub-federal entities, 31 of which are full sovereign states and one which functions as a Federal District (*Distrito Federal* or DF). The Federal District is commensurate with that of Mexico City, which is the nation's capital. As one of the world's largest cities, Mexico City is not only the nation's capital and home of the powers of the union; it has a political and geographical scope of more than 15 delegations and 38 municipalities.

As the seat of the power of the union, the area encompassing Mexico City was under the authority of the federal government until 1997, authority that extended to private law matters.[4] The Congress of the Union had general licence to legislate for Mexico City (Federal District), designate its judiciary and the power to divide and distribute the District's internal divisions.[5] In addition, the President of the Republic was empowered to designate and remove at will the two main heads of Mexico City's executive power, the local governor and Attorney-General.[6]

The imposition of a representative selected by the federal government and not by the city's citizens was a source of constant and often bitter resentment among the inhabitants of Mexico City.[7] There was also deep-seated concern

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[3] Family law is an umbrella term used here to refer to legal changes within Mexico City's (substantive and procedural) civil law and the interpretations adopted by the Mexican Supreme Court of the rights contained therein.

[4] Article 44 of the *Constitución Política de los Estados Unidos Mexicanos, 1917* (as amended by *Diario Oficial de la Federación* (DOF) 25 October 1993) (Mexican Constitution of 1917).

[5] See Mexican Constitution of 1917, art 73(VI).

[6] See Mexican Constitution of 1917, art 73(VI)(3a). Up until the 1986 reforms, the Federal District was governed indirectly by the President of the Republic, who delegated his authority to a federally appointed Head of the Federal District Department, referred to as the *Regente* (Regent). Federal Congress also had power to legislate in private law matters in Mexico City.

[7] For commentary and analysis relating to the problems of centralisation of power in Mexico see Guillermo Boils Morales 'México: una ciudad sin gobierno democrático' (1987) 3(1) Mexican Studies/Estudios Mexicanos 195; Enrique Serna 'Giros negros: La opulenta México' *Letras Libres (*August 2002) 68; Luis Maeda Villalobos 'El centralismo hace daño a la nación' *El Siglo de Torreón* (8 November 2003). For a review of the political changes against the background of Mexico City's democratically elected governor, which spurred political

over the legislative-political effect of the federal government's power.[8] The extent of federal government power over local matters was multiplied by the dual jurisdiction that the *Código Civil para el Distrito Federal en Materia Comun y para Toda la Republican en Materia Federal, 1928*[9] (Civil Code for the Federal District in Local Matters and for the Whole Republic in Federal Matters, 1928, hereinafter CCDF 1928) had in regulating private law matters both in Mexico City and at a federal level.[10] The CCDF 1928 had indirectly permeated the 'federal pact' that gave states exclusive authority over civil and criminal matters, by serving as a model and rule from which to interpret civil law.[11] This arrangement in turn had an overriding effect on state family law by stifling law reform within states and the Federal District and endorsing the presumption that state civil codes were virtual copies of the federal model.

The jurisdictional independence of Mexico City came about as part of the national 'democratic transition' that took place within the Federal District between 1986 and 2000. This process was characterized by three elements: the establishment of a multi-party governing system, the creation of a democratically elected executive authority for the Federal District and the formation of a quasi-state government system. Mexico City's longstanding legal and political arrangement with the federal government changed with the 1997 constitutional reforms introduced by Presidents Carlos Salinas and Ernesto Zedillo. Operatively it has given the constituents of Mexico City (Federal District) a special regime, a 'mixed system of distribution of competence'.[12] This system is made up of three levels of governance:

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pluralism, greater decentralisation and collaboration between the executive, legislature and judiciary at federal and local level see Victoria E Rodriguez 'Recasting federalism in Mexico' (1998) 28 Publius: The Journal of Federalism 235 and Peter M Ward, Victoria E Rodriguez 'New federalism, intra-governmental relations and co-governance in Mexico' (1999) 31(3) *Journal of Latin American Studies* 673.

8 If the seat of the power of the union was changed and Mexico City became a state, it would take the name 'Valley of Mexico State'. See Diane E Davis and Martha Donís 'Protesta social y cambio político en México' (1988) 50 *Revista Mexicana de Sociología* 89 (discusses the partisan tensions against the background of resistance towards the Federal District's autonomy).

9 *Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, 1928* (DOF 7 January 1926, 3 January 1928 and 30 August 1928) (Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928). The Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928 code was initially enacted through four separate decrees publishing different parts of the code in the official federal reporter *Diario Oficial de la Federación* (DOF).

10 The Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928 code was applicable in the Federal District in local matters and throughout Mexico in federal civil law matters until the enactment of the CCDF 2000 and the *Código Civil Federal* (Federal Civil Code or FCC) in 2000 (DOF 29 May 2000).

11 See Miriam Castillo 'Jefe de Gobierno capitalino, Ebrard exige autonomía legislativa para mejora en derechos humanos, Ciudad de México, Serias deficiencias en las investigaciones del caso Paulette, opina Álvarez Icaza' *Milenio* (20 April 2010) available online at www.milenio.com/cdb/doc/noticias2011/562a77fdb11ec7137554a9298bab480c (accessed June 2013).

12 José María Serna de la Garza *El Sistema Federal Mexicano: Un Análisis Jurídico* (Mexico City: Instituto de Investigaciones Jurídicas UNAM, 2008) at 57.

(a) a regime of 'express' powers reserved for the Congress of the Union;[13]

(b) subject matter not expressly conferred upon the Legislative Assembly of the Federal District but reserved for the Congress of the Union;[14] and

(c) a regime with express and limited designations of power for the Legislative Assembly of the Federal District to exercise according to the Statute of the Government of the Federal District.[15]

These reforms substituted the federal government's power to designate the Regent in exchange for a newly created authority, the *Jefe de Gobierno del Distrito Federal* (Head of Government of the Federal District), to be appointed through popular election.[16] The changes also provided the Federal District with executive, judicial, and legislative independence from the federal government, including power to legislate in civil and criminal matters.[17] As a result, Mexico City was granted an autonomous government, similar to that of the states with authority to elect its own chief of government and delegation leaders, establish and elect a legislative assembly of its own and legislate in civil and criminal law matters, akin to that of the federated states.

Initially, both the Federal government and Mexico City had the exact same civil codes because the new government provisionally adopted the text of the existing Federal Civil Code (FCC).[18] However, beginning in 2000, the Legislative Assembly for Mexico City, using its newly acquired legislative powers, published a number of family law reforms to the Civil Code for the Federal District 2000 (CCDF 2000) which created striking differences between the new CCDF 2000 and its predecessor, the FCC.[19] Given the liberal nature of the civil code reforms in Mexico City, the new CCDF 2000 created an important liberal force in terms of recognition of rights within Mexican civil codes.

III MARRIAGE AND DIVORCE-LIKE RIGHTS OF CONCUBINES

The reforms of the CCDF in 2000 broadened cohabitant rights through the inclusion of concubinage in the types of bonds created through affinity.[20] Through this explicit recognition of family status, cohabitation between a

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13 Mexican Constitution of 1917, art 122(A)(II–V).

14 Mexican Constitution of 1917, art 122(A)(I & c).

15 Mexican Constitution of 1917, art 122(C), first requisite (V).

16 The growth of the PRD political position in national politics has been due to this new jurisdictional forum from which it successfully brought about discussion and changes in both the political and legislative realms.

17 Mexican Constitution of 1917 (as amended by DOF 22 August 1996), art 122.

18 See above n 10.

19 Ibid.

20 CCDF 2000, art 294. Kinship by affinity (*parentesco de afinidad*) is that which is acquired by marriage or concubinage between a woman or a man and their respective blood relatives.

woman and a man now has legal consequences that create support rights, succession rights and a presumption of paternity regarding children.[21]

Concubinage is not defined directly in the CCDF 2000, nor in the FCC. Which unions constitute concubinage unions requires determining the extent to which a relationship fulfils the requirements established by the Code. There are three main elements that a concubine must show to establish concubinage:[22] (a) consorts should not have another established claim of concubinage; (b) consorts must show that they are single and legally able to contract marriage (not married); (c) consorts must show they have cohabitated continually for at least 2 years or have had a child together. While initially concubinage meant only a female in the CCDF 1928, this changed with the reforms in 1983, which included *concubinos* or male concubines as inheritance rights bearers.[23]

Prior to the CCDF 2000, unwed concubine consorts in Mexico City[24] had a presumption of paternity towards children born within the union if the children were born 180 days after initiating the relationship or less than 300 days after the union had ceased.[25] Concubines also had support obligations towards their descendants and mutual support rights between consorts if they had cohabitated for 5 years or had born children together.[26] Consorts also had mutual inheritance rights provided there was only one surviving concubine and not several.[27] However, in contrast to the treatment afforded to married spouses, concubines were not recognised as creating a lawful family affinity.[28] This resulted in concubine consorts being left without the same affiliation and inheritance rights as those afforded to married spouses.[29]

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21 CCDF 2000, art 291 quater.

22 CCDF 2000, art 291 bis.

23 CCDF 1928, art 1635.

24 Within Mexico City at both local and federal civil law level.

25 Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928 (above n 10) (as amended by DOF 27 December 1983), art 383.

26 Ibid, arts 302–303. The Mexican state of Tlaxcala offered concubines the same rights. This contrasts with the civil code for the Mexican state of Morelos which only gave support rights in favour of female concubines. The state of Tlaxcala gave support rights only upon the death of one of the concubines and only when the surviving spouse observed good conduct, did not marry, was unable to work and had no property to call their own. Flavio Galván Rivera 'El Concubinato Actual en Mexico' *Medio Siglo de la Revista de la Facultad de Derecho* (Mexico City: UNAM, 1991) at 556.

27 Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928, art 1635.

28 One exception was the Civil Code for the State of Tlaxcala and Puebla which recognised concubines as having a legal family affiliation with their concubine spouse and families. Galván Rivera 1991, above n 26 at 558.

29 It also restricted concubines from formally adopting their partner's family name as their own, a right permitted married wives in some states. Gálvan notes that arts 97–99 of the Civil Code for the State of Hidalgo permitted women upon marriage to adopt a name to use when married and that they could either conserve their maiden family name or add to their own last name that of their husband. In practice however, both married and unmarried wives frequently informally adopted their husbands' family name with or in substitute of their own, a practice that remains (ibid).

Justification for cohabitation reforms in Mexico City in the year 2000 was reasoned from the viewpoint that the distinction between concubines and married spouses was discriminatory. Thus, in aiming to equate concubinage to marriage, the concubinage union was recognised as a family institution with its own status rights.[30] The reforms introduced the notion of recognition of economic and non-economic contributions, and support and division of property principles.[31] In contrast to the CCDF 1928 the new CCDF 2000 does not establish a de minimis cohabitation period for concubines to have a right to support.[32] Although support obligations are only enforceable after dissolution of the relationship,[33] they can be granted for a period of time equal to that of

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[30] The reforms do not adopt a definition of concubinage per se. However, by outlining the requisites for recognition of rights and obligations of concubines, the reforms indirectly define the institution. Thus chapter eleven of the CCDF 2000 relating to concubinage, states that a concubinage relationship results from a reciprocal relationship of obligations and rights between female and male concubines, if and only when they both are devoid of legal impediments to contract marriage, have cohabited together continually for a minimum of 2 years or when a child has been born from the relationship. The code establishes that a relationship of concubinage can only be established between two persons, and that multiple concubinages will annul all actions for concubinage. See CCDF 2000, art 291 bis, above n 10.

[31] Federal Civil Code, art 164: 'Spouses shall jointly make their financial contributions for the maintenance of the home, their food requirements, those of the children, as well as for their education as provided by law, without restriction of the distribution of the burden in accordance with their mutual agreement and their income-producing abilities. If either is disabled for remunerative employment and without assets, the other spouse shall carry the full burden of expenses. The rights and obligations created by a marital relationship shall always be equal between the spouses and independent from their respective economic contributions for the maintenance of the home.' Article 308 of the Civil Code for the Federal District details what is considered support. Support (*alimentos*) comprises: 'I. The food, clothing, dwelling, medical attention, hospitalization and, when appropriate, pregnancy and birth expenses; II. In addition, regarding minors, the expenses for their education and for providing them with a trade, art or profession adequate to their personal needs; III. With regard to persons with some kind of physical incapacity or those declared in state of interdiction, what is necessary to accomplish, within feasible means, their training or rehabilitation and their development; and IV. Regarding elderly people (*adultos mayores*) who lack economic capacity, in addition to whatever is needed for their geriatric care, and effort should be made for them to receive support, incorporating them into the family.'

[32] CCDF 2000, art 291 quater & quintus, above n 10. See also Manuel F Chávez Asencio 'Comentarios al Código Civil para el Distrito Federal' (2000) 30 *Jurídica: Anuario del Departamento de Derecho de la Universidad Iberoamericana* 357 at 369–374.

[33] CCDF 2000, art 291 quintus. Initially courts interpreted, in non-binding case-law, that if a support request came after one of the concubines had moved out of the family home, the request was deemed inexistent. However, the court reading of the law change in 2010, recognised that concubines have a right to request support after the dissolution of the relationship if they can show that they lack the income and property to sustain themselves. This support will only be given for a period equal to that of the duration of the relationship and will proceed if the request is formulated within a one-year period after the dissolution of the relationship. See '*Alimentos en el concubinato. La obligación de proporcionarlos existe solamente cuando el vinculo subsiste*', [TA]; 9a. Época; TCC; SJF y su Gaceta; Tomo XXI, June 2005; p 757; '*Concubinato. Los derechos que produce entre los concubinos solo duran mientras la relación subsista*', [TA]; 9a. Época; TCC; SJF y su Gaceta; Tomo VII, June 1998, p 626; '*Concubinato. El derecho a alimentos es exigible aunque la vida en común de los concubinos haya cesado'*, [TA]; 9a. Época; TCC; SJF y su Gaceta; Tomo XXXII, September 2010; p 1216; '*Alimentos. Es un derecho limitado al mismo lapso que duro el matrimonio, que cuando no hay conyugué culpable en el divorcio necesario, porque la causal de divorcio prevista en la fracción IX*

the relationship if one of the requesting concubines does not have any personal income or assets. In addition, a concubine who has shown 'ingratitude', is involved in another concubine relationship, or is married cannot claim support. Concubines who have been full-time home and family caretakers are however assumed to require support.[34]

Concubines now have a family status which gives consorts a share of the family patrimony.[35] In practice this right recognises that concubines and their offspring are entitled to have their assets protected from liens or unauthorised selling until the partnership is dissolved or ends.[36] The CCDF 2000, however, did not provide concubines with direct rights over property acquired during the union.

Notably, Mexico City's concubinage reforms have indirectly contributed to case-law recognising property rights in favour of concubine spouses and furthered legal enactments in other states that have further narrowed the gap between the rights of concubines and married spouses. For example, in 2007 the Collegiate Circuit Courts delivered binding case-law which denied a former concubine the division of property rights resulting from the dissolution of her concubinage relationship.[37] The court found that a concubinage relationship does not generate a division of property rights according to the terms of divorce for married partners.[38] The court argued that, even when reforms to the CCDF sought to provide equal protection to concubinage with respect to children and in favour of female concubines, it also sought to render homage to the institution of marriage, because it considered marriage to be the 'legal and moral manner' of constituting a family.[39] The court found that while the institutions may be similar, they are 'abstractly and ethically different' and

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del articulo 267 del Código Civil para el Distrito Federal se asemeja más al divorcio voluntario', [J]; 9a. Época; TCC; SJF y su Gaceta; Tomo XXIX, February 2009; p 1661.

34 '*Concubina. Goza de la presunción de necesitar alimento*', [TA]; 9a. Época; TCC; SJF y su Gaceta; Tomo XXXII, September 2010; p 1215.

35 CCDF 2000, art 724.

36 CCDF 2000, art 727. The figure of family patrimony law under Mexican law provides for certain assets to be legally protected from any encumbrance or lien as a way to ensure that food and housing for all family members is protected. To invoke this right in Mexico City, a filing must be made with a family law judge who will authorise the creation of the family patrimony and registration in the Office of the Public Registry if all the requisites are fulfilled. Family patrimony can consist of both moveable and real property but is limited to the family home, furnishing for domestic use, farm land, industry or commerce worked by the family and tools used for this family business. The title to the property included in the family patrimony transfers to family members, creating a de facto co-proprietorship between the family members included in the registration. See CCDF 2000, arts 723, 725, 731–732.

37 See '*Concubinato. No genera el derecho a la indemnización a que se refiere el articulo 289 bis del Código Civil para el Distrito Federal*', AMPARO DIRECTO 619/2006, Registro No 19871, Localización: Novena Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, Tomo: XXV, January 2007, p 2222 ('Concubinato 619/2006').

38 Concubinato 619/2006.

39 Ibid.

claims for the division of property rights relating to divorce are only applicable to those who have a marriage certificate, something that is absent from concubinage relationships.[40]

However, in 2008 the court gave a non-binding decision that has indicated a substantive change in the reading of property rights of concubines. The court specifically examined the lack of a specific property regime associated with concubinage relationships. It stated that when the division of concubine rights and property results from the products that arose from the joint collaboration of concubines, the criteria for determining the division of property should be based on the rules for de facto partnerships.[41] The court reasoned that while there might not be express consent to the partnership, the nature of concubinage as a family institution suggests that concubines tacitly agree to combine their resources and efforts for a common objective: the constitution of a family nucleus.[42] While there might not be explicit consent to the partnership, tacit consent is deemed to have been given on behalf of the partners through the act of cohabitation. Contributions can be non-economic or economic, and contributions of property imply transmission of property to the partnership.[43] As such, the court found that division of property rights between concubines is to be determined by the rules of partnership under civil law.[44]

Diffusion of the CCDF 2000 in different state codes has also resulted in the expansion of concubinage rights through formal recognition of marriages celebrated under religious and indigenous laws and the creation of registration schemes and divorce provisions applicable to concubinage.[45] The *Ley para la Familia de Hidalgo* (The Family Law of Hidalgo, FLH) has created a de facto marriage regime and set up divorce-like proceedings for the dissolution of these de facto marriage relationships.[46] In contrast to the development of the scheme of civil unions for both heterosexual and same-sex couples in Mexico City[47] and Coahuila,[48] the FLH has introduced a mechanism to 'officialise' or 'judicialise' the concubinage relationship.[49]

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40 Ibid.

41 '*Concubinato. La inexistencia de un régimen patrimonial, no impide la liquidación de los bienes y derechos adquiridos por el trabajo común de los concubinos, mediante las reglas de la sociedad civil*', [TA]; 9a. Época; TCC; SJF y su Gaceta; XXVIII, September 2008; p 1219.

42 Ibid.

43 Ibid.

44 Ibid.

45 See arts 330–340, especially 331(II) of the *Código Civil para el Estado Libre y Soberano de Baja California* (BOEBCS, 10 July 2000). See also arts 10, 105–113 of the *Código Familiar para el Estado de San Luis Potosí* (POESLP, 18 December 2008).

46 See generally arts 143–147 of the *Ley para la Familia de Hidalgo* (The Family Law of Hidalgo or FLH*)* (POEH, 5 November 2007). The law explicitly seeks to equalise both institutions (art 145).

47 See *Ley de Sociedad de Convivencia para el Distrito Federal* (Law for Cohabitating Partnerships for the Federal District) (GODF, 16 November 2006).

48 See arts 147, 195–1–195–8, 262(VII), 364(XX), 385–1 of the *Código Civil para el Estado de Coahuila de Zaragoza* (POEZ 25 June 1999, as amended by reforms published in POEZ 12 January 2007). The reforms included a civil union scheme labelled 'Civil Pact of Solidarity' (*Pacto de Solidaridad*). The pact is defined as 'a contract celebrated by two individuals, of age,

The FLH states that a concubinage relationship will be considered equivalent to marriage when it is the result of a peaceful, publicly held and permanent relationship between an unmarried woman and an unmarried man, continuous for more than 5 years,[50] and when both parties have held themselves out as married in terms of duties, rights and obligations.[51] There are two methods through which concubines can officialise or transform their relationship into marriage: through registration or through judicial declaration. Under Hidalgo's law, registration of a concubinage relationship can originate from a request by one or both concubines, through a request from a child of the relationship, or through the Public Attorney.[52] When only one of the concubines requests registration of the relationship (or neither of them in the case of a request by a child), concubines have 30 days to oppose the registration.[53] The second method through which concubinage can be made equal to marriage is through a judicial declaration of concubinage status. These reforms have created a judicial right of action for the determination of 'de facto marriage' status.[54] Based on the result of either of these processes, the law accords concubines de facto marriage status.

Hidalgo's law establishes that concubinage can end in the case of death of one of the parties, abandonment by one concubine of the other for more than 6 months,[55] or by mutual agreement. In the latter case the parties must present an agreement relating to custody, support and division of property that meets 'the same requisites for voluntary divorce'.[56] Upon dissolution of the concubinage relationship, the assets within the relationship are divided under a separation of property regime according to the rules for marriage. Hidalgo's law has also incorporated the fault-based scheme of necessary divorce for dissolution of the registered concubinage relationship.[57] Thus, concubines can unilaterally request dissolution of the relationship showing fault. Unless the parties have signed a separation of property agreement, the dissolution of the relationship and division of assets will be governed by the rules of *sociedad conyugal* or marriage governed by a community property agreement.[58] By treating concubinage as a de facto marriage, and by regulating the instances

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of different or same gender, or who organize their lives their life in common. Those who celebrate [this union] are considered civil companions. Civil companions owe each other help and mutual assistance, consideration and respect as well as a duty of mutual gratitude and will have the obligation to act with common interest and right to support' (POECZ, 12 January 2007).

49 See FLH, art 145(III), above n 46 and arts 3, 27 and 450 of the *Código de Procedimientos Familiares para el Estado de Hidalgo* (COFEH 2007), POEH, 9 April 2007.

50 The requisite of 5 years required to declare a concubinage relationship contrasts with the CCDF, which through the reforms reduced cohabitation requirements from 3 years to 2.

51 FLH, art 143, above n 46.

52 FLH, art 145.

53 FLH, art 145.

54 COFEH 2007, art 2, above n 49.

55 FLH, art 146(III), above n 46. It is for a term of more than 6 consecutive months, when abandonment is without just cause and when there are no children born from the relationship.

56 FLH, art 146(III).

57 FLH, art 147.

58 FLH, art 147.

under which a concubinage relationship ends as well as the economic effects of the termination of the relationship, FLH goes a step further than the CCFD. Thus it incorporates notions of civil law divorce into the dissolution of a concubinage relationship. A similar scheme has been adopted in the Civil Code of Queretaro, where in defining the rights and obligations of concubines, the Code cites articles that regulate married spouses.[59]

IV COHABITATING PARTNERSHIPS (*SOCIEDAD DE CONVIVENCIA*)

In November 2006, the Legislative Assembly for Mexico City approved a law whereby recognition was given to relationships not borne out of filiation or civil bond: *Ley de Sociedad de Convivencia* (Law for Coexisting Partnerships, hereinafter referred to as LSC).[60] This law establishes the possibility of a de jure relationship called a cohabitating partnership (CP) between individuals of either the same or different gender who are not married or cohabiting with anyone else.[61]

The law provides for a public registry of cohabitation partnerships and partners register at the legal affairs office (*Dirección General Juridical*) of the delegation where they are domiciled.[62] Similarly to civil marriage, partners need to fill out and sign a form with personal information, stating their common domicile, their intention to live together to help each other mutually and permanently,[63] and an agreement relating to their property partnership. If an agreement about property is not submitted, it is assumed that partners retain their pre-existing property status. Registration is not required but is necessary for the union to have effect against third parties.[64]

Cohabitating partnerships create cohabitation and support obligations between partners.[65] However, support is only granted when one of the partners lacks the income and property necessary for their own sustenance.[66] Support will only be granted for a period equal to half of the time that the union lasted and must be requested within one year of the dissolution of the union.[67] Cohabitating partnerships create rights to exercise tutelage but no obligation in the event of a declaration of legal incapacity.[68] Inheritance and property rights are governed by the agreement stipulated by the partners and have effect for third parties only if the cohabitating partnership has been registered according to the terms

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[59] See art 276 of the *Código Civil del Estado de Queretaro*, POEQ, 22 November 1990 as amended by reforms published in POEQ, 23 March 2007.

[60] See *Ley de Sociedad de Convivencia para el Distrito Federal*, above note 47.

[61] *Ley de Sociedad de Convivencia para el Distrito Federal*, art 2.

[62] *Ley de Sociedad de Convivencia para el Distrito Federal*, arts 6–10.

[63] *Ley de Sociedad de Convivencia para el Distrito Federal*, arts 6–7.

[64] *Ley de Sociedad de Convivencia para el Distrito Federal*, arts 2–3.

[65] *Ley de Sociedad de Convivencia para el Distrito Federal*, arts 5, 13–14.

[66] *Ley de Sociedad de Convivencia para el Distrito Federal*, art 21.

[67] *Ley de Sociedad de Convivencia para el Distrito Federal*, art 21.

[68] *Ley de Sociedad de Convivencia para el Distrito Federal*, art 15.

of the law. Support obligations and the process for cohabitating partnerships are governed by the same rules applied to concubines.[69] The union dissolves upon a declaration or repudiation by one of the partners, the unjustified abandonment of the partnership domicile for more than 3 months, concubinage or marriage by one partner with another person, acting in malice or upon death.[70] If the union was registered, the law requires that parties must notify the dissolution of the union in the office where the partnership was registered.[71] The office in turn is required to notify the other partner except in the case of death.

The difference between cohabitating partnerships, marriage and concubine partnerships are multiple: first and most importantly cohabitating partnerships are a legal arrangement provided outside the normal framework of the codes. This has both a symbolic and legal significance. In the tradition of Mexican family law and civil law traditions in general, all arrangements relating to family are primarily provided for in the codes. Therefore, the fact that the cohabitating partnerships are regulated outside of the codes implicitly means that they are not 'family' per se: operatively this means that these unions do not enjoy the status benefits afforded to members and institutions regulated under the Civil Code.

Another important difference is that, in the discourse of the LSC, cohabitating partnerships are set out as a legal bilateral obligation between two adults of different or the same gender to establish a home together with an objective to cohabit and help each other. The emphasis is on cohabitation and economic responsibility between the parties and there is a lack of emphasis on the sexual relationship and procreation inherent in marriage. As such, cohabitating partnerships do not provide adoption rights, the children who are born within the relationship are not deemed children of the partnership, and recognition of parentage by partners of the same gender is not provided for in the CCDF or the LSC.

Essentially, the LSC provides for an institution which sits outside of the explicit and implicit normal framework of the family, which is not in the Civil Code and which seeks to protect the economic relationship between cohabitating partners by recognising inheritance rights, common property rights and support obligations (obligations more in the area of contract than of family law).

What is notable about Mexico's LSC is that it was an important step in making the legal issues surrounding same-sex unions visible, and in opening up the possibility of legalisation of same-sex marriage and adoption in Mexico City.[72] Following Mexico City's reforms on civil unions, in 2007 the state of Coahuila (bordering Texas) enacted the *Pacto Civil de Solidaridad* or Civil Solidarity Pact

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69 *Ley de Sociedad de Convivencia para el Distrito Federal*, art 5.
70 *Ley de Sociedad de Convivencia para el Distrito Federal*, art 20.
71 *Ley de Sociedad de Convivencia para el Distrito Federal*, art 24.
72 See Part V, below.

(CSP).[73] Coahuila's CSP law differs to Mexico City's CP law in that civil unions are integrated into state civil code and the CSP rules on formality, legality,[74] property and support rights closely mirror those relating to marriage. It recognises CSP unions as constituting a lawful family affinity.[75] Formalisation of the union takes place before an officer of the civil registry[76] and partners can choose between the same marital property models allowed for married consorts.[77] It builds in the same presumption of shared property when partners do not submit a separate property agreement and the possibility of this arrangement changing during the life of the union.[78] It also adopts divorce-like rules.[79] However, adoption by CSP unions or individuals in a CSP union is prohibited.[80]

V SAME-SEX MARRIAGE

In December of 2009, Mexico City published reforms to the substantive and procedural civil codes, allowing the celebration of same-sex marriage.[81] The amendment suppressed the reference to 'man' and 'woman' within the definition of marriage.[82] The article defining marriage now states:[83]

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[73] 'Decreto 209', *Periódico Oficial del Estado de Coahuila* (POEC, 12 January 2007).

[74] *Código Civil de Coahuila* (as amended by the reforms published in the POEC, 12 January 2007), arts 385–8 and 385–9.

[75] Ibid, arts 385–4 and 714.

[76] Ibid, art 385–3.

[77] Ibid, arts 385–10 and 385–11.

[78] Ibid.

[79] Ibid, arts 385–12–386–16.

[80] Ibid, art 385–7. This restriction was declared unconstitutional in 2011. See '*Interés superior del niño tratándose de adopción por matrimonios entre personas del mismo sexo*' [J]; 9a. Época; Pleno; SJF y su Gaceta; Tomo XXXIV, August 2011; p 872. The court has also declared that same-sex couples right to adoption is not 'automatic', but subject to the same review terms as those of heterosexual unions. See '*Matrimonio entre personas del mismo sexo. La posibilidad jurídica de que puedan adoptar no debe considerarse como una autorización automática e indiscriminada (Artículo 391 del Codigo Civil para el Distrito Federal)*', [J]; 9a. Época; Pleno; SJF y su Gaceta; Tomo XXXIV, August 2011; p 876.

[81] GODF, 29 December 2009.

[82] Article 237 of the CCDF 2000 as amended by GODF, 29 December 2009. It is curious to note that the Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928, like many other Mexican state civil codes which applied to Mexico City up until 2000, did not have a definition of marriage per se. Marriage as such was defined indirectly through the article on marital age and marriage nullity, property regimes of married couples and causes for divorce. Marriage between two people of the same gender was not formally restricted. However, in Mexico, marriage is a contract that historically has always been assumed to be between a man and a woman, and any other act against this is considered illegal. Prior to the Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928 the Law on Family Relations decreed on 1917, by Don Venustiano Carranza, abolished the 1884 Civil Code. Article thirteen of this law stated that 'marriage is the civil contract between one only man and one only woman, that unite in a dissolvable bond of marriage to reproduce and help each other during life'. Paradoxically, when concubines were extended marriage-like rights in 2000, this same group of reforms modified the definitions of marriage. Among the reforms was the inclusion of definition of marriage as that of one man and one woman. It also eliminates the mention of marriage as a civil contract and it eliminates procreation as the main objective of marriage. While this reform was of no consequence to

> 'Article 146: Marriage is the free union of two persons for the achievement of a community of life, where both [consorts] will encourage respect, equality and mutual assistance. [Marriages] should be celebrated before a judge of the Civil Registry and in accordance with the formalities that this present Code stipulates.'

The reforms also made the text on marital age and marriage by minors gender-neutral.[84] Modifications to the wording of concubinage rights were also made, opening up the possibility of concubinage between same-sex partners.[85] The decree also republished an unmodified version of the article that stipulated the adoption rights of couples who were married or living in concubinage. This article was republished to underscore that same-sex partners, like heterosexual partners, have a right to adopt.[86]

The reforms of the CCDF can be better understood when we look at the history of proposals for the recognition of same-sex marriage in Mexico City and the resulting LSC. The current law is the result of several years of struggle in the recognition of lesbian, gay, bisexual and transgender (LGBT) rights in Mexico,[87] which started in Mexico City and could not have come about without the 'independence' of the Federal District, its own legislative powers in civil law matters and the incorporation of new definitions. There had been discussions between LGBT groups and the Legislative Assembly members for the Federal District for the proposal of a law recognising same-sex unions since 1999. In 2000 the PRD (*Partido de la Revolución Democrática*, Party of the Democratic Revolution), the country's largest left-wing party, also had its own interest in presenting a proposal for the legal recognition of same-sex couples but this was never formally introduced.[88] The law that was finally accepted in Mexico City in 2006 had already been presented by LGBT groups in 2001, but had been postponed for consideration due to political struggles within the Assembly. A notable aspect of Mexico City's same-sex marriage reforms is that they have indirectly opened up the possibility of immigration, residency and nationality rights also to foreign same-sex married spouses.[89] It indirectly

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heterosexual partners, it was strategically crafted to block the road to same-sex marriage through court interpretation. At the time, US states were undertaking constitutional reforms to prohibit marriage between same-sex partners. For a historical review on the changing definition of marriage in Mexico see José Antonio Sanchéz Barroso 'El concepto de matrimonio en la Constitución. Análisis Jurídico a partir de las Reformas al Código Civil para el Distrito Federal de 2009' (2011) 256 *Revista de la Facultad de Derecho de México* 277.

83 CCDF 2000.

84 CCDF 2000 (as amended by GODF), art 237.

85 Article 291 bis.

86 For a review of the effect of the legislative decree recognising same-sex marriages in Mexico City see Eli Rodríguez Martínez 'Los matrimonios homosexuales en el Distrito Federal. Algunas consideraciones en torno a la reformas a los Códigos Civiles y de Procedimientos Civiles' (2010) 128 *Boletín Mexicano de Derecho Comparado*.

87 See Mirka J Negroni 'From movement Demands to legislation: Organizing in the LGBT Community in Mexico City' in Yolanda C Padilla *Gay and Lesbian Rights Organizing: Community-based Strategies* (Harrington Press, 2004) 208. Also co-published in 2004 16(3) *Journal of Gay & Lesbian Social Services*.

88 Ibid.

89 See art 39 of the *Ley General de Población* (General Law of Population); art 20(II) of the *Ley de Nacionalidad* (Law of Nationality).

recognises married or concubinage same-sex partners with spousal labour Social Security (*Seguro Social*) beneficiary rights[90] and the possibility of accessing formal international adoption avenues.[91]

VI UNILATERAL DIVORCE

In 2008, both the substantive and the procedural civil codes were substantially modified in order to remove the structures and institutions of fault-based divorce and incorporate the values of no-fault divorce procedures into Mexico City's legislation. In place of voluntary judicial divorce and necessary divorce it established a process for unilateral divorce. The reforms that incorporated the *Divorcio Express* or unilateral divorce eliminated the option and process for necessary divorce and the 21 justifying faults, and also eliminated voluntary divorce via judicial procedure.[92] The legislation requires those seeking divorce to either apply for administrative voluntary divorce or unilateral divorce.

Under the new reforms, divorce is understood as a process that dissolves the marital bond, leaving spouses legally able to marry again.[93] A process for unilateral divorce can originate from one or both spouses when they request it before a judicial authority. Spouses are not required to state a reason or cause for this request if and when one year has passed since the celebration of the marriage.[94] In order for a spouse to request unilateral divorce, the CCDF requires them to present a request in the first instance before a civil court or a family court, accompanying the request with an agreement that regulates the consequences inherent in the dissolution of the marital bond.[95] The agreement proposed by the interested spouse should resolve issues relating to custody and support of minor children, spousal support, use and distribution of the marital home and its contents, administration of any marital assets, and compensation required based on the marital property regime.[96] Along with the divorce request, the requesting spouse must remit the proposed agreement and evidence

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90 *Ley del Seguro Social* (Law of Social Security), art 5(XII).

91 *Codigo Civil Federal*, arts 410E and 410F.

92 This reform eliminated art 273 of the CCDF 2000 which had provided an additional option of divorce, voluntary divorce via judicial procedure.

93 CCDF 2000, art 266 (GODF, 3 October 2008).

94 Ibid.

95 CCDF 2000, art 266 and arts 25, 272-A, 272-B of the *Código de Procedimientos Civiles para el Distrito Federal* (Code of Civil Procedure for the Federal District, CPCDF 2000).

96 CCDF 2000, art 267. This article outlines that the divorce agreement must designate the person that will have care and custody of minor children; and the mode under which the non-custodial parents will exercise visitation rights, maintain respect for mealtimes, rest and school. It must specify the form, place and dates of payment of support for children, as well as the form of warranty that will guarantee fulfilment of this obligation. The agreement must designate the spouse that will use the marital home, as well as its moveables, and give an indication of how the assets of the marriage will be administered during the divorce process, until they are liquidated, showing also the marriage property agreement and an estimate of the assests. If spouses have celebrated a marriage under a division of property scheme, this document must show the compensation that the spouse who was dedicated to working in the home and caring for children has a right to, up to 50% of the value of combined assets. This

that demonstrates the basis of the divorce agreement.[97] The other spouse will be notified of the divorce request and can respond by either accepting the terms of the agreement or counterproposing with a new agreement. This new agreement must be accompanied by evidence to establish the request. When the parties are in agreement on the terms and the judge is satisfied that they fulfil the requirements of the law, the judge will decree the dissolution of the marital bond and formally approve the agreement.[98]

However, lack of agreement over the terms of divorce between the spouses will not affect the outcome of the process. If the counteragreement put forward by the companion spouse is not accepted and the spouses do not come to an accord, the court will go ahead and decree the dissolution of the relationship, noting that issues relating to property, custody or support are to be resolved through an incidental process.[99] This decree dissolving the marital bond is not appealable.[100]

During the incidental process the court will schedule a meeting to promote agreement between the spouses. If this fails, the court will then open the evidentiary phase of the process, which consists of an oral evidentiary presentation by the parties before the court.[101] If, despite attempts at conciliation, spouses cannot reach an agreement, the judge will proceed to give a judgment concerning these issues.

What has been the court's reaction to unilateral divorce? It is important to note that unilateral divorce laws are not new to Mexico. Inspired by the migratory divorce business that developed in the United States and Mexico between 1914 and the 1940s, there was a surge of new laws directed at facilitating divorce. In 1914, President Venustiano Carranza published two federal decrees launching vincular divorce.[102] The decrees amended constitutional laws sanctioning civil marriage only as an insoluble union and established that civil marriages could be dissolved with the mutual and free consent of the parties after either 3 years of marriage, at any time when procreation was impossible or when grave omissions by one of the spouses made a spousal dispute irresolvable.[103]

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also covers a spouse who for some reason did not acquire property in their own name or having acquired it, whose property is notably of inferior value than that of the other spouse.

97 CCDF 2000, art 255(X).

98 CPCDF 2000, art 287, above note 95.

99 Ibid.

100 CPCDF 2000, 265 bis and CCDF 2000, art 287.

101 CCDF 2000, arts 290 and 299.

102 *See Decreto del 29 de diciembre de 191, El Constitucionalista, Veracruz, num 4, 2 de enero de 1915* (Law of 14 December 1874) and *Decreto que reforma el Código Civil para el Distrito y Territorios Federales de 1884, 19 de enero de 1915* (Law of 19 January 1915). Carranza's *Vincular Divorce Laws* are a set of constitutional decrees that in 1914 eliminated marriage as a lifetime union from the *Acta Orgánica de 1874*. The second decree (1915) amended the Civil Code for the Federal District to include non-vincular divorce. Also see Jorge A Vargas 'Concubines under Mexican Law; with a Comparative Overview of Canada, France, Germany, England and Spain' (2005) 12 Sw JL & Trade Am 45 especially at 74–75.

103 The decree of 1915 modified the text of art 226 of the Civil Code for the Federal District and Federal Territories of 1884 to: 'divorce was the legal dissolution of the bond of marriage and

State reforms of the 1920s and 1930s took these changes up a notch by reforming the substantive and procedural code in order to reduce or facilitate ways around residency periods, eliminating the necessity of the presence of both parties or the consent of both married consorts. In the Mexican state of Sonora (bordering Arizona), divorce required consort presence only at the first hearing; a power of attorney permitted couples to continue their case through their lawyer.[104] Campeche enacted a law that gave the governor authority to grant a divorce to out-of-state petitioners after a 24-hour residency period.[105] Similar reforms were enacted in the states of Chihuahua, Chiapas, Coahuila, Morelos, Sinaloa and Tamaulipas.[106]

Most notable, however, were Yucatan's reforms which authorised both reciprocal and unilateral divorce.[107] These expedited divorce by extending power to officers of the civil registry to receive divorce requests and to decree dissolution of the marital union.[108] Spouses who were in agreement as to custody, support and property could thus be granted divorce that same day.[109] Moreover, a lack of agreement between spouses did not limit a spouse's right to divorce.[110] When parties did not concur on issues or when divorce without cause was requested by one spouse, the court was allowed to decree the separation, leaving all other aspects to be resolved under an orthodox civil process.[111] Liquidation of property and issues of spousal and child support were resolved using a set of principles that differentiated between the effects of when divorce was obtained unilaterally and when there was malicious conduct by the spouses.[112]

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leaves spouses' legally able to celebrate a new marriage. Sara Montero Duhalt 'Evolución legislativa en el tratamiento a los hijos extramatrimoniales (México independiente)' in José Luis Soberanes Fernández (ed) *Memoria del III Congreso de Historia del Derecho Mexicano* (Mexico City: UNAM, 1983) at 438.

104 See Lindell T Bates 'The Divorce of Americans in Mexico' (1929) 15 ABAJ 709.

105 Ibid.

106 See generally Jesús de Galindez 'El divorcio en el derecho comparado de América' (1949) 6 *Boletín del Instituto de Derecho Comparado* 9.

107 'Ley de divorcio y reformas al Código del Registro Civil y al Código Civil del Estado/Gobierno Socialista del Estado de Yucatán' 3 April 1923 (Ley de Divorcio de Yucatán, 1923), art 2.

108 Ley de Divorcio de Yucatán, 1923, art 4.

109 Ley de Divorcio de Yucatán, 1923, art 6.

110 Ley de Divorcio de Yucatán, 1923, art 7.

111 Ley de Divorcio de Yucatán, 1923, arts 8 and 9.

112 Ley de Divorcio de Yucatán, 1923, art 9.The code provided that each spouse was to recover their property. The marital partnership was divided between the shares of each spouse. Spouses recovered their legal capacity to remarry. But a woman could not marry until 300 days after the temporary separation. If the wife was the defendant, she was entitled to support and lodging, from the date of temporary separation. This ended if she married, lived dishonestly, or acquired sufficient property of her own. If the defendant was the husband, he was entitled to support if he could not work and had no money. Children younger than 6 and all girls were to live with mothers, except if their mothers lived dishonestly or remarried. Both spouses were required to contribute in proportion to their means in the support and education of their children until the children ceased to be minors. Summary provided from the English translation in John T Vance Jr 'Divorce Laws of Yucatan' (1924–1925) 13 Geo L J 227 at 235.

However, criticism of migratory divorce between US states and the number of US spouses flocking to Mexico for easy divorce motivated an assault by both US and Mexican courts on Mexican unilateral divorce laws.[113] US courts began to declare Mexican divorce decrees invalid on the basis of jurisdictional overreaching,[114] on due process violations, or because one or neither of the parties had resided in Mexico during divorce proceedings.[115] In an effort to counteract the unilateral divorce movements of its own states, the Mexican Supreme Court overturned state divorce laws on the grounds that they: (1) were sanctioned by the governor without legislative approval; (2) violated due process rights by denying the respondent divorce party an opportunity to contest the claim for divorce by presenting evidence or being heard in any

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[113] For example, one case in the Mexican Supreme Court held that Yucatan divorces, granted in the absence of mutual consent and without valid cause, infringed the guarantees of the due process clause of the Mexican constitution. See '*Divorcio*', Amparo administrativo en revisión 2326/25. Rendón de Matence Laura, 24 de marzo de 1926, [TA]; 5a. Época; Pleno; SJF; XVIII; p 631 (Divorcio 1926). In another case, the Mexican Supreme Court invalidated divorce when notification or service was not made on a non-resident in accordance with the laws of the non-resident's domicile. See e g '*Divorcio por causa de abandono del hogar*'. Competencia 58/37. Suscitada entre el Juez Segundo de letras del ramo Civil de Nuevo León Monterrey y Primero de lo Civil de Saltillo, Coahuila. [TA]; 5a. Época; Pleno; Informes; Informe 1938; p 106 (Divorcio por causa de abandono del hogar, 1938) (this forces the plaintiff to serve the defendant according to the laws of the matrimonial domicile and not according to the easy requirements of the lex fori. Notification of divorce by publication was barred in Morelos if the plaintiff did not know the whereabouts of the defendant but could have discovered it. See '*Divorcio en Morelos*', Amparo civil en revisión 3970/29. Chanfreau de Bixler Julieta. 31 mayo de 1930. [TA]; 5a. Época; 3a. Sala; Informes; Informe 1944; p 35 (Divorcio en Morelos, 1944). The court has also held that statutes that conferred on an administrative official of the Civil Registry the authority to determine residence like those found in the laws of Yucatan, Campeche and Chihuahua as unconstitutional. See '*Divorcio en el estado de Campeche, inconstitucionalidad de la ley*', Amparo civil en revisión 3799/28, De la Peña de Berlanga Amelia, 29 de noviembre de 1933, [TA]; 5a. Época; 3a. Sala; SJF; XXXIX; p 2548 (Divorcio en el estado de Campeche, 1933).

[114] See *Alzman v Muher*, 23 App Div 139, 210 NY Supp 60 (Sup Ct 1930) (mandamus proceeding to compel a city clerk to issue a marriage license to a plaintiff who offered Mexican divorce from a prior marriage). In this case the court found that the divorce was held to be invalid because of lack of jurisdiction of the parties or over the subject matter. The court considered that because both spouses were residents of New York, they were bound to all laws of that state, and that by obtaining a Mexican divorce the couple had violated the laws, procedures and public policies of New York.

[115] See *Bonner v Reandrew*, 203 Iowa 1355, 214 NW 536 (1927) (Action for alienation of affections); c f *Wells v Wells*, 230 Ala 430, 161 So 794 (1935) (Mexican decree did not recite that the husband was a resident). In this case the husband had acquired residence in Yucatan in order to obtain divorce. The New York court pointed out the right to inquire into the question of domicile and, because the only evidence of domicile was the decree of residence by Yucatan, the divorce was held invalid. See also *Golden v Golden*, 41 NM 356, 68 P2d 928, 936 (1937). Even 9 days residency did not constitute valid domicile, as one court said 'a foreign divorce obtained through simulated residence and not in good faith is open to attack'. See *Ryder v Ryder*, 2 Cal App 426, 37 P2d 1069 (1934). In one case the couple obtained divorce after a day trip across the US/Mexico border. Despite claims of jurisdictional fact of domicile or residence, the decree did not hold up when the wife brought up a subsequent divorce action in New Mexico. The court said: 'To permit a foreign state or nation to assume jurisdiction over residents of this state and grant a divorce on request, like a slot machine in which you deposit a fixed sum of money, press the lever and out comes a decree, is a condition which New Mexico does not yet tolerate.' *Golden v Golden*, 41 NM 356, 68 P2d 928, 936 (1937).

way;[116] and (3) granted authority to justices of the civil registry to determine divorce matters which went against the constitutional divisions of powers.[117]

Despite attempts to align divorce law with constitutional principles, the court continued to find unilateral divorce models unconstitutional.[118] Finally, the court unequivocally declared in 1933 that the sui generis process, put forth by Yucatan to dissolve the marriage contract and incorporate due process principles, was unconstitutional since the process still left the resolution of shared rights and obligations that arose in a shared marriage contract to the whim of only one of the parties.[119] The court reiterated and expanded on this opinion in 1934 and 1936, declaring that Yucatan's divorce laws were unconstitutional because the parties' judicial mediation meeting could not be construed as a proper notification of a proceeding because, despite improper notifications and counterarguments put forth by the other party, the process resulted in a decree of divorce.[120]

Thus, until 2008, the prevailing view in Mexico was that divorce obtained by either spouse without the consent of the other spouse was unconstitutional. The return of unilateral divorce in Mexico therefore represents a radical departure from the criteria adopted by the Supreme Court in the early nineteenth century. Nonetheless, a clear incongruity is evident in the court's favour of mutual consent to unilateral divorce. In two decisions rendered in 2008 and 2009, the court upheld its reasoning protecting unilateral divorce laws based on two main arguments. First, there could be no due process violations because the decree of unilateral divorce is not a document constitutive of rights and obligations but a declarative instrument that indicates the rupture of the marital bond that is subject to the will of both marriage parties.[121] Secondly,

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[116] See Divorcio 1926 and 1944, above n 113.

[117] See Divorcio en el estado de Campeche, 1933, above n 113.

[118] In response to the decisions rendered by the Supreme Court in 1929, Yucatan amended its laws by withdrawing the most important elements of Carrillo's earlier laws. See '*Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de*'. Amparo civil en revisión 3727/34. Seidel Elías. 14 de noviembre de 1935. [TA]; 5a. Época; 3a. Sala; SJF; XLVI; p 3581 (Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de, 1935). '*Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de*'. Amparo civil directo 2601/33. Villanueva de Triay Rosario. 5 de octubre de 1935. [TA]; 5a. Época; 3a. Sala; SJF; XLVI; p 372 (Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de, 1935 bis). New '*Ley de Divorcio*', DO, 17 April 1926. While unilateral divorce was still permitted under the new reforms, it could no longer be granted without notification of the other partner. Foreigners were also required to reside 6 months in Yucatan, as opposed to 30 days, in order to obtain a divorce decree.

[119] See Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de, 1935 bis, ibid.

[120] Ibid.

[121] '*Articulo 4.96 del Código Civil del Estado de México. No viola la garantía de audiencia establecida en el artículo 14 Constitucional*', Registro No 168382, Localización: Novena Época Instancia: Primera Sala Fuente: Semanario Judicial de la Federación y su Gaceta XXVIII, Diciembre de 2008, Página: 231 Tesis: 1a. CXII/2008 Tesis Aislada Materia(s): Constitucional, Civil; 'Divorcio por voluntad unilateral del conyugue. Los articulos 266, 267, 282, 283, fracciones IV, V, VI, VII Y VIII, 283 bis, 287 Y 288 del Código Civil para el Distrito Federal, reformado mediante decreto publicado en la Gaceta Oficial de la entidad el 3 de octubre de 2008, que regulan su tramitación, no violan las garantías de audiencia y de debido proceso legal', Amparo directo en revisión 1475/2008. 15 de octubre de 2008. Unanimidad de cuatro

with respect to the 'secondary matters' of marriage, ie economic and custody issues, due process rights were fulfilled through the inclusion of a list of rights accorded to parties. This list included the notification of the affected spouse by delivery of accompanying copies of supporting documents and a procedural phase giving an affected spouse an opportunity to accept or to counter the agreement on economic and custody matters (not the divorce itself). Currently, the message of the court is clear in that it considers due process rights to be protected by dividing the divorce process. This division means that the initial decree affects only the marital status of partners, providing aggrieved spouses with a sui generis process for providing judicial notice and giving affected spouses an opportunity to be heard when economic and custody rights are at stake.[122] This is evidence of a drastic change in the importance given to women in divorce.

The court has also enacted constitutional guidelines in order to keep judgments in line with constitutional principles. For example, the court has been careful to curtail the interpretative mechanism by which Yucatan's easy divorce schemes expanded, while simultaneously opening up the constitutional limitations to this new type of divorce. To prevent interstate migratory divorce, the court has declared that married spouses are bound to the courts of their conjugal domicile or, in the case of abandonment, to the domicile of the abandoned consort.[123] In an effort to protect Mexico City's laws from being abused by divorce tourism couples, the court has upheld as constitutional Mexico City's de minimis time requirements limiting the *divorcio express* to marriages that have lasted at least one year.[124] With respect to the conflict of laws that arises

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votos. Ausente: José de Jesús Gudiño Pelayo. Ponente: José Ramón Cossío Díaz. Secretaria: Dolores Rueda Aguilar; Registro No. 165810, Localización: Novena Época, Instancia: Primera Sala, Fuente: Semanario Judicial de la Federación y su Gaceta, XXX, Diciembre de 2009, Página: 280, Tesis: 1a. CCXXIII/2009, Tesis Aislada, Materia(s): Civil.

122 'Divorcio. Se naturaleza a partir de las reformas a los Códigos Civil y de Procedimientos Civiles para el Distritito Federal, publicadas el tres de octubre de dos mil ocho.Tercer Tribunal Colegiado en Materia Civil del Primer Circuito, Amparo directo 216/2009. 1o. de julio de 2009. Unanimidad de votos. Ponente: Víctor Francisco Mota Cienfuegos. Secretario: Erick Fernando Cano Figueroa, Registro No. 166441, Localización: Novena Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, XXX, Septiembre de 2009, Página: 3127, Tesis: I.3o.C.752 C, Tesis Aislada, Materia(s): Civil.

123 Divorcio encausado [divorce without cause], competencia por razón de territorio. Segundo Tribunal Colegiado en Materia Civil del Primer Circuito, Amparo directo 27/2010. Antonio Eroles Santamaría. 16 de marzo de 2011. Cinco votos. Ponente: Arturo Zaldívar Lelo de Larrea. Secretaria: Ana María Ibarra Olguín, Registro No. 164796, Localización: Novena Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, XXXI, Abril de 2010, Página: 2728, Tesis: I.2o.C.45 C, Tesis Aislada, Materia(s): Civil, Amparo en revisión 1869/2009. 9 de marzo de 2011. Cinco votos. Ponente: José Ramón Cossío Díaz. Secretario: Jesús Antonio Sepúlveda Castro. Competencia 3/2009. Suscitada entre el Juzgado Tercero de lo Familiar del Tribunal Superior de Justicia del Distrito Federal y el Juzgado Segundo de Primera Instancia del Distrito Judicial de Veracruz, Veracruz. 8 de enero de 2010.

124 'Divorcio sin causa [divorce with cause]. Constitucionalidad del artículo266 del Código Civil para el Distrito Federal, en cuanto exige que el matrimonio haya durado un año'. Octavo Tribunal Colegiado en Materia Civil del Primer Circuito, Amparo directo 738/2010. 24 de noviembre de 2010. Unanimidad de votos. Ponente: Abraham S. Marcos Valdés. Secretario:

from legal change, the court has stated that the applicable divorce laws are those that are relevant within the time frame when the divorce claim arises, not when the marriage is celebrated.[125] The court has also upheld a rule that allows previously filed divorce cases to transfer their claims under the new laws if such a transfer does not affect economic or custody rights under the former divorce laws.[126]

With these reforms the court has also established fragile but important limitations on the use of discrimination as a tool to challenge the constitutionality of family law. The court has put limits on the use of the 'family right' argument to protect women's family law rights. In 2009, one wife challenged the constitutionality of a Mexico City unilateral divorce decree on the grounds of violation of art 4 of the Constitution. Article 4 puts an obligation on the state to enact laws which favour the protection of the organisation and development of the family.[127] Without explicitly recognising constitutional freedom of choice in marriage and divorce, the court found that Mexico City's reforms did not violate a state's obligation to protect the family given that the state does not obligate spouses to remain married when cohabitation with their spouses or their children is rendered impossible or when spouses lose affection for one another. The court reasoned that divorce is a mechanism devised by the state to dissolve the marital union and to avoid instances of mistreatment or violence that can result from cohabitation between consorts who no longer wish to live together. Therefore, divorce is not a tool to promote conjugal rupture, but a mechanism to protect the freedom of spouses to express their wish to leave the marriage and to do so only by giving formal recognition of the de facto dissolution of the marital union. Similarly, in 2010, the court unequivocally declared in isolated, non-binding case law that Mexico City's divorce reforms did not in any way 'imply discrimination against any of the consorts' because under no circumstances does it allow 'treatment of

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Francisco Banda Jiménez, Registro No. 162599, Localización: Novena Época Instancia: Tribunales Colegiados de Circuito Fuente: Semanario Judicial de la Federación y su Gaceta, XXXIII, Marzo de 2011, Página: 2323, Tesis: I.8o.C.300 Tesis Aislada, Materia(s): Constitucional.

125 'Divorcio. Para determinar la legislación aplicable para decretarlo debe atenderse a la fecha en que se actualiza el hecho que lo genera, y no a la de celebración del matrimonio, Amparo directo en revisión 1013/2010. René Alejandro Chavarría García. 4 de agosto de 2010. Cinco votos. Ponente: Juan N. Silva Meza. Secretario: Rodrigo de la Peza López Figueroa, Registro No. 162866, Localización: Novena Época, Instancia: Primera Sala, Fuente: Semanario Judicial de la Federación y su Gaceta, XXXIII, Febrero de 2011, Página: 614, Tesis: 1a. XXXII/2011, Tesis Aislada Materia(s): Civil.

126 'Divorcio sin causa. El artículo tercero transitorio del decreto por el cual se reforma y deroga el Código Civil para el Distrito Federal y se reforma, deroga y adiciona el Código de Procedimientos Civiles para el Distrito Federal, publicado en la Gaceta Oficial de la entidad el 3 de octubre de 2008, no viola el principio de irretroactividad de la ley', Localización: Novena Época, Instancia: Primera Sala Fuente: Semanario Judicial de la Federación y su Gaceta, XXXIII, Mayo de 2011, Página: 232, Tesis: 1a. LXXVII/2011, Tesis Aislada, Materia(s): Constitucional.

127 The article recognises the rights of families to a 'dignified and decent household', children's integral rights and empowers the state to enforce these rights against ascendants, tutors and guardians. In this particular case, the court used the language of freedom of expression to protect divorce-seeking spouses.

inferiority that translates into discrimination (on the basis of age, race, religion, politics, social position, civil status, etcetera) that provides unfair advantage to either of the consorts'.[128]

By giving privilege to freedom in marriage choice, the court has indirectly constitutionalised a right to divorce. While constitutionalising private law rights has become an expedient solution to resolving the inequities of substantive and procedural private law in Mexico, it does not resolve the competing constitutional interests that arise. Thus, by privileging divorce and failing to acknowledge or consider how this individual right to divorce competes against basic constitutional gender equality and children's rights, the court has too easily surrendered analysing divorce when there are competing interests at play. With this change in criteria the court has affirmed the principle that a 'person has no due process interest in remaining married'[129] but the court has neglected to deeply examine the corollary of this principle, whether marriage and the parenting and property partnership that it can give rise to creates 'any legally recognized interest' in divorce that merits constitutional due process protection.[130]

VII CONCLUSIONS

The examination of Mexico City's recent family law reforms through a federalism lens highlights the connections between women, family and shifts in private law governance in Mexico. The most recent broadening of cohabitant rights within the Mexican civil codes has been the result of a combination of the complex democratisation process that has taken place in the Federal District and the inclusion of concubinage as a family form. The reforms are connected to the surge of private law power introduced by Mexico's new private law autonomy and the gendered legal remedies instituted for unmarried women and mothers during Mexico's early codification period.

This same pattern of events is evident in Mexico City's law recognising cohabitation unions, which was drafted to protect inheritance rights, common property rights and the support obligations of registered same-sex and different-sex cohabitation partners. The CP law was one step towards the ultimate goal of legitimising same-sex unions; however, reforms eliminating the gendered language of concubinage and marriage within the civil codes rendered CP laws virtually irrelevant in the family law landscape. Mexico City

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[128] 'Divorcio exprés. Su regulación no es discriminatoria para las partes. Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito', Registro No 165562, Localización: Novena Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, XXXI, Enero de 2010, Página: 2108, Tesis: I.4o.C.206 C.

[129] See Sheila Jordan Cunningham 'Jurisdiction in the Ex Parte Divorce: Do Absent Spouses Have a Protected Due Process Interest in Their Marital Status' (1982–1983) 13 Mem St U L Rev 205 at 243 and fn 226 at 243. This means that the court has ignored from the outset the fact that there could exist a 'protected interest' that can only be resolved by 'remaining married to an unwilling spouse'.

[130] Ibid at 244.

reforms allowing the celebration of same-sex marriage in 2009 also opened up the possibility of concubinage between same-sex partners.[131] However, these reforms are strongly connected to several years of struggle in the recognition of LGBT rights in Mexico, which started in Mexico City and could not have come about without the independence of the Federal District. The reforms have opened the window to health insurance, home financing, pension and daycare rights through the figure of social security rights as well as immigration rights for foreign same-sex marriage spouses.

Federalism has also been shown to be a recurring theme in divorce reform. While federalism issues were present in early nineteenth century divorce reform, the political and ideological context surrounding Mexico City's divorce laws is quite different from that which prevailed during the 1930s and 1940s, as is the treatment of these issues by the Supreme Court. The balance has largely shifted in favour of individual rights, allowing individuals to make decisions concerning their private lives, especially decisions relating to marriage and family life, free from unwarranted interference by the state. It privileges the competing interests between the rights to marital freedom, as well as economic and custody rights and obligations. In addition, the shift in balance has given judicial authorities a key role in the distribution of assets, allocation of support and custody. These differences indicate a change by the state to the relative weight accorded to individual rights compared to the interests of the state.

[131] CCDF 2000, art 291 bis, above n 10.

New Zealand

2013: A TIME OF CHANGE IN NEW ZEALAND FAMILY LAW – MARRIAGE EQUALITY, INTERNATIONAL SURROGACY AND ONGOING CHANGES TO THE FAMILY COURT

*Mark Henaghan and Ruth Ballantyne**

Résumé

Cette contribution expose les liens entre la politique et le droit de la famille à la lumière des quatre réformes du droit de la famille récemment proposées en Nouvelle-Zélande. Les réformes envisagées sont les suivantes: une révision gouvernementale approfondie du fonctionnement de la Cour de la Famille néozélandaise, notamment en considération de l'augmentation de ses dépenses; un Livre Vert du gouvernement, contenant des solutions envisageables pour améliorer la situation des enfants vulnérables en Nouvelle-Zélande, sans augmenter les dépenses; une révision détaillée du régime de la pension alimentaire pour les enfants (comprenant l'introduction du Child Support Amendment Bill) dans le but de fournir un système plus juste et plus moderne; et, sur proposition de la Commission des Lois néozélandaises, une révision de la loi sur les trusts, basée sur le fait qu'ils souffrent des réclamations fondées sur le Property (Relationships) Act de 1976. La conclusion de cette contribution est que les réformes du droit de la famille ne doivent pas être uniquement basées sur des préoccupations budgétaires et politiques, mais plutôt sur la recherche de la meilleure façon d'aider les familles en crise, c'est-à-dire de la manière la plus efficace et la plus efficiente.

I INTRODUCTION

The year 2013 is a time of momentous change in New Zealand family law. This chapter will focus on three areas of development that are currently pertinent in New Zealand: marriage equality and the consequent adoption amendments, the parentage and citizenship of children born as a result of international surrogacy procedures and the potential transformation of the entire New Zealand Family Court system.

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II MARRIAGE EQUALITY

(a) The original interpretation of the Marriage Act 1955

The original Marriage Act 1955 did not define 'marriage', nor did it limit marriage merely to heterosexual couples. However, the Act had always been interpreted by the common law to exclude same-sex couples. In *Quilter v Attorney-General*[1] the New Zealand Court of Appeal unanimously held that it would be against the spirit of the Act to allow same-sex couples to marry, even though the wording of the Act does not explicitly exclude same-sex couples. Thus the interpretation of the Marriage Act 1955 (rather than the actual wording of the Act) discriminated against individuals on the basis of their sexuality in direct contravention of s 19 of the New Zealand Bill of Rights Act 1990. As Thomas J said:[2]

> 'Based on sexual orientation, the distinction inherent in the Marriage Act and the many enactments which then confer rights and benefits on married persons undoubtedly discriminates against gays and lesbians. The concern, respect and consideration implicit in the goal of equality before and under the law is lacking. In the result, gays and lesbians do not receive equal treatment under the law or the equal benefit of the laws of this land.
>
> My conclusion is that as a matter of law, as well as of logic, gay and lesbian persons and couples are discriminated against contrary to s 19 of the Bill of Rights.'

However, Richardson P, Keith and Gault JJ held that the interpretation of the Marriage Act 1955 was not discriminatory because marriage is, in essence, a heterosexual concept and therefore the Act did not contravene the New Zealand Bill of Rights Act 1990.

Thomas J recognised that discrimination on the basis of one's sex, sexual orientation or gender identity can have a significant impact on the individual concerned. As Thomas J stated:[3]

> 'It is the sexual preference of gays and lesbians and their resulting choice of a same-sex partner that makes them vulnerable to discrimination. Based upon this personal characteristic, gays and lesbians are denied access to a central social institution and the resulting status of married persons. They lose the rights and privileges, including the manifold legal consequences which marriage conveys. They are denied a basic civil right in that freedom to marry is rightly regarded as a basic civil right. They lose the opportunity to choose the partner of their choice as a marriage partner, many again viewing the right to choose as a basic civil right of all citizens. In a real sense, gays and lesbians are effectively excluded from full membership of society.

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1 *Quilter v Attorney-General* [1998] 1 NZLR 523.
2 At 539.
3 At 537.

> But the denial of the opportunity for gay and lesbian couples to marry should not be seen solely in terms of a denial of access to an important social institution, a special status, the resulting legal consequences and benefits, or to civil rights and freedoms. It has a personal dimension which is not difficult to understand. With many gay and lesbian couples the inability to marry must impinge on almost all aspects of their lives. It can only add to the stigmatisation of their relationship and have a detrimental effect upon their sense of self-worth.'

The Court of Appeal ultimately held that it was for Parliament to enact legislation changing the interpretation of the Marriage Act 1955. As Thomas J said:[4]

> '[I]t remains for Parliament to decide whether or not legislation is required to extend marriage to gay and lesbian couples. That is a question weighted with policy considerations of the kind Parliament is both constitutionally and practically equipped to decide. Thus, once it is accepted that the exclusion of gays and lesbians from the status of marriage is discriminatory, the question whether the law should be changed and, if so, in what manner, are questions for the legislature, not this Court. The numerous and competing policy considerations are for it to weigh and determine.'

(b) Recent developments: Marriage (Definition of Marriage) Amendment Bill

Marriage in New Zealand is no longer limited purely to heterosexual couples. On 26 July 2012 Labour Member of Parliament (MP) Louisa Wall's Marriage (Definition of Marriage) Amendment Bill (39–1) was pulled out of the Parliamentary Members' Bills Ballot and introduced to the House. The purpose of this Bill is: 'to amend the principal Act [the Marriage Act] to clarify that a marriage is between 2 people regardless of their sex, sexual orientation, or gender identity'.[5] As the Bill's explanatory note states:[6]

> 'Marriage, as a social institution, is a fundamental human right and limiting that human right to 1 group in society only does not allow for equality. This Bill will ensure that there is equality for people wishing to marry regardless of their sex, sexual orientation, or gender identity and will be in accordance with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.'

On 29 August 2012 the Marriage (Definition of Marriage) Amendment Bill (39–1) passed its first reading in a parliamentary conscience vote 80 votes to 40. The Bill was then sent to the Government Administration Committee ('the Committee') for consideration and the public were invited to make written and oral submissions. The Committee received a total of 21,533 submissions on the Bill.[7] In considering the Bill the Committee contemplated many issues including human rights, religious freedoms, the role of the state in regulating

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4 At 542.
5 Marriage (Definition of Marriage) Amendment Bill (39–1), cl 4.
6 Marriage (Definition of Marriage) Amendment Bill (39–1) at 1.
7 Marriage (Definition of Marriage) Amendment Bill (39–2) at 2.

marriage, adoption consequences, civil unions, and transgender issues.[8] The majority of the Committee ultimately found that 'marriage is a human right, and that it is unacceptable for the state to deny this right to same-sex couples'.[9] However, some members of the Committee believed that 'marriage is not a right, and should continue to be the sole domain of heterosexual couples'.[10] In its report to the House on 28 February 2013 the Government Administration Committee recommended by a majority that the Bill be passed. Some amendments were suggested including inserting a clause to make clear that a marriage licence shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates.

On 13 March 2013 the Marriage (Definition of Marriage) Amendment Bill (39–2) passed its second reading in a parliamentary conscience vote 77 votes to 44. On 17 April 2013 the Marriage (Definition of Marriage) Amendment Bill passed its third and final reading in a parliamentary conscience vote 77 votes to 44. Royal assent for the Bill was given on 19 April 2013. The Marriage (Definition of Marriage) Amendment Act 2013 (as it will be enacted) will come into force when the Governor-General makes an Order by Council or 4 mouths after the Act received Royal assent, whichever date is sooner.

(c) Recent developments: adoption

Aside from the obvious ramifications of the Marriage (Definition of Marriage) Amendment Act 2013 (which will allow people to marry regardless of their sex, sexual orientation or gender identity) the Act will also make consequential amendments to our current adoption laws. The Act will allow married couples regardless of their sex, sexual orientation or gender identity to adopt children. As the earlier Bill's commentary states:[11]

> 'If the bill were to pass, it would make consequential amendments to the Adoption Act 1955 that would have the effect of enabling married same-sex couples to adopt children lawfully, as any married couple may do.
>
> …
>
> We note that currently under the law a homosexual or transgender person may legally adopt a child, but same-sex couples may not. Such a position seems absurd. The amendments we recommend will ensure that married couples are eligible to adopt, regardless of the gender of the adoptive parents.
>
> We note that many families already exist which comprise children and same-sex or transgender parents. However, both parents do not have access to the full range of

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8 Marriage (Definition of Marriage) Amendment Bill (39–2) at 2–6.
9 Marriage (Definition of Marriage) Amendment Bill (39–2) at 3.
10 Marriage (Definition of Marriage) Amendment Bill (39–2) at 3.
11 Marriage (Definition of Marriage) Amendment Bill (39–2) at 5–6.

> legal rights that married heterosexual couples have. We consider that allowing same-sex couples to marry would grant an appropriate legal right to those families who are already raising children.'

Previously only heterosexual married couples could adopt a child as a couple. Section 3(2) of the Adoption Act 1955 states that an 'adoption order may be made on the application of 2 spouses jointly in respect of a child'. The word spouse was interpreted narrowly by the Courts and deemed to only apply to married couples. However, in *Re AMM*[12] the High Court allowed de facto heterosexual couples to jointly adopt for the first time in 2010.[13] The High Court held that:[14]

> '[A] meaning more consistent with the right to freedom from discrimination can be found. It is to interpret "spouses" as including de facto couples of the opposite sex. Although not the meaning that was intended at the time of enactment, it is a meaning that is consistent with the purposes of the Act, is not a strained meaning of "spouse", and is workable within the other parts of the Act. It will have quite limited consequences beyond the area of adoption.'

The Court specifically limited this decision to heterosexual de facto couples.[15] Same-sex de facto couples (and curiously all civil union couples heterosexual or otherwise) were still unable to adopt jointly as a couple, even though individuals of any sex, sexual orientation or gender identity have been permitted to adopt for some time.[16] It remains to be seen whether the passing of the Marriage (Definition of Marriage) Amendment Act 2013 will open the door to same-sex de facto couples and civil union couples to adopt jointly as a couple.

III INTERNATIONAL SURROGACY

(a) Background

International surrogacy has been a steadily growing industry since the beginning of the twenty-first century. The birth of a child of a surrogate mother in one country with genetic or intended parents from another creates a myriad of legal hurdles often not anticipated by those involved at the time of artificial conception. The commercial aspect of many cases of international surrogacy is particularly complex, given that different jurisdictions take a vastly different approach as to whether the commercialisation of gamete donation, pregnancy and childbirth is morally and legally acceptable. This creates a number of legal conflicts that can leave children born of international

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12 *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629.

13 For a more detailed analysis of *Re AMM* see Henaghan 'Discretion, Status and Money: The Essence of Family Law in New Zealand' in Bill Atkin (ed) *The International Survey of Family Law 2011 Edition* (Jordan Publishing, Bristol, 2011).

14 *Re AMM*, above n 12, at [50].

15 At [11].

16 See *Re T* [2008] NZFLR 185.

surrogacy both stateless and parentless. The lack of international regulation in relation to surrogacy potentially encroaches the human rights of the often-vulnerable surrogate mothers and children involved. Instead, protecting all the parties involved is left up to habitually scantily detailed contracts – which may or may not be legally enforceable – between surrogate mothers and commissioning parents.

There are two forms of surrogacy: traditional and gestational. In traditional surrogacy the egg of the surrogate mother and the sperm of either the intended father or a sperm donor are used, so the child is genetically related to the surrogate mother. Since the 1990s scientific advances and in vitro fertilisation (IVF) have enabled gestational surrogacy to be used instead, which involves the surrogate carrying a child that she is not genetically related to, created from eggs and sperm deriving from either the intended parents or donors. This creates additional complexity as three women become involved in the birth of a child; the intended mother, the egg donor and the surrogate who carries and gives birth to the child.[17] Legal issues arising from such arrangements include the parentage of the child, citizenship, immigration and contractual issues.

(b) New Zealand's current approach to international surrogacy

In New Zealand, s 14 of the Human Assisted Reproductive Technology Act 2004 allows surrogacy arrangements, but the agreements themselves are deemed to be unenforceable. Commercial surrogacy is illegal and it is a specific offence (punishable by up to one year's imprisonment or a fine not exceeding $100,000) to give or receive 'valuable consideration' for any person to participate in a surrogacy arrangement.[18] The Human Assisted Reproductive Technology Act 2004 does permit payments for 'any reasonable and necessary expenses' such as for counselling, IVF-related expenses, pregnancy tests and independent legal advice for the potential surrogate mother.[19] The outright ban on commercial surrogacy in New Zealand has increased the number of New Zealand couples looking overseas, in particular to Thailand, in order to find surrogates. Between August 2010 and November 2012 Immigration New Zealand reported that 18 children born as a result of international surrogacy were brought back into the country.[20]

The parentage of children born as a result of surrogacy is often complex, especially when international surrogacy is involved. Under the Status of Children Act 1969 the surrogate mother is always the legal mother of any child born as a result of any assisted human reproduction procedures, even where the

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17 Davis 'The Rise of Gestational Surrogacy and the Pressing Need for International Regulation' (2010) 21 Minn J Int'l L 120 at 123.

18 Human Assisted Reproductive Technology Act 2004, s 14(3) and (5).

19 Human Assisted Reproductive Technology Act 2004, s 14(4).

20 Johnston 'A Different Answer to *That* Question' *New Zealand Herald* (online ed, Auckland, 3 November 2012).

surrogate mother has no biological relationship to the child.[21] Who is deemed to be the legal father of the child is dependent on the father's relationship with the mother of the child.[22]

In New Zealand for the commissioning parents of the child born via surrogacy to become the legal parents of the child a legal adoption must take place. New Zealand is a signatory to the Hague Convention on Protection and Co-operation in Respect of Intercountry Adoption ('the Convention'), which is part of New Zealand law by virtue of the Adoption (Intercountry) Act 1997 ('the AIA'). If the surrogacy occurs in a country not party to that Convention, then the adoption requirements under the Adoption Act 1955 apply.[23] The children are normally brought into New Zealand on a temporary visa while the adoption process takes place.

The AIA and the Convention apply in situations 'where a child who is habitually resident in one contracting state ("the state of origin") has been, is being, or is to be moved to another contracting state' either after or preceding an adoption.[24] In cases where a child born through international surrogacy has been brought back to New Zealand for adoption, the court has tended to find that the AIA and the Convention do not apply. This is based on findings that the child is not 'habitually resident' in another state. In *Re application by KR*[25] the court dealt with the case of a baby born to a surrogate in Thailand from an embryo created by using the intended father's sperm and a donated egg. The intended parents assumed care of baby S immediately, and upon their return to New Zealand applied to adopt S. In determining whether S was habitually resident in Thailand, the court relied on authority that:[26]

> '… an important concept in assessing habitual residence is that of settled purpose … the settled purpose of a young child is necessarily that of the parent or the person or persons able to exercise the right to decide where the child should reside.'

As the intention of the intended parents was always to return to New Zealand with the child, S was held not to have been habitually resident in Thailand, and the AIA did therefore not apply.[27]

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21 Status of Children Act 1969, s 17.

22 Section 18 of the Status of Children Act 1969 dictates that the legal father of the child is the partner of the surrogate mother if the surrogate mother has a partner and if the surrogate mother has undertaken the surrogacy with her partner's consent. For more detailed information about the maternity and paternity of children conceived via assisted human reproduction procedures see ss 16–27 of the Status of Children Act 1969.

23 As a signatory to the Convention, the New Zealand Government will still work in accordance with its principles as a matter of best practice. See Internal Affairs, Child, Youth and Family and Immigration New Zealand *International Surrogacy Fact Sheet* (New Zealand, June 2011).

24 Hague Convention on Protection and Co-operation in Respect of Intercountry Adoption, Art 2.

25 *Re application by KR* [2011] NZFLR 429.

26 *Punter v Secretary for Justice* [2004] 2 NZLR 28 (CA) at [60]–[68].

27 *Re application by KR*, above n 25 at [14].

Adoptions then proceed under the Adoption Act 1955. The gestational mother must have given valid consent. Section 11 of the Adoption Act 1955 requires that:

(a) the applicants be fit and proper persons to raise children; and

(b) the adoption promotes the best interests of the child.

In such cases it will nearly always be in the best interests of the child to allow the adoption. In *Re application by KR* immigration authorities had made clear that if an adoption order was not granted S would 'have to be returned to Thailand notwithstanding that she had no identifiable parents or family connection'.[28] In this case the court said that it would be 'cruel and in fact quite ridiculous … it is in her welfare and best interests to remain here in New Zealand in the special and unique circumstances of her case'.[29]

The Adoption Act 1955 did not previously allow same-sex couples to adopt children jointly. This meant that both parties to a same-sex relationship could not jointly become the legal parents of the child. In *Re Application by BWS*[30] a same-sex couple in a civil union had two children via surrogates in California, one from the sperm of each same-sex partner and donated eggs. Their individual applications to adopt were successful; although each adopted only the child they were genetically related to. However, with the advent of the Marriage (Definition of Marriage) Amendment Act 2013 couples of any sex, sexual orientation and gender identity will soon be able to legally marry in New Zealand. Once married, couples of any sex, sexual orientation and gender identity will be able to apply to adopt children jointly. It remains to be seen if this legislative change will also open the door for civil union couples and same-sex de facto couples to adopt children jointly as a couple.

In *Re Application by BWS* the court also discussed the implications of s 25 of the Adoption Act 1955, which prohibits payment or consideration for the adoption of a child. It accepted the argument that the money exchanged was, in the minds of the participants, for the egg donation and surrogacy procedures, rather than for the adoption itself, and therefore there was no breach of the Adoption Act 1955. If there was a breach this would bring possible criminal sanctions, but would not necessarily prevent the adoption from proceeding due to the court's discretion to issue adoption orders.

(c) Proposed future legislation

In New Zealand new legislation entitled the Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill has been proposed. The Bill is currently in the Parliamentary Members' Bills Ballot. This Bill intends to

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[28] At [8].
[29] At [19].
[30] *Re Application by BWS* [2011] NZFLR 621.

reform both adoption and surrogacy law in New Zealand. Importantly, in relation to surrogacy, the Bill sets out the 'requirements with which a commissioning parent or parents must comply when entering into an altruistic surrogacy arrangement, and when seeking to have that child legally recognised as being a part of their family'.[31] These requirements include setting out guidelines for overseas altruistic surrogacy processes that incorporate the New Zealand adoption process. The Bill ultimately seeks to ensure the best interests of the child are at the heart of adoption and surrogacy laws.

The proposed Bill amends the Status of Children Act 1969 to provide a prima facie presumption as to parenthood for surrogate and adoptive parents of children born overseas whose names have been entered into the birth registry of the overseas country where the child was born, or when a foreign court has made a parentage order in favour of the surrogate/adoptive parents.

Section 5 of the Status of Children Act 1969 currently states:

> **'5 Presumptions as to parenthood**
>
> (1) A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.
> (2) Every question of fact that arises in applying subsection (1) shall be decided on a balance of probabilities.
> (3) This section shall apply in respect of every child, whether born before or after the commencement of this Act, and whether born in New Zealand or not, and whether or not his father or mother has ever been domiciled in New Zealand.'

Clause 8 of the proposed Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill 2012 would add the following two subsections to s 5 of the Status of Children Act 1969:

> '(4) If a child has been born in a foreign country, and the names of the parent or parents for that child have been entered in a register relating to births in that country, a certified copy of that entry purporting to be signed or sealed in accordance with the law of that foreign country shall be prima facie evidence that in New Zealand, the person or persons named as the parent or parents are the parent or parents of the child.
>
> (5) If a child has been born in a foreign country, and a court or a judicial or public authority in that country has made an order as to the parentage of the child, a certified copy of that order purporting to be signed or sealed in accordance with the law of that foreign country shall be prima facie evidence that in New Zealand, the person or persons named in the order as the parent or parents are the parent or parents of the child.'

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[31] Proposed Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill, Explanatory Note.

These additional clauses would be particularly helpful for New Zealand couples who commission a commercial surrogacy in California. This is because in California the names of the commissioning parents go straight onto the child's birth certificate and thereby would be prima facie evidence in New Zealand that the commissioning parents are the legal parents.

An earlier draft of the proposed Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill in New Zealand MP Nikki Kaye's name contained the following provision regarding international commercial surrogacy:

> **'224 International commercial surrogacy arrangements**
>
> (1) For the purposes of this Act, **international commercial surrogacy arrangement** is defined as any surrogacy arrangement where one or more parties gives or receives, or agrees to give or receive, valuable consideration for his or her participation or for any other person's participation, or for arranging any other person's participation, in a surrogacy arrangement that occurs in a country other than New Zealand.
> (2) The fact that an international commercial surrogacy arrangement has occurred does not prevent an adoption application from being lodged.
> (3) Any adoption application made in New Zealand in respect of a child conceived via an international commercial surrogacy arrangement must be determined in light of the provisions of this Act.
> (4) The Court is not compelled to refuse to grant an adoption order in favour of the adoptive parents because the child in question was conceived via an international surrogacy arrangement.
> (5) To avoid doubt, in making its decision the Court must have regard to the principle that the welfare and best interests of the child must be the paramount consideration when considering an adoption application.'

However, in the current version of the Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill in New Zealand MP Kevin Hague's name this proposed provision has unfortunately been removed. Despite commercial surrogacy being prohibited in New Zealand, any new surrogacy legislation needs to address what happens (particularly to the child concerned) in the international commercial surrogacy cases that will still undoubtedly occur. It is best to accept the reality that many people want to have children and that some prospective parents will stop at nothing, including international commercial surrogacy, to make that happen. The evidence thus far shows that these prospective parents really want to have, love and nurture these children, despite any parentage and immigration barriers involved.

International commercial surrogacy does raise many complicated legal questions. Both case law and legislation are currently limited on international commercial surrogacy, leaving a gap that will need to be filled in the future by judges, immigration authorities, and lawmakers. The major challenge for New Zealand authorities and courts faced with international surrogacy cases is ensuring that the welfare of children born via surrogacy can be safeguarded, while respecting New Zealand's surrogacy laws and policies. Any potential legal

framework on a global basis needs to ensure that surrogate mothers receive a fair payment for their services and that their health and well-being is protected. It is also essential that a child's right to know his or her identity, particularly his or her genetic identity, is preserved. This becomes even more important in the future where genetic medicine may become the dominant diagnostic tool in many healthcare systems.

In the meantime, the parentage and/or citizenship of children born via an international surrogacy arrangement will remain a significant issue for courts and judges to contend with. In these cases Family Court Judges need to put the welfare and best interests of the child before the politics of the morality and legality of international surrogacy. Not to recognise the parentage and/or citizenship of children born via international surrogacy is to leave these children in legal limbo and to disconnect them from their commissioning parents who seek to have, love and nurture these children.

IV FAMILY COURT REVIEW UPDATE: THE FAMILY COURT PROCEEDINGS REFORM BILL

The initial phases of the review of New Zealand Family Court were discussed in *The International Survey of Family Law 2012 Edition*.[32] Since that time the Family Court review process has progressed and the Family Court Proceedings Reform Bill (90–1) was introduced to the House on 27 November 2012. The Bill passed its first reading on 4 December 2012 and was referred to the Justice and Electoral Committee. Public submissions closed on 13 February 2013 and the Justice and Electoral Committee report is due to be released on 4 June 2013.

The Family Court Proceedings Reform Bill (90–1) is designed to improve the current family court system and to reduce the rising costs of resolving family law disputes. As the Bill's explanatory note states:[33]

> 'The Family Court Proceedings Reform Bill implements the Government's decisions resulting from a review of the Family Court conducted by the Ministry of Justice. The purpose of the reforms is to ensure a modern, accessible family justice system that is responsive to children and vulnerable people, and is efficient and effective.
>
> The Bill encourages faster, less adversarial resolution of family disputes through requiring parties to disputes about children to participate in an out-of-court family dispute resolution process, and a parenting information programme, before applying to the Family Court.

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[32] Mark Henaghan 'The Changing Politics of Family Law in New Zealand' in Bill Atkin (ed) *The International Survey of Family Law 2012* (Jordan Publishing, Bristol, 2012) at pp 255–261.

[33] Family Court Proceedings Reform Bill (90–1) at 1–2.

> The Bill focuses the Family Court on those disputes that need a judicial decision. It includes changes to make the operation of the court more efficient and effective, to mitigate the adversarial nature of court proceedings, and to improve the court's response to victims of domestic violence.
>
> Changes included in the Bill allow for better targeting of resources in the family justice system. These changes are aimed at ensuring that the system remains affordable in the future, and that the court is able to support those children and vulnerable people who most need its protection.'

The Bill proposes substantial changes to the family justice system and would amend most of New Zealand's legislation pertaining to families and children including the Care of Children Act 2004, the Child Support Act 1991, the Children, Young Persons, and Their Families Act 1989, the Domestic Violence Act 1995, the Family Courts Act 1980, Family Proceedings Act 1980 and the Property (Relationships) Act 1976.[34]

Two significant changes involve replacing court ordered counselling, lawyer led settlement, counsel led mediation and judicial mediation conferences with a new family dispute resolution service,[35] and changing the name of the Family Courts Act 1980 to the Family Disputes (Resolution Methods) Act 1980.[36] Whilst alternative dispute resolution may provide an important opportunity for parties to talk matters through, the Family Court Proceedings Reform Bill (90–1) provides little information as to what individuals and groups will be approved as family dispute resolution providers, and what legal qualifications (if any) these providers will have. How can the providers protect parties' legal rights and reach fair resolutions if they have no legal knowledge? The motive for changing the name of the Family Courts Act 1980 to the Family Disputes (Resolution Methods) Act 1980 is to specifically change the focus of the legislation from court hearings to dispute resolution in a wider sense. As the Bill's explanatory note states:[37]

> 'Family dispute resolution will be incorporated into the Family Courts Act 1980, which is being renamed the Family Disputes (Resolution Methods) Act 1980 to make it clear that Family Court proceedings are only 1 method of resolving family disputes and that family dispute resolution comes first.'

This name change may be confusing to parties involved in family law disputes and may diminish the importance of the Family Court as a crucial forum for resolving some disputes.

The Family Court Proceedings Reform Bill (90–1) seeks to limit appointments of separate lawyers to represent children. Clause 5 of the Bill will allow lawyers to represent children to be appointed under the Care of Children Act 2004 only if the court has 'concerns for the safety or well-being of the child and considers

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34 Family Court Proceedings Reform Bill (90–1) at 2.
35 Family Court Proceedings Reform Bill (90–1), cl 58.
36 Family Court Proceedings Reform Bill (90–1), cl 58.
37 Family Court Proceedings Reform Bill (90–1) at 3.

an appointment necessary'.[38] The current provisions state that the court *must* appoint a lawyer to act for a child if the proceedings concern who should provide day-to-day care of a child and are likely to proceed to a hearing, unless the court 'is satisfied the appointment would serve no useful purpose'.[39] Lawyer for the child is the only opportunity for some children to be heard when their parents are in serious dispute. Children are the most vulnerable during the emotional turmoil of parental separations. Many parents are under significant emotional and economic pressure during this time so it is essential that the interests of children are protected by separate child-focused legal representation. Their voices must be heard so that good decisions are made about their future. Reducing separate legal representation for children is not a child-focused proposal.

One of the cost-cutting measures of the Family Court Proceedings Reform Bill (90–1) was to reduce the roles of lawyers in family law disputes generally. Clause 5 of the Bill states that lawyers may only act for a party to a proceeding commenced by an application made without notice, in a case involving international child abduction or in a 'defended proceeding if a Judge has directed that the issues in dispute between the parties proceed to a hearing'. The Family Court Judges of New Zealand made a joint submission to the Justice and Electoral Committee criticising many of the proposed reforms.[40] One of their main concerns was the reduction in the role of lawyers. The Judges' submission states:[41]

> 'Parties are not permitted to have legal representation for the early court process. If parties have no legal assistance they often have misunderstandings about their legal rights and there will be deficiencies in the evidence they file. Before a matter can be finalised legal and factual issues must be addressed, including the safety of children. A social work or psychological report may be required. Without legal representation all but the simplest cases will have to be set down for defended hearings. Currently unrepresented parties cause a multitude of problems in family proceedings and consume a great deal of judicial time and the time of court staff. The new proposals will increase the number of these problems significantly.'

Following this submission the Justice Minister Judith Collins has assured New Zealanders that the Bill was 'a proposal to get feedback' and that there would be changes when the Family Court Proceedings Reform Bill came back from the Justice and Electoral Committee in June.[42] Collins is quoted as saying:[43]

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38 Family Court Proceedings Reform Bill (90–1), cl 5.

39 Care of Children Act 2004, s 7.

40 Family Court Judges of New Zealand 'Submission of the Family Court Judges of New Zealand to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012'.

41 At [4].

42 Simon Collins 'Govt Backdown Follows Attack by Family Judges' *The New Zealand Herald* (online ed, Auckland, 30 March 2013).

43 Collins, above n 42.

> 'There will be more involvement by lawyers than indicated … There are likely to be opportunities for lawyers to be involved in relation to children as well … We will be definitely proceeding with FDR. However, we have listened very much to the judges and their concerns, and the departmental report coming back to the select committee is likely to reflect that listening has occurred.'

It remains to be seen exactly how the Bill will be altered to reflect the greater involvement of lawyers in family disputes.

Some of the reforms proposed by the Family Court Proceedings Reform Bill (90–1) are extremely positive. In particular, the amendments to the Domestic Violence Act 1995 are to be applauded. Clause 35 of the Bill extends the current definition of domestic violence to include 'financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education)'.[44] The Bill also introduces better delivery of non-violence programmes for perpetrators of domestic violence.[45] Most importantly, the maximum penalty for breaching a protection order will increase from 2 years' imprisonment to 3 years' imprisonment.[46]

V CONCLUSION

Family law affects people's personal lives very deeply and consequentially never stands still. As this chapter shows, legislative transformation is inevitable. What generally lies behind all legislative change in family law is a push for those who are currently marginalised to be included within the legal concepts of family law. The Marriage (Definition of Marriage) Amendment Act 2013 incorporates a request for all New Zealanders to be able to legally marry their partner regardless of their sex, sexual orientation, or gender identity and also to be able to jointly adopt children in the same way that heterosexual married couples currently can. Proposed legislation such as the Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill communicates a desire for easier ways for New Zealand commissioning parents to become the legal parents of their children born through assisted human reproductive procedures such as international surrogacy and to ensure the best interests and well-being of the children born as a result of those procedures. The Family Court Proceedings Reform Bill (despite the flaws that still need to be ironed out) seeks to ensure (amongst other things) that the financial and economic abuse as suffered by many New Zealanders is included within the definition of domestic violence and that all family disputes are resolved as efficiently and effectively as possible.

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44 Family Court Proceedings Reform Bill (90–1), cl 35.
45 Family Court Proceedings Reform Bill (90–1), cl 40.
46 Family Court Proceedings Reform Bill (90–1), cl 51.

Norway

FUTURE POWERS OF ATTORNEY

Peter Hambro[*]

Résumé

La Norvège a présenté une nouvelle forme de procuration, appelée 'future powers of attorney' (mandat futur). Ceci correspond à ce que l'on appelle en anglais 'enduring/lasting or durable powers of attorney' (mandat permanent). Le but de cet article est de donner un résumé des nouvelles dispositions et de leur contexte.

I INTRODUCTION

Norway has introduced a new form of power of attorney, called future powers of attorney. This corresponds to what in English is called enduring/lasting or durable powers of attorney. The purpose of this article is to give a summary of the new provisions and their background.

II DEFINITION

The present Norwegian law of guardianship is dated 3 March 2010 and enters into force 1 July 2013. The previous law is from 1927.

'Future powers of attorney' is a form of power of attorney which, as mentioned, has previously not existed. The name may seem somewhat strange since all powers of attorney necessarily apply to the future. The point is that such a power of attorney only enters into force in the future depending on whether a specified event takes place. This event is that the grantor becomes incapable of taking care of his or her own affairs. According to § 78 in the new law, the attorney is given the right to represent the grantor 'after the grantor due to mental illness, including dementia, or other serious health problems becomes incapable of taking care of his affairs within the areas specified in the power of attorney'. Originally the proposal in the committee report was that future powers of attorney only applied to powers of attorney entering into force in the future. In the proposal from the Ministry the term was expanded to include powers of attorney which enter into force immediately and remain in

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force in the future even if the grantor becomes incapacitated.[1] The term future power of attorney therefore includes both lasting or durable powers of attorney and what we call pure or real future powers of attorney. This definition is identical with principle 1 in the Council of Europe's Recommendation (2009) 11 where the wording is: 'A continuing power of attorney is a mandate given by capable adults with the purpose that it shall remain in force, or enter into force, in the event of the granter's incapacity.' In this chapter I will use the term durable power of attorney for both types, abbreviated to DPA. Where the difference is relevant I will use the term immediate DPA and pure DPA for those entering into force in the future. Other English words are as mentioned 'enduring' or 'lasting' powers of attorney.

III THE LEGAL NECESSITY OF THE NEW LAW

The Norwegian law of contracts is from 1918. According to § 22 of this law, a power of attorney expires if the grantor is put under guardianship. If the grantor merely becomes incapacitated, the question arises whether the law can be applied by analogy. In Denmark and Finland a power of attorney remains in force after the grantor becomes incapacitated while in Sweden one has assumed that a power of attorney becomes inoperable in such cases. In Norway the legal situation has been unclear, which is one of the main reasons DPAs have been included in the new law of guardianship.[2] In the law of contracts, § 22 has been changed and now stipulates clearly that a power of attorney expires if the grantor become incapacitated unless a future power of attorney has been made.

IV BACKGROUND HISTORY

There has during the last roughly 15 years been a trend in continental European countries to enact law about DPAs. English speaking countries such as Australia, Canada, Great Britain and the USA have had DPAs for a longer time. This trend started for most countries in Europe with the Recommendation in 1999 from the Council of Europe which emphasised the need for self-determination and autonomy for adults with incapacity. A further important argument in favour of such powers of attorney is the saving in public resources as mentioned in the Explanatory memorandum/general comments to the Recommendation of the Council of Europe (2009) 11. Here the following is stated:

> 'Some states that have recently introduced the system have identified a further benefit in reducing the workload of the judicial and administrative authorities concerning measure of protection, having regard to the time required, the rising public costs and the risk that the public representation might be ineffective.'

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1 Ot prp nr 110, p 211.
2 NOU 2004: 16, p 292.

Scotland became the first country in Europe to enact a law concerning DPAs after 1999. The Adults with Incapacity Act is from 2000 and was later revised in 2007. 'Continuing power of attorney' (CPA) is the term for powers of attorney covering financial matters and 'welfare power of attorney' (WPA) the term for powers of attorney concerning health and personal welfare. England and Wales have had laws about powers of attorney since 1985 and the present regulation of DPAs is based upon the Mental Capacity Act of 2005.

In the United States each state decides whether to enact laws governing powers of attorney. A model law has been made called the Uniform Durable Powers of Attorney Act in 2006 and was made by the National Conference of Commissioners on Uniform State Law.

In Europe, Germany is a special case due to the fact that powers of attorney in Germany do not expire when the grantor becomes incapacitated. Therefore such powers of attorney have existed in Germany for almost a hundred years. Austria introduced the system of DPAs – called *Vorsorgeauftrag* – in 2006. Switzerland followed in 2008.

France legalised the system in 2007 and the new law entered into force in 2009. DPAs are called '*mandat de protection future*'. In France a DPA has to be signed by the attorney in addition to the grantor as the power of attorney is viewed as a contract.

In the Nordic countries Denmark has so far not passed a law about DPAs, but in Denmark powers of attorney do not automatically expire when the grantor becomes incapacitated. In Sweden a draft for a law concerning DPAs was prepared in 2004,[3] but has so far not been enacted as law. Finland passed in 2007 a special law about DPAs called '*lov om intressebevakningsfullmakt*'.

V SHOULD ONE MAKE A DURABLE POWER OF ATTORNEY?

Obviously a DPA is not an ideal solution for all elderly people. Probably the largest group of people making such powers of attorney will be elderly people in early stages of dementia. Roughly 95–98% of all people suffering from dementia are more than 65 years old.

Whether one should make a DPA depends mainly on whether one has a spouse or cohabitant and/or children and the relationship between family members. DPAs would seem a sensible solution for a single person with no children. Such a person could appoint a friend or other person one feels is suitable for the task and thus avoid being put under guardianship in the future. Another example would be a person with a spouse or cohabitant and no children. Most people in this situation would want the spouse as attorney. Moving on we have people

[3] SOU 2004: 112.

with a spouse and joint children. In such cases an important factor would be the relationship within the family; whether there is a friendly and trustful relationship between the children and between the children and the spouse of the grantor. Probably the most complicated situation is families where the grantor has children from a previous marriage or relationship and perhaps joint children with his present spouse. This situation is quite common in Norway since we have a divorce rate of roughly 50%.[4] Obviously there is a considerable risk of conflict between the children from a previous marriage and the spouse or other children. In such cases the grantor should devote considerable time and thought to the exact wording and contents of the DPA and choice of attorney.

VI THE FUTURE CONDITION

The future condition is in § 78 defined with the wording that the grantor due to mental illness, including dementia or other serious deterioration in health, becomes incapable of taking care of his or her interests within the areas covered by the power of attorney. Mental illness according to the Ministry's proposal covers all forms of conditions which according to medical science are defined as mental illness. Quite certainly dementia will be the most important illness covered by § 78. The attorney must in the future determine whether the grantor's condition has become sufficiently serious to bring the power of attorney into use. This problem is avoided if the power of attorney becomes effective immediately upon fulfilling the form's requirement. When deciding whether to make a DPA, grantors should therefore seriously consider making an immediate DPA rather than the 'pure' power of attorney. Dementia involves practical problems since it develops gradually and it can be difficult to determine how serious the condition is. A person suffering from serious dementia can often carry on relatively serious conversations. Geriatric specialists frequently have to examine a patient several times in order to draw a conclusion about the stage of dementia the patient is suffering from.

VII GRANTOR AND ATTORNEY

(a) Grantor

According to § 79 a DPA may be created by a person aged over 18 who is capable of understanding the implications of such a power of attorney. In other words, a person suffering from mental illness, including severe dementia, cannot establish a valid power of attorney. Most likely the majority of DPAs will be made by elderly people suffering from early stages of dementia. There is no requirement in the law concerning proof of the grantor's mental state at the time when the power of attorney is signed. Both in the committee report and the proposal from the Ministry, the question of whether one should require a

[4] Ssb no Befolkningsstatistikk. Ekteskap og skilsmisser, 2010.

certificate from a doctor was taken into consideration. In the proposal from the Ministry, it is stated that it is definitely advisable to obtain such a certificate, but the Ministry did not wish to include a requirement in the law.[5]

Obviously it is advisable and important to obtain a certificate or declaration from a doctor. Quite often the time duration from writing a DPA to the time it becomes effective is very short. A survey in Great Britain showed that 50% of all DPAs enter into force within a year after they were made.[6] This shows that there often will be uncertainty concerning the mental state of the grantor at the time of signing the power of attorney. The best solution is to get a declaration from a specialist, in other words a geriatrician, about the grantor's mental health. In a country like Norway where large areas are thinly populated, most people will only have access to a general practitioner. Unfortunately, a large part of elderly people in early stages of dementia are not themselves aware of this fact.

(b) Choice of attorney

A DPA may be given to one or more persons to represent the grantor (§ 78). The only formal requirement in the law is that the attorney must be 18 years of age when the DPA enters into force. The grantor may choose whoever he or she wishes with no limitations apart from the requirement that the attorney must be a physical person. Most often the attorney will be the spouse or cohabitant or one of the grantor's children. If there are several children, the grantor definitely should discuss with them the plans to establish a DPA and try to achieve agreement among them. Giving a DPA to several children who then have to act jointly is definitely not an ideal solution. There is no need for the attorney to have a legal background and using a lawyer will probably involve costs above the acceptable level in the law, where § 88 mentions 'suitable' compensation.

The grantor may appoint several attorneys and may appoint them to act jointly or separately, or as substitutes. An example would be giving a DPA for financial affairs to one person and a DPA for personal affairs to another person. According to § 79 third section the grantor may appoint a substitute attorney to step in for the first attorney if this person is unable to undertake the tasks. Quite often when a DPA is established the grantor does not know when it will enter into force. Several years might pass and the attorney might die in the meantime or become mentally incapable him or herself. Obviously, if one appoints a spouse as attorney, it is advisable to appoint a substitute in case the spouse predeceases the grantor.

VIII EXTENT OF A DPA

In the report from the Ministry the following is stated:

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5 Ot prp nr 110, p 148.

6 Svend Danielsen, *Generationsskifte i ret og praksis* 1999, p 305.

> 'The law of contracts contains no limitations on the grantor's choice of attorney or the content of the power of attorney. The grantor therefore decides the extent of the power of attorney insofar as other laws do not set limitations.'[7]

The DPA can cover financial affairs and personal affairs (§ 80 in the law). It may be written as a general power of attorney and will then cover everything which a guardian can decide in relation to financial and personal affairs. A comprehensive or general power of attorney may be formulated in various ways. One is a quite general and comprehensive DPA which covers 'all my financial affairs' or as it usually is formulated in Great Britain and other English speaking countries, 'all economic and financial matters' or 'property and financial matters'. The following wording is used in a Danish form for a general DPA: 'gives the right to take care of my entire estate with no exceptions and to undertake any transaction as if it were done by myself'.[8] In the report from the Ministry, financial affairs are exemplified with these words: 'Financial affairs may among other things include buying and selling items, payment of debts and other expenses, insurance questions, taking care of bank accounts and tax returns, application for financial assistance on behalf of the grantor, receiving or declining an inheritance and investing the assets of the grantor.'[9]

A different alternative is to make a precise list of all transactions the attorney may undertake. The best alternative in my opinion is to combine a comprehensive wording which is then followed with various specified transactions as examples and the wording, 'including but not limited to the following …'.

According to § 80 a DPA may be limited to certain areas. One alternative is to make a generally formulated DPA and then specify certain areas which are not covered by the DPA. A drawback with limitations and specifications is that doubt may arise concerning the contents and limits of the DPA. A DPA must be interpreted in view of what were the intentions of the grantor at the time it was made. Certain very personal matters may not be included in a DPA. The law in § 80 mentions such matters as voting, entering into marriage, making or revoking a will. Important decisions on health matters can only be made by the attorney to the extent that special laws in this field permit.

(a) Specifications

Quite often it is advisable to include in the DPA a list of tasks given to the attorney and which transactions the attorney can undertake. The extent of such a list will, of course, depend on the size of the grantor's estate and type of assets owned. Normally the attorney will be given the right to dispose of the grantor's income and use the income to pay all bills. Therefore the attorney should be given the right to sign for the grantor's bank accounts and possibly

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7 Ot prp nr 110, p 142.
8 Svend Danielsen, *Generationsskifte i ret og praksis* 1999, p 316.
9 Ot prp nr 110, p 213.

also accounts with a stock broker or other financial institution. Real property is for most people their main asset. If the DPA is to cover real property these should be listed and specified with address in the DPA. The various types of transactions given to the attorney should also be listed and these would include (a) payment of all running expenses such as insurance and local taxes, (b) all decisions involving upkeep and renovations, (c) wholly or partial renting out and (d) taking out a new mortgage or selling the property. Frequently single, elderly people in advanced stage of dementia will have to live in an institution and selling their real property will become necessary.

We have in the law a paragraph regulating conflicts of interest (§ 86). In the DPA the attorney may be given the right to undertake transactions which otherwise would be in violation of this paragraph. There is a limitation on the right to give gifts, but again in the DPA this right may be extended which in English is called 'extended gift power'. Payment of expenses and compensation for the attorney's work is another area which can be regulated in the DPA.

(b) Instructions

The grantor may include instructions as to how certain transactions are to be carried out. Instructions may be included in the DPA or in a separate document which is advisable if they are to be kept secret from a third party. An example could be how decisions are to be made for the investment of funds with a stockbroker. The grantor may wish to avoid speculative investments. If a DPA is given to the spouse, the grantor perhaps wishes to include a clause about their children receiving equal amounts in any gifts. Another example could be how real property in the future is to be sold. The grantor may include an instruction that a second home must be sold within the family.

IX FORM REQUIREMENTS § 81

Most countries include in their laws about DPAs certain form requirements. In the Recommendation (2009) 11 from the Council of Europe principle 5 states that a continuing power of attorney shall be in writing. The form requirements in our law are specified in § 81 and are virtually identical to making a will. The DPA must be in writing with two witnesses who have been accepted by the grantor and are aware that the document is a DPA and the document must be signed by the grantor in the presence of the witnesses and then signed by both witnesses.

The witnesses must be mentally capable of understanding the nature of their task and the attorney may of course not act as a witness. The same applies to certain persons closely related to the attorney. In one respect the form requirement for a DPA is in fact stricter than for a will. For wills it is sufficient that the document is titled 'will' while for DPAs it must be clear from the text of the document that it is a DPA. In other words it must be specified in the

document either that the DPA enters into force immediately and is to remain in force after the grantor becomes incapacitated or that the DPA shall enter into force in the future in case of incapacity. It is not sufficient to inform the witnesses that the document is a DPA. This again is in accordance with Recommendation (2009) 11 principle 5 where it is stated that the document shall explicitly state that it shall enter into force or remain in force in the event of the grantor's incapacity.

There is no requirement that a DPA is registered once it has been signed and there is no system for such a registration. It is up to the grantor to decide whether to inform third persons about the power of attorney that has been created.

(a) Advisable additional formalities

Information which it is advisable to include, but which is not legally required, is specified in § 82. The most important of these is that the DPA should be dated. Writing the date is important because DPAs often are made by elderly people in the initial stages of dementia. Other information that it advisable to include is that the grantor has made the DPA of his or her own free will, that the grantor was able to understand the importance of the act and other circumstances which may be of relevance for deciding the validity of the DPA at a later time.

X ENTERING INTO FORCE § 83

A pure DPA enters into force when the grantor, in the opinion of the attorney, becomes incapable of taking care of his or her affairs (§ 83). An immediate DPA, of course, enters into force when it is signed or at the time otherwise specified in the DPA. This is precisely the main advantage of an immediate DPA; the attorney does not have to make a decision concerning the mental state of the grantor. Often people with dementia will gradually decline mentally which means that it may be difficult for the attorney to decide exactly when the DPA enters into force. The grantor may have appointed several attorneys each with different areas of responsibility. In such cases each attorney must decide whether the DPA should enter into force.

The law requires that the attorney sends a notification to the grantor and the grantor's spouse or cohabitant and other close relatives about the existence of the DPA and of the fact that the attorney now intends to use it. If the grantor is suffering from severe dementia this requirement of notifying the grantor is a mere formality. There is no requirement in § 83 as to how the notification is to be given, but in order to obtain an official confirmation (see below), it will have to be made in writing. It is not possible to register the fact that the DPA has entered into force.

With a pure DPA the document in itself, and the attorney's opinion that it has entered into force, will not be sufficient to make important transactions. Most important transactions will involve a third person and this person most likely will insist upon proof of the grantor's mental condition. This means that the attorney for most practical purposes will need a written statement from a doctor concerning the grantor's mental state. Furthermore, banks, other financial institutions and the public authority which registers transactions involving real property, will not be satisfied merely with a document and statement from a doctor.

XI CONFIRMATION

According to § 84 the attorney can obtain an official confirmation about the DPA entering into force and this is given by the '*fylkesmann*'. The fylkesmann is the formal head of the local county and would in English be called county mayor or governor.

In order to obtain a confirmation the attorney has to send in the original document of the DPA and proof that notification has been sent according to § 83. In addition the attorney must obtain a certificate from a doctor about the grantor's mental state. It is quite possible that the grantor or close relatives claim that the grantor still is able to take care of his or her own affairs. It is even possible that one of these people obtains a doctor's certificate with a different conclusion from the one presented by the attorney. We have in Norway a system where everybody is allotted a 'fixed' doctor. Accordingly most people will go to the same doctor over a period of many years. This means that in most cases the attorney will contact the 'fixed' doctor and get a certificate from that doctor. The county governor will regard this certificate as reliable given the fact that the doctor will have known the grantor as a patient for many years. The doctor's statement would be more important than a statement from an outside doctor who has made only one observation of the grantor. Obviously, the most reliable doctor's statement would be one from a geriatrician.

A confirmation shall not be given if the grantor at the time the DPA was signed was incapable of taking care of his or her affairs or if the attorney is not suited for the tasks covered by the DPA. It is important to remember that the whole point with the system of DPAs is that the grantor as such shall have the right to choose who shall make decisions on his or her behalf on becoming incapacitated. The fact that the county governor disagrees with the choice of attorney is not sufficient reason to refuse to issue a statement of confirmation. One reason mentioned in the Ministry's report is that the attorney in a criminal case has been found guilty of fraudulent behaviour in financial matters. If as much as for example 10 years have passed since the DPA was signed, it would be advisable for the county governor to contact family members and make inquiries about the qualifications of the attorney at the present time.

According to § 84 the county governor is required to gather together relevant information about the grantor and can for this purpose contact a spouse, cohabitant or close relatives. If confirmation is given, the county governor gives the attorney an attestation. This attestation will most likely become very important as it will make it possible for the attorney to undertake all transactions covered by the DPA. Third persons who rely on this attestation will be viewed as acting in good faith. An attestation does not necessarily mean that the DPA is valid. A spouse, cohabitant or close relative who has not been appointed attorney may dispute the validity of the DPA before the regular courts, but this would be costly and time consuming.

If the grantor owns real property and the DPA authorises transactions concerning such assets, the attestation should be registered with the land register. This requirement also applies to several other similar registers for assets such as automobiles and shares (stocks).

XII THE ATTORNEY'S ASSIGNMENTS

According to § 85 the attorney shall act in accordance with the DPA and in the interests of the grantor. This is virtually a direct translation of principle 10 in the Recommendation (2009) 11. An additional declaration of principle is included in § 85 second section where the wording is that the attorney shall as far as possible consult with the grantor before decisions are made. This is unnecessary if the grantor is incapable of understanding the information.

The third section of § 85 is of more practical importance. The grantor's economic and financial matters are to be kept separate from the attorney's own. In addition, the attorney must keep sufficient records of all decisions and transactions made on behalf of the grantor. Obviously if the spouse or cohabitant is the attorney, it will often be extremely difficult to keep the grantor's assets apart. The extent of the obligation to keep records will depend on the importance of the decisions which are made. It has not been the intention that records are to be kept of all daily and more trivial transactions. Again, if the spouse or cohabitant is the attorney the duty to keep records will be somewhat limited. The grantor may in the DPA include detailed instructions about the records which are to be kept by the attorney.

There are no sanctions in law if the attorney does not fulfil these requirements. The county governor may demand more detailed accounts and a violation of § 85 could be taken into consideration if close family members request that a guardian be appointed for the grantor.

The attorney may not represent the grantor in matters where the attorney could not act as a guardian (§ 86). Conflict of interest for guardians is regulated in § 34 of the law. A conflict of interest is contingent upon the guardian, or a person closely related to the guardian, having a personal interest in the matter which is in conflict with the interests of the grantor. There are several

exceptions to this rule about conflict of interest. The attorney may give 'normal' gifts on behalf of the grantor and also has the right to have expenses covered and receive a suitable financial compensation for the work done. The attorney can also, regardless of conflict of interest, make decisions which are specifically mentioned in the DPA.

(a) Gifts § 87

The attorney may give traditional gifts on behalf of the grantor. Such gifts can be received by the attorney him or herself and close family members which would be the case if the spouse is the attorney. The term 'traditional', is of course, discretionary and includes birthday and Christmas gifts. Relevant factors would be the grantor's economic situation and previous habits about making gifts. This limitation on the right to give gifts does not apply if otherwise specified in the power of attorney. The grantor may therefore make what in English is called an 'extended gift power'. Other gifts may be given if this is clearly specified in the power of attorney. In other words a general right to give gifts of any size to whomever one wishes would not be valid. The extended right to give gifts must be sufficiently clearly written so that it is possible for a third party to determine whether the attorney is acting in accordance with the power of attorney. This means that there must be a specified limit to gifts and a specification as to whom gifts may be given. An example would be that the attorney is given the right to make gifts up to a certain amount each fifth year to the grantor's grandchildren.

(b) Expenses and compensation § 88

This is a matter which definitely should be discussed between the grantor and the attorney when the power of attorney is made. At this point in time it is impossible to know the duration of the attorney's work. This depends on when the grantor become incapacitated and how long the grantor lives. Furthermore, it is difficult to estimate how much time the attorney will spend on the assignments. If the level of compensation is specified in the power of attorney or in a separate document, this is binding upon the attorney even if the work is more extensive than originally envisaged. The attorney always has the option to resign from the assignment. According to § 88 the attorney has the right to cover all necessary expenses from the grantor's funds. The amount of expenses which are viewed as necessary depends on the extent of the attorney's assignments. One must also take into consideration work which usually is done with no refunding by close relatives or the spouse.

As far as compensation for work is concerned, the wording in the law is very discretionary. Where it is viewed as reasonable the attorney may receive a suitable payment. Whether compensation is reasonable will depend on the choice of attorney. If the attorney is the spouse or cohabitant, compensation in most cases would not be viewed as reasonable. After all, spouses do not pay

each other for assistance given in practical matters. This would also be the case if a child is the attorney unless the assignments are comprehensive.

(c) Spouse or cohabitant as attorney

Special problems may arise in relation to §§ 86 and 87 when the spouse or cohabitant is the attorney. One can use as an example a case where the husband is suffering from early stages of dementia and gives a DPA to his wife. By and large his income, whether from pension or capital, is used to cover all household expenses and most of the liquid capital is owned by him. At a given stage of development the DPA enters into force. We then have to differentiate between two completely different situations. One is quite simple: the husband still lives at home. In this case the wife as attorney may pay all expenses as before. The mutual obligation of financial support according to § 38 in the Marriage Act[10] is not influenced by the fact that a spouse is incapacitated and when the wife undertakes transactions in order to maintain their accustomed standard of living, this obviously is in accordance with the wishes of the husband (grantor).

A fairly high percentage of all elderly people suffering from dementia must at a certain stage live in institutions. An obvious and simple case concerning the extent of the DPA is if the spouses have what I would call an average standard of living. When the husband lives in an institution his needs are taken care of. The mutual obligation of financial support between spouses continues and when the wife uses the DPA this is hardly contrary to the interests of the husband. If the spouses have no children or joint children, this will in any case hardly be an area of conflict.

A conflict may arise if the husband has children from a previous marriage or relationship and the spouses have a standard of living above what we can call average. We can use as an example spouses who have a main residence and one or two second homes and two cars. The husband's income and capital is used to pay all household expenses and the upkeep of several homes. The wife as attorney wishes to maintain this lifestyle although it is far above the legal obligation of mutual financial support. Using the grantor's financial resources in this manner can hardly be viewed as a gift and is not in conflict with his interests. The case could be somewhat more doubtful if the wife owns the residence and other real property as her separate property due to a marriage contract. If she uses the grantor's fund for maintenance and upkeep she would in fact be increasing her own wealth.

In the English Enduring Power of Attorney Act 1985 a provision was included for such cases. The wording is:[11]

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[10] § 38 of the law of 4 July 1991.

[11] Section 3(4) of the Enduring Powers of Attorney Act 1985.

> 'Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further, that is to say –
>
> (a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively, and
> (b) he may do whatever the donor might be expected to do to meet those needs.'

In my opinion this quotation gives a correct description of the extent to which a spouse may use a DPA under Norwegian law. It is, however, advisable to explicitly state in the DPA that the attorney is entitled to undertake all transactions which are necessary to maintain the customary standard of living and cover all expenses related to real property regardless of who owns these assets.

XIII REVOCATION AND EXPIRATION

A DPA may be time limited and will then expire at the stated time. A DPA may also be limited to only one task and thereby expire when this task is completed.

According to § 89, a DPA is always revocable. This is in accordance with Recommendation (2009) 11 where the wording is as follows: 'A capable grantor shall have the possibility to revoke the continuing power of attorney at any time.' In order to make a valid revocation, the grantor needs to be mentally capable of understanding the consequences of his or her actions. Revocation can take place at three different points in time. The first and most practical is revocation before the DPA enters into force. It might take years before a DPA enters into force and during this time the grantor may decide that some other person is more suited to act as attorney. The grantor might also attempt to revoke the DPA at the time when the attorney decides that it should enter into force. This would mean that the grantor disagrees with the attorney's decision that the grantor has become incapacitated. Finally, and most unlikely, the grantor could attempt to revoke after the DPA has entered into force. Dementia is an ailment with a gradual decline which cannot be changed. The grantor can therefore not recover from this ailment. In theory at least the grantor could recover from some other mental illness.

Revocation can be accomplished either by the attorney returning the DPA to the grantor or by physical destruction of the document. Upon demand from the grantor the attorney must return the DPA. In addition a DPA would become invalid if the grantor makes a new DPA covering the same areas of responsibility. A DPA expires if the grantor is put under guardianship. This decision is made by the county governor, who must then see to it that the DPA is returned or destroyed. It is possible to establish guardianship only for certain areas and in such cases the DPA could remain valid to the extent it covers other areas.

If the attorney dies, the DPA of course expires unless the grantor in the DPA has included a substitute attorney for such an event. A DPA does not automatically expire if the grantor dies. Within a short time after death it will be decided who shall handle the estate. Given the fact that the attorney is obliged to further the interests of the grantor, it is extremely unlikely that there will be any practical problems during this short time period. It is in the interest of the grantor's estate that the attorney continues to work until the DPA is terminated by the courts or the administrator of the estate.

XIV CONTROL MECHANISMS §§ 90 AND 91

One area where there is considerable variation in the laws of countries with a system of DPAs is the type of control mechanisms which are used to avoid misuse of a DPA. On the one hand, if the DPA is generally written to cover all financial affairs for the grantor, the attorney has the opportunity to misuse the DPA for his or her own interests. This risk increases if the grantor has no spouse or close relatives and is wealthy. On the other hand, the whole purpose of DPAs is to respect the autonomy of the grantor and reduce the workload for public authorities. If the control mechanisms are very comprehensive, one will in reality come close to the system of guardianship. In the Norwegian law one has chosen a compromise; some but limited public control with the use of DPAs.

First, the grantor can in the DPA include instructions imposing a duty on the attorney to keep detailed accounts and supply a named third party with information and accounts on a regular basis. If not satisfied with the material received, this third party can pass it on to the county governor who can then use the material when deciding whether a guardian shall be appointed. Further, the county governor on his or her own initiative can demand from the attorney detailed accounting of transactions carried out. The grantor's spouse, cohabitant and other close relatives have the right to present an application to the county governor to appoint a guardian. The county governor can also make this decision on his or her own initiative. When making this decision the decisive factors are whether the attorney is carrying out the duties in a correct manner in the interest of the grantor and whether more assistance is required. A conflict between the attorney and the grantor's relatives is not sufficient reason to appoint a guardian. Appointing a guardian is necessary if the DPA is being misused which would be the case if the attorney has been enriched at the expense of the grantor beyond what the attorney is entitled to according to the DPA.

If guardianship is established covering all the same areas as the DPA, this means that the DPA is terminated. The county governor must in that case revoke the DPA by having it returned by the attorney or destroyed.

XV REPRESENTATION BY LAW FOR RELATIVES

A new system of power of attorney by law for the spouse or close relatives has been introduced in § 94 of the law. This legal representation can be used under the same circumstances as a DPA – in other words a person must be unable to take care of his or her own economic affairs. This right, which can be abbreviated LR (legal representation), can only be used for routine daily transactions. In the report from the Ministry such tasks are mentioned as payment of rent, heating, insurance, food, clothes, newspapers, television licence, telephone, medicine, dentist and transportation. Paying such expenses depends on the relative being given access to the incapacitated person's bank account. In the report from the Ministry it is simply stated that the relative must be allowed access to the incapacitated person's bank account in order to pay expenses. In reality this will be rather difficult. Banks and other financial institutions will as a minimum require a certificate from a doctor about the person's mental state and proof that the person trying to pay bills is in fact the closest relative of this account holder. My impression is that banks even with such documentation will only accept a LR for payment of a small amount and only until a guardian has been appointed. It is quite likely that local banks in small towns will require fewer formalities than branch offices in large cities.

The following persons above 18 years of age are listed in § 94 according to priority:

(a) spouse or cohabitant;

(b) children;

(c) grandchildren; and

(d) parents.

The right of LR is terminated if a guardian is appointed and cannot be used in competition with a DPA.

Poland

DIVORCE LAW IN POLAND: A NEW REGIME NEEDED?

*Anna Stępień-Sporek, Paweł Stoppa and Margaret Ryznar**

Résumé

En Pologne comme dans d'autres pays, le nombre de divorce a tendance à augmenter. Néanmoins, le mariage demeure une institution populaire et familiale et est l'une des valeurs les plus importantes de la vie polonaise. Ces observations contradictoires ont inspiré cet article. Il est évident, et peut-être même cliché, que la loi devrait tenir compte des changements sociétaux. Mais que cela signifie-t-il pour la loi relative au divorce? Est-ce que cela signifie que les divorces devraient être rapides et faciles? Ou bien est-ce que cela implique que la société doit protéger la famille et, en dépit des statistiques actuelles, maintenir une inflexibilité de la loi relative au le divorce?

La loi polonaise est un exemple d'une approche plutôt démodée de divorce. Toutefois, en raison de cette caractéristique, elle fournit une bonne étude de cas sur le droit du divorce. Cet article se déroule en trois parties. La première partie examine l'actuelle loi polonaise sur le divorce. La deuxième partie analyse les inconvénients de cette loi, tandis que la troisième partie décrit ses avantages. La conclusion tente d'apporter des réponses aux questions formulées au début de l'article.

I INTRODUCTION

A trend in Poland, as in other countries,[1] is the growth in the number of divorces.[2] Nonetheless, marriage remains a popular institution and family is

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1 In Germany in 2009, there were 185,817 divorces. This number is stable, with a previous peak of more than 187,000 divorces in 2010 and 2011.

2 Between 2001 and 2010, there were 593,900 divorces in Poland. Approximately 83% of them were of spouses who lived in cities and towns rather than in the countryside. From 2001 to 2005, the number of divorces grew from 45,300 divorces in 2001 to 67,600 divorces in 2005. In

one of the most important values in Polish life.[3] These contradictory observations have provided the inspiration for this chapter.

It is obvious and perhaps even a cliché that the law should reflect societal changes. But what does this mean in the law on divorce? Does it mean that divorces should be quick and easy? Or does it mean that society should protect family and, despite current demographic statistics, make divorce law more inflexible?

Polish law is an example of a rather old-fashioned approach to divorce. However, because of this characteristic, it provides a good case study for divorce law. Therefore, in studying Polish divorce law, this chapter proceeds in three parts. Part II will review the present Polish divorce law.[4] Part III will analyse the disadvantages of the present law, while Part IV describes its advantages. The final part will conclude and offer answers to the questions formed at the beginning of this chapter.

II DIVORCE IN POLAND

Only judges may grant divorces in Poland. The courts of first instance in divorce cases are regional courts, while the courts of appeal are available as higher courts.[5]

The main source of law for divorce in Poland is the Family and Guardianship Code of 25 February 1964 (KRO),[6] which came into force on 1 January 1965. According to KRO, art 56(1), the basic prerequisite for divorce is an irretrievable and total breakdown of matrimonial life between the spouses. This standard provides discretion to the judge, who takes into account all of the circumstances of the case to determine whether to grant a divorce.[7]

According to the case-law, a total breakdown of marriage means a lack of any spiritual, physical and economic bonds between the spouses.[8] These bonds are

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2010, there were 61,300 divorces, which was less than in 2009 (65,300 divorces). See www.stat.gov.pl/cps/rde/xbcr/gus/p_population_size_structure_31_12_2012.pdf (accessed May 2013).

3 See eg http://gu.us.edu.pl/node/227861 (accessed May 2013).

4 Conflicts of law and procedure are outside the scope of this chapter. However, the shape of the regulations in these areas can influence the answers to the questions formed at the beginning of the chapter because the law as a whole provides a clear picture of national regulation. Nonetheless, some simplifications are necessary in each analysis and this chapter will focus on substantive law.

5 The regional courts are on the second level in the judiciary structure and they are both the courts of the second instance for the majority of cases and the courts of the first instance for the cases mentioned in the Code of Civil Procedure.

6 *Kodeks rodzinny i opiekuńczy*.

7 See Tadeusz Smyczyński *Prawo rodzinne i opiekuńcze* (Warszawa: CH Beck, 2009) 140–141.

8 Jacek Ignaczewski in Adam Bodnar, Urszula Dąbrowska, Jacek Ignaczewski, Joanna Maciejowska, Andrzej Stempniak and Anna Sledzinska-Simon *Rozwód i separacja* (Warszawa: CH Beck, 2010) 38–39.

important because spouses are obliged to live together, assist each other and remain faithful, and work together for the good of the family their marriage has created. An irretrievable breakdown takes place if the bonds between the spouses ceased so long ago[9] that, according to the principles of life experience, a return to matrimonial life will not happen.[10] Although a couple's separation can be evidence of an irretrievable breakdown of the marriage,[11] separation is insufficient to establish the irretrievable breakdown of the marriage.[12]

There are no presumptions regarding the total and irretrievable breakdown of marriage. The court uses the general rules of civil proceedings, taking into account the uniqueness of divorce proceedings. For example, the court is obliged to hear the testimony of both parties. The court's decision cannot be based on the acknowledgement of the claim or facts made by the defendant. If the defendant does make an acknowledgement, the evidence proceedings can be limited to the testimony of the spouses only if the spouses do not have common minor children.

Even if there is an irretrievable and total breakdown of marriage, according to KRO, art 56(2) divorce is not permitted if it would be detrimental to the welfare of the minor children of both spouses, or if there are other reasons why the decision to divorce is contrary to the principles of social coexistence. For example, the claim for divorce can be contrary to these principles if the wife is expecting the couple's child[13] or if one spouse is seriously ill.[14]

The consent of a spouse is also significant in divorce proceedings. According to KRO, art 56(3), divorce is not permitted if it has been requested by the spouse who is solely guilty for the breakdown of marriage unless the other spouse consents to the divorce, or the refusal to consent to the divorce, under the circumstances, is contrary to the principles of social coexistence. This requires that the court determine the motives of the consenting spouse. The court should also examine whether the consent was freely given, without pressure or threats by the other spouse.[15]

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9 The period of separation can differ in each case. In one of its decisions, the Supreme Court stated that even a 3-year separation of spouses who are 70 years old and have been married for 38 years does not automatically mean that there is a total and irretrievable breakdown of marriage. See decision of 17 October 2000, I CKN 831/98.

10 Decision of the Appellate Court of Katowice of 12 March 2010, I ACa 51/10, LEX no 1120376.

11 See decision of the Supreme Court of 12 December 1955, I CR 1889/54, OSN 1957, position 44.

12 Eg separation can result from a change in employment that forces one spouse to leave the family to get a job. Compare this to the situation wherein neither spouse is able to buy or rent a house separately, forcing the spouses to live together despite not behaving as a husband and wife.

13 Bronisław Czech in Kazimierz Piasecki (ed) *Kodeks rodzinny i opiekuńczy. Komentarz* (Warszwa: LexisNexis, 2006) 329.

14 Decision of the Supreme Court of 18 September 1952, C 1283/52, OSN 1953, position 84.

15 Decision of the Supreme Court of 14 May 1956, I CR 746/55, OSN 1956, position 120.

Although the current divorce law dates back to the 1960s, it nonetheless reflects a modern approach in certain ways. For example, there is no special provision in the law stating a minimum duration of the marriage for divorce.[16] Of course, in practice, if the marriage lasted only a few months or years, judges are more cautious in examining whether there has been a total and irretrievable breakdown of the marriage, but judges still have leeway in this aspect. If both spouses want a divorce, there is a simplified divorce process available.[17] However, the court is always obliged to establish whether there is a total and irretrievable breakdown of marriage.

In a divorce ruling, the court decides whether there is fault and which spouse is at fault for the breakdown of the marriage.[18] Upon joint motion of the spouses, the court may waive a ruling on fault and then neither of the spouses is considered to be at fault. If there is a lack of joint motion by the spouses in this regard, the court is obliged to make a decision on fault.

The court has three possible options regarding guilt:[19] sole guilt can be attributed to one spouse, both spouses could be found guilty, or neither of the spouses can be deemed guilty.[20] Establishing guilt is important for the grant of divorce, as well as for the existence and scope of the duty to pay maintenance. The basis for establishing fault is the behaviour of each spouse.[21] If the court comes to the conclusion that the behaviour of a spouse affected the total and irretrievable breakdown of the marriage, that spouse is at fault and it is irrelevant that the fault of the other spouse is greater.[22] The differing extent of each spouse's guilt is not an obstacle to finding them both at fault.[23]

There are a few elements to each divorce ruling. These elements can be divided into three groups: (1) elements put into the ruling ex officio without any motion by the spouses; (2) elements introduced to the ruling because of a motion by at least one of the spouses; and (3) elements introduced to the ruling on the joint motion of the spouses.[24] The first group includes fault in the breakdown of

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16 Such a period was demanded according to the decree Matrimonial Law of 25 September 1945 (Dz U 1945, no 48, position 270), which allowed divorce upon a unanimous motion of the spouses. There was one crucial prerequisite for such a divorce – the marriage must have lasted at least 3 years.

17 If the defendant admits the claim and the spouses have no common minor children, the court may limit the evidence to the testimony of the parties.

18 See KRO, art 57.

19 Also known as 'fault' in the United States.

20 See Jan Winiarz in Krzysztof Pietrzykowski (ed) *Kodeks rodzinny i opiekuńczy. Komentarz* (Warszawa: CH Beck, 2010) 547.

21 Eg a new relationship of one spouse that started before the divorce and after a total and irretrievable breakdown of matrimonial life is not a basis to say that this spouse is at fault (decision of the Supreme Court of 28 September 2000, IV CKN 112/00, OSN 2011, position 41).

22 There is no 'smaller' or 'greater' guilt. See e g decision of the Appellate Court of Poznań of 10 February 2004, I ACa 1422/03, Wokanda 2005, no 2.

23 See e g the decision of the Supreme Court of 29 June 2000, V CKN 323/00; the decision of the Supreme Court of 22 September 1997, II CKN 329/97.

24 See Tadeusz Smyczyński *Prawo rodzinne i opiekuńcz*, (Warszawa: CH Beck, 2009) 147.

marriage, parental responsibility (authority), the maintenance obligation towards children and the temporary use of shared accommodations. The second group includes an eviction from shared accommodation, division of common property and maintenance between spouses. Finally, the third group includes the division of the common home, ie a home belonging to the common property of the spouses.[25]

In its ruling on divorce, apart from its decision on the dissolution of marriage, the court should rule on parental responsibility. On this issue, the court takes into account the agreement of the spouses on how to exercise parental responsibility insofar as it is compatible with the welfare of the child.[26] It is also important that siblings should be brought up together, unless the welfare of the child requires otherwise.

The judge has several options on this issue, as well. The judge may leave parental responsibility with both parents on their joint motion if they present such an agreement and it is reasonable to expect that they will co-operate in matters concerning the child. The judge may also ask parents to modify their agreement. If there is no agreement between the spouses or if the agreement is incompatible with the welfare of the child, the court may give the power to exercise parental responsibility to one parent and limit the parental responsibility of the other parent to specific rights and duties.

By motion of either spouse, the court may also divide the joint property in the ruling on divorce, as long as carrying out the division does not cause undue delay to the proceedings. In practice, the distribution of property does not often occur, either because no suitable motion is made or because the spouses are not unanimous in determining the common property and its division. In the latter case, it is possible to divide common property in divorce proceedings only if evidentiary proceedings are not time-consuming. If they are, the court decides to not address the motion for division because the division would cause undue delay.

The maintenance issue between ex-spouses can also be subject to a ruling on divorce. Alternatively, request for maintenance can be made subsequently. The scope and time of the maintenance obligation depends on guilt.[27]

There are two general rules regarding guilt in maintenance. First, a divorced spouse who has not been found exclusively guilty for the breakdown of the marriage and who is found without means may demand that the other spouse provide the means for upkeep as appropriate in light of the needs of the

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[25] See Bronisław Czech in Kazimierz Piasecki (ed) *Kodeks rodzinny i opiekuńczy. Komentarz* (Warszawa: LexisNexis, 2006) 396.

[26] This agreement has become important since the amendment of the Family and Guardianship Code in 2009 (Statute of 6 November 2008 – Dz U no 200, position 1431).

[27] See Jacek Ignaczewski and Urszula Dąbrowska in Adam Bodnar, Urszula Dąbrowska, Jacek Ignaczewski, Joanna Maciejowska, Andrzej Stempniak and Anna Sledzinska-Simon *Rozwód i separacja* (Warszawa: CH Beck, 2010) 418.

entitled spouse and the earning capacity and assets of the obliged spouse. This is the so-called ordinary maintenance obligation.[28]

According to the second rule, if one spouse has been exclusively guilty for the breakdown of the marriage and the divorce results in a significant deterioration in the standard of living of the innocent spouse, at the motion of the innocent spouse, the court may decide that the guilty spouse is obliged to contribute as appropriate to satisfy the needs of the innocent spouse, even if the innocent spouse is not destitute. This is the so-called extraordinary (extended) maintenance obligation.[29]

There is no time-limit for initiating an action in regards to the maintenance obligation between former spouses. However, the obligation to provide maintenance for an ex-spouse ceases if the entitled ex-spouse remarries; cohabitation is not treated in the same way as remarriage.[30] The obligation also ceases 5 years after the ruling on divorce if the obliged spouse was found not exclusively guilty of the breakdown of the marriage, unless extended by the court at the request of the entitled spouse due to exceptional circumstances.

If the spouses share an accommodation such as a family home, the court also rules on the use of that residence for as long as the divorced spouses share the accommodation. In exceptional cases, when one spouse's blameworthy behaviour makes such cohabitation impossible, the court may order an eviction on the suitable motion of the other spouse.

A marriage is dissolved at the moment the court's judgment becomes final and cannot be appealed. Within 3 months after the ruling on divorce becomes final, a divorced spouse who changed a surname as a consequence of the marriage may submit a statement before the head of the registry office to revert back to the previous surname.[31]

III DISADVANTAGES OF THE PRESENT REGULATION

The main disadvantage of Polish law is its significant level of formalism. Notably, there is no divorce by mutual consent. Even if the spouses are certain that there is an irretrievable and total breakdown of marriage, they must undertake time-consuming divorce proceedings before the court that will examine whether the prerequisites of divorce are fulfilled.[32] Simplified proceedings by mutual consent could therefore be useful for spouses, especially

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28 Ibid, 421–423.

29 Ibid, 424–429.

30 See decision of the Supreme Court of 10 July 1998, I CKN 788/97, LEX no 34443.

31 KRO, art 59.

32 For example, in the Regional Court of Gdansk, one has to wait for the first session of the court at least 3 months, and additional court sessions are necessary in cases where the spouses have not made a common motion to omit a decision on fault. In more complicated cases,

if they do not have any children or are in a new relationship with newborn children. It could also spare them an unnecessary analysis of the difficult moments in their matrimonial life.

These formalities can also cause conflicts to develop and deepen between the spouses during the divorce proceedings, which can have further negative implications. Even if the spouses were ready for agreement in certain aspects, after a court appearance they may lose agreement and become adversarial. Therefore, the introduction of a less formal form of divorce proceedings could be a good alternative for spouses who are not interested in continuing their marriage and want to stop the escalation of negative emotions.

The second controversial issue is the maintenance obligation between ex-spouses. Notably, it is possible to start a lawsuit for maintenance even a few years after divorce. This may occur when spouses are not willing to start an independent life or when they act passively. The claimant spouse is not encouraged by the legal regulations to be active and make efforts to become independent, which results in an obstacle for the other spouse to begin a brand new life.

Another controversial matter concerning the maintenance obligation is the time-limit on the obligation of a guilty ex-spouse to pay a non-guilty ex-spouse. The only definite termination of the obligation is the marriage of the non-guilty ex-spouse. Given the increasing numbers of long-term informal relationships,[33] there is a risk that the non-guilty spouse will not be motivated – mainly due to economic reasons – to transform his or her permanent but informal relationship into a marriage. This could be unfair to the ex-spouse obliged to provide the maintenance, and it is therefore worth considering whether to permit the termination of a maintenance obligation upon the entitled ex-spouse's residence with a long-term romantic partner.[34] The courts could in such cases assess the facts and establish the character of the relationship existing between the non-guilty ex-spouse and his or her new life partner. If the relationship could be assessed as a stable and long-term one, the maintenance obligation should be declared as ceased.

Another disadvantage of the present regulation is the lack of gradation of the guilt of the spouses. This can be unfair for a spouse whose fault is minimal and whose behaviour was in fact a reaction to the behaviour of the other spouse. It seems necessary to give the judge the discretion to evaluate the level of the fault and to declare only one spouse as the guilty party in such exceptional cases, especially when there is a great difference in the individual faults of the spouses.

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where spouses do not have a common opinion on parental authority or contact with children, there are a few court sessions required and the ruling on divorce is made after a year or two, not counting the appellate proceedings.

33 These relationships often create marriage-like bounds on the economic activities of the partners.

34 Compare s 1579(2) of the German Civil Code (*Burgerlisches Gesetzbuch*).

Providing the judge with such discretion could eliminate some possibly unjust decisions which – apart from pure ethics – would affect the existence and scope of the duty to pay maintenance.

IV ADVANTAGES OF THE PRESENT REGULATION

One of the main advantages of the present divorce regulation is the protection against rushed and ill-considered decisions of spouses to divorce. Especially in the first few years of marriage, even minor quarrels can end with a petition for divorce. The formalities and the proceedings before a court provide the opportunity for spouses to reconsider their decision to divorce. Not only are the proceedings time-consuming, but also the judge endeavours to convince the spouses to reconcile at each stage of the proceedings. If the spouses have doubts regarding their divorce, this can prevent a quick ruling on divorce and make the spouses work on their relationship and improve the quality of their common life. However, a question arises whether the state should decide the durability of marriage. An argument for such a policy can be derived from the Constitution of the Republic of Poland. According to art 18, marriage shall be placed under the protection and care of the Republic of Poland.

Nonetheless, the prerequisites for divorce are rather flexible and judges have a large margin of discretion. There is no minimal time of marriage as a condition for starting divorce proceedings, so even spouses after a short period of marriage can file for divorce.[35] On the other hand, there are limitations on divorce that include the welfare of common minor children and the principles of social coexistence. These rules create the balance between the will of a spouse to be divorced and the need to protect the minor children of the spouses if the divorce is ethically unacceptable.

Another advantage of the present regulation is the division of the elements of the divorce ruling.[36] There is a clear indication which elements should be obligatory and included in the divorce ruling, and which ones are only optional and dependent on the spouses' initiative and the court decision.[37] Such an approach permits focus on the most important aspects of the divorce proceedings and reduces the risk of undue delay. It should be emphasised that the parties have the right to conduct separate proceedings regarding the issues raised but omitted in the divorce ruling, such as the division of common property or division of the common home.

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[35] The majority of divorces in Poland concerned marriages that lasted between 5 and 9 years. The next group of divorces was of those couples who were together between 10 and 14 years. See www.stat.gov.pl/cps/rde/xbcr/gus/p_population_size_structure_31_12_2012.pdf (accessed May 2013).

[36] Eg elements put into the ruling ex officio without any motion by the spouses, elements introduced to the ruling because of a motion by at least one spouse and elements introduced to the ruling on the joint motion of the spouses – see KRO, art 58.

[37] Ruling on the division of common property and the common home.

V CONCLUSION

According to the Polish Constitution, marriage, being a union of a man and a woman, as well as family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.[38] This is a general duty, which is developed by different laws. The question is whether this constitutional protection means a strict law on divorce.

It is debatable whether strict divorce law actually protects family, especially today. For example, many children are born in extramarital relationships. If a married man without marital children has children from an extramarital relationship, the question is whether the law should enable him a quick divorce in order to protect his new family. In such situations, there would exist a conflict between the two protected institutions: marriage and family, which always should be solved ad casum.

The institution of marriage in most cases should be protected more than any informal relationship, even if it can be treated as a family under the Polish Constitution. The reasons are both juridical and ethical ones. The law should protect its own formal institutions to a greater extent than any informal relationships. In most cases, there should be no special preference for the relationship that is the reason for the divorce. In court practice, marital treason is treated as a break from moral rules and a manifestation of gross disloyalty to the other spouse. The spouse committing treason is in most cases found guilty of the breakdown of marriage.[39] It seems that the only exception that could justify a quick divorce in such a case would be a stable extramarital relationship with minor children as opposed to a marriage not having minor children.

It is important to note that the common trend in European countries is to permit divorce by mutual consent.[40] According to principle 1:4 of the Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses:[41]

> 'divorce should be permitted upon basis of the spouses' mutual consent. No period of factual separation should be required. Mutual consent is to be understood as an agreement between the spouses that their marriage should be dissolved. This agreement may be expressed either by a joint application of the spouses or by an application by one spouse with the acceptance of the other spouse.'

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38 Article 18. The English translation of the Constitution of the Republic of Poland is available at www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (accessed May 2013).

39 See e g decision of the Supreme Court of 6 May 1997, I CKN 86/97.

40 See Katharina Boele-Woelki, Fréderique Ferrand, Cristina González Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny and Walter Pintens *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp: Intersentia 2004) 27–32.

41 Principles prepared by the Commission of European Family Law available at http://ceflonline.net/ (accessed May 2013).

Divorce by mutual consent could also be implemented in Polish law. If both spouses accept their decision on divorce, there may be no reason for the law to ignore their will. Nonetheless, even in such situations, it seems that limitations should remain on divorce, such as the welfare of common minor children. This is because the law should protect the weakest members of the family, and the needs and protection of children should be one of the most important values.

The protection of the welfare of children is the first and most important value for family law. It is based on the assumption that the child is a weaker person and therefore needs protection.[42] This is not mentioned explicitly in the Constitution, but it is suggested by a careful analysis of the Constitution, and particularly art 72(1), which states that the Republic of Poland shall ensure protection of the rights of the child and everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions that undermine their moral sense.

The current demographic statistics[43] suggest that Poland should develop a system of family protection. Regulations should be implemented that would encourage people to establish families and have more children. Otherwise, the negative demographic trends such as lower fertility, emigration and population ageing will create a population in which the number of people in the productive age group will be lower than in the non-productive age group. This will likely result in economic and social issues, and suggests that the institution of marriage is part of a system of not only family protection, but also demographic policy. These trends and factors should be viewed as one complex system.

Flexibility in divorce law, such as divorce by mutual consent, could also be particularly appropriate for married couples who do not have children. On the other hand, such flexibility should not be implemented in marriages with children, especially minor ones. The law should prefer stable, law-sanctioned relationships and promote values such as loyalty, maturity and responsibility.

These issues are also relevant to the institution of opposite-sex registered partnerships. The growing number of divorces is parallel to the growing number of long-term relationships. Although the institution of the registered partnership (sometimes called civil partnership) exists as a formal institution in certain European countries,[44] Polish law does not regulate or create such an institution despite giving certain rights to people living in such relationships.[45] There is a question of whether such an institution would be in accordance with

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42 Tadeusz Smyczyński *Prawo rodzinne i opiekuńcze* (Warszawa: CH Beck, 2009) 18–19.

43 As observed there is a growing number of divorces – see above n 2. The population projection for Poland 2008–2035 shows that the size of the population is going to decrease by about 5% until the year 2035. See www.stat.gov.pl/cps/rde/xbcr/gus/L_prognoza_ludnosci_na_lata2008_2035.pdf (accessed May 2013).

44 For example, in France and the Netherlands.

45 Such rights regard the right to refuse to testify against a partner and a right to inherit the lease of a house.

the Polish Constitution, which protects the institution of marriage.[46] It seems that there should be additional legal rules implemented for people living in informal relationships, but it does not seem necessary to create an additional legal institution of 'quasi-marriage' or a kind of 'more flexible' marriage. Non-marital relationships are permitted and tolerated by the legislators but they do not enjoy special protections from the state. This model of non-regulation of cohabitation has proponents among representatives of the doctrine that considers the complex regulation of cohabitation unnecessary, claiming that only a few aspects of cohabitation should be regulated.[47]

Partnership between same-sex partners is another issue, but is beyond the scope of this chapter. It should only be mentioned that Polish law neither regulates nor recognises such relationships. In January 2013, significant public debates occurred regarding the introduction of same-sex relationships into Polish law. The Polish Sejm (the lower house of the legislature) rejected all drafts of such regulation for these couples after the first reading and, in the near future, this issue will not be regulated because the legislative process takes time.

The disadvantages of the present Polish divorce law, as summarised, show that it requires certain changes. However, the nature of the disadvantages also suggests that no revolution in the divorce law is required. Instead, the current divorce law is rather stable and relatively flexible. It also creates a high level of protection for family, although the current demographic trends in Poland may require implementation of some additional measures. Therefore, this issue should be the subject of a long-term policy plan of the Polish state.

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[46] See art 18 of the Polish Constitution.

[47] See Tadeusz Smyczyński 'Czy potrzebna jest regulacja prawna pożycia konkubenckiego (heteroseksualnego i homoseksualnego)?' in Piotr Kasprzyk (ed) *Prawo rodzinne w Polsce i w Europie* (Lublin: Towarzystwo Naukowe KUL, 2005) 461–467.

Scotland

CAN FAMILY LAW BE RENDERED MORE ACCESSIBLE?

Elaine E Sutherland[*]

Résumé

Le droit de l'enfance et de la famille a évolué rapidement au cours des dernières décennies pour donner priorité aux principes d'égalité, d'inclusion et de protection. Le bénéfice de ces avancées est cependant atténué si tous les membres de la société n'ont pas un accès significatif au droit et à la justice. L'accès à la justice est une question qui a largement retenu l'attention des instances gouvernementales et autres, la dernière initiative en date devant donner lieu à un rapport attendu pour l'été 2013. Mais le présent chapitre s'intéresse plutôt au premier défi, soit celui de l'accès au droit lui-même. L'éparpillement des documents juridiques ne facilite pas la compréhension du droit en vigueur. Il constitue une source de frustration pour les juristes et rend la tâche presqu'impossible pour les autres conseillers. Étant donné que les moins nantis doivent souvent se contenter de faire appel à des conseillers non juristes, il devient impératif de rendre les sources du droit plus accessibles. Il serait naïf de penser que le droit de l'enfance et de la famille peut être présenté de manière à ce que le commun des mortels puisse s'y retrouver et se passer de conseils. Il reste qu'une codification faciliterait la tâche de tous.

I INTRODUCTION

In common with many other legal systems, Scots child and family law has undergone significant development in recent decades: striving to reflect greater respect for the human rights of both children and adults; promoting equality for children and within adult relationships; recognising a more diverse range of adult relationships; and seeking to protect vulnerable family members.[1] All of that is to be welcomed. The full benefit of these advances is diminished, however, if all members of the community do not have meaningful access to the law and to the legal process. It does not matter how fine and principled the law

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1 See further EE Sutherland 'Scotland: The Marriage of Principle and Pragmatism' in EE Sutherland (ed) *The Future of Child and Family Law: International Predictions* (Cambridge University Press, 2012) p 363.

is if the very people it is there to serve cannot understand its content and are denied access to an expert to advise them on what the law provides and how it applies to their situation.

In this, Scots law faces two challenges: presenting the law in a more user-friendly format and removing the obstacles individuals experience in accessing legal services and the courts. There is a certain irony in the fact that the first of these – access to the law – has attracted so little government interest since it is the easier of the two to address by the relatively simple expedient of codification.

In contrast, the second challenge – access to legal services and the courts – has received enormous attention in recent years from government, the legal profession and non-governmental organisations, through a veritable plethora of committees, reviews, consultations and reports.[2] A further crucial part of that process, the *Review of Expenses and Funding of Civil Litigation in Scotland*, known as the *Taylor Review*,[3] is due to report in the summer of 2013. Thus, a comprehensive assessment of the future provision of legal services, particularly for those with limited financial means, would be premature. However, there is every indication that the poor will increasingly be encouraged, if not forced, to use 'alternative sources of legal advice' and that some of this advice will be provided by lay persons rather than lawyers. If that happens, addressing the first of the challenges – access to the law – will become all the more pressing. This chapter seeks to do that, setting out the nature of the problem and exploring the benefits of codification as the solution.

II THE PROBLEM

In the past, all Scottish legislation was passed by the Westminster Parliament, sitting in London, and regular readers of the *International Survey* will be familiar with the lament expressed by the present author over the lack of time available to pass statutes on Scots child and family law despite excellent law

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[2] The most significant for child and family law to date is the Report of the Scottish Civil Courts Review (Gill Review) (Edinburgh: Scottish Government, 2009), at: www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review, a comprehensive appraisal of the civil court system and its operation. The Civil Justice Advisory Group, set up by Consumer Focus Scotland, a non-governmental organisation, has also contributed to the debate, emphasising effective access and affordable justice and exploring alternatives to the court system. See *Ensuring effective access to appropriate and affordable dispute resolution: the final report of the Civil Justice Advisory Group* (Edinburgh: Consumer Focus Scotland, 2011), at: www.consumerfocus.org.uk/scotland/files/2011/01/Civil-Justice-Advisory-Group-Full-Report.pdf (accessed May 2013). This was the report of the reconvened body that had already published a 'final report' that preceded the *Gill Review*: see *The Civil Justice System in Scotland – a case for review? The final report of the Civil Justice Advisory Group* (Edinburgh: Scottish Consumer Council, 2005), at: http://webarchive.nationalarchives.gov.uk/20090724135150/http:/scotcons.demonweb.co.uk/accessjustice/documents/rp11civil.pdf (accessed May 2013).

[3] For information about the *Review of Expenses and Funding of Civil Litigation In Scotland* (*Taylor Review*), including its remit and the consultation paper it issued, see: http://scotland.gov.uk/About/taylor-review (accessed May 2013).

reform proposals being generated by the Scottish Law Commission and other bodies.[4] The passing of the Scotland Act 1998 heralded the arrival of a federal system of government in the United Kingdom,[5] with the Scottish Parliament sitting in Edinburgh and legislating on 'devolved matters', while the United Kingdom Parliament continues to sit at Westminster and retains jurisdiction for Scotland on 'reserved matters'.[6] Most of child and family law is devolved and, thus, the province of the Scottish Parliament, although numerous matters that impact upon it are reserved to Westminster,[7] a familiar pattern in federal systems. In addition, even where an issue is devolved to the Scottish Parliament, it may, by its own motion, authorise the United Kingdom Parliament to legislate for Scotland[8] and, on occasion, it has done so.[9]

Enormous hopes attached to the creation of the Scottish Parliament and there was a sense of optimism that the new legislature would have the time to implement reform of child and family law (and the law in other areas) that would reflect better the wishes of the people of Scotland. Members of the Scottish Parliament have shown creditable industry, passing a whole raft of family law statutes creating greater equality for children, improving the position of non-marital fathers and reforming the law on adoption, child protection, marriage, the grounds for divorce and civil partnership dissolution and the consequences thereof, and cohabitation, both during the relationship and on its termination.[10] It is anticipated that a Marriage and Civil Partnership (Scotland) Bill,[11] introducing same-sex marriage, will be brought forward this legislative session, in part, in response to public support for the measure.[12]

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4 See EE Sutherland 'Scotland: Consolidation and Anticipation' in A Bainham (ed) *International Survey of Family Law, 2000 Edition* (Jordan Publishing, 2000) p 329 and EE Sutherland 'Scotland: What has a Decade of Devolution Done for Scots Family Law?' in Bill Atkin (ed) *International Survey of Family Law, 2009 Edition* (Jordan Publishing, 2009) p 390.

5 The National Assembly for Wales was created by the Government of Wales Act 1998. As a result of the Government of Wales Act 2006, it gained legislative power in some areas, albeit subject to veto by the Secretary of State or Westminster. The devolved authority in Northern Ireland is the Northern Ireland Assembly: Northern Ireland Act 1998.

6 Scotland Act 1998 (c.46), ss 29 and 30 and Sch 5. Further powers were devolved to the Scottish Parliament by the Scotland Act 2012.

7 Reserved matters include child support (but not aliment), welfare benefits, (most of) taxation and, perhaps most controversially, abortion and assisted reproduction.

8 This is done by means of a Legislative Consent Motion (formerly known as a 'Sewel Motion'): *Scottish Parliament Standing Orders* (Edinburgh: The Scottish Government, 3rd edn (1st revision), 2007) chapter 9B.

9 This legislative mechanism was used in respect of gender recognition and the creation of civil partnerships, the marriage-equivalent for same-sex couples: see Gender Recognition Act 2004 and Civil Partnership Act 2004, respectively.

10 See EE Sutherland, KE Goodall, GFM Little and FP Davidson (eds) *Law Making and the Scottish Parliament: The Early Years* (Edinburgh University Press, 2011) and EE Sutherland 'Scotland: The Marriage of Principle and Pragmatism' in Sutherland *The Future of Child and Family Law: International Predictions*, n 1 above.

11 See Programme for Government 2012-2013, at: www.scotland.gov.uk/About/Performance/programme-for-government/2012-13/marriage-civil-partnerships (accessed May 2013).

12 *Scottish Social Attitudes Survey 2010: Attitudes to Discrimination and Positive Action* (Edinburgh: Scottish Government, 2011), at: www.scotland.gov.uk/Publications/2011/08/11112523/0 (accessed May 2013), para 3.18 (61% of the Scottish population supported the introduction of same-sex marriage).

While these developments have led to more vibrant and modern legislative provision, one is reminded of the old adage, 'be careful what you wish for', since the result has been a proliferation of legislation.

In addition, the Westminster Parliament continues to generate family-related legislation with child support providing a particularly graphic example of a 'reserved matter'. Ever since the passing of the ill-fated Child Support Act 1991, there have been numerous attempts to repair what has always been regarded as a defective system, with three further statutes and a slew of secondary legislation being enacted.[13] That these attempts have been unsuccessful is acknowledged and further legislative amendment is in the offing.[14]

The real problem is that finding the current statutory provision on a particular aspect of Scots child and family law is often far from straightforward. The practice, in Scotland (and the rest of the United Kingdom), is to pass a statute on a given topic, usually supplementing it with secondary legislation, then to amend the primary legislation by passing other statutes as the need arises. The secondary legislation is similarly subject to amendment. In time, the law becomes scattered over numerous statutes and statutory instruments and one often has to cross-reference between an array of documents in order to establish precisely what the current law is. Needless to say, this is a source of frustration to lawyers and it renders aspects of the law almost impenetrable to all but the most determined lay person. Granted, there is a government website offering the text of statutes as amended,[15] but it carries the warning that it is not necessarily up to date and the secondary legislation appears on the site in its original, unamended form. In addition, collections of statutes, duly updated, are published commercially, but they are either expensive or highly selective in terms of content.[16]

The following example illustrates the difficulty. The Children (Scotland) Act 1995 sought to bring together legislative provision on children in the family setting and child protection. The content of parental responsibilities and parental rights, their allocation and the resolution of disputes over them was addressed in a single statute alongside the various protective mechanisms

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13 See the Child Support Act 1995, Child Support, the Pensions and Social Security Act 2000 and the Child Maintenance and Other Payments Act 2008.

14 The latest attempt at repair was signalled when the United Kingdom Department of Work and Pensions published *Supporting Separated Families Securing Children's Futures*, Cm 8399 (2012) at: www.dwp.gov.uk/docs/childrens-futures-consultation.pdf (accessed May 2013), which will lead to further legislative changes.

15 See the *UK Statute Database* at: www.legislation.gov.uk/ (accessed May 2013).

16 The most reliable and comprehensive is the *Parliament House Book* (Edinburgh: W Green), a looseleaf publication, updated 5 times a year and covering all of Scots law, but costing £1,050 for the original volume with an annual fee of some £800 for the updating parts. More affordable, at about £18, are the *Avizandum Statutes on Scots Family Law* (Edinburgh: Avizandum), published annually. That volume contains excerpts from the most commonly used statutes, with the amendments inserted, but with no indication of their source or date, and is intended primarily for the student market.

designed to deal with the problems in the family and how they might be resolved through the courts and the children's hearing system. Adoption of children remained in a separate statute, the Adoption (Scotland) Act 1978.[17] The 1995 Act has now been amended numerous times. In its original form, it empowered the court to grant various orders relating to child protection: a child assessment order, an exclusion order, a child protection order and a parental responsibilities order. The last of these was, quite correctly, found to be problematic and it was replaced by the permanence order, the details of which were located in the new Adoption and Children (Scotland) Act 2007[18] which reformed adoption law but left much of the prior adoption statute in place. Then two of the remaining child protection orders were moved to the Children's Hearings (Scotland) Act 2011 which effected comprehensive reform of the hearings system. Each of the new statutes is supplemented by plentiful statutory instruments. What began as an attempt to deal comprehensively with many aspects of child law in a consolidated way has now been fragmented and that pattern has been replicated in other areas of child and family law.

Quite apart from this fragmentation rendering the law less accessible than it might be, it creates the opportunity for inconsistencies and ambiguities to occur, something illustrated by the legislation dealing with protection from domestic abuse. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 provided certain protection to spouses and different-sex cohabitants in a hetero-normative statute, symptomatic of the attitudes of its time. When civil partnership, the marriage-equivalent for same-sex partners, was introduced by the Civil Partnership Act 2004, the protection was extended to civil partners. It was not extended, however, to same-sex cohabitants and it was to be a further 2 years before the Family Law (Scotland) Act 2006 corrected the omission.

Nor are the problems confined to inconvenience to lawyers or delays in extending remedies to particular groups as respect for equality requires. Such is the complexity of secondary legislation that omissions can occur, leading to fundamental legal – and very real – problems. When Scots divorce law was amended many years ago adding the two non-cohabitation grounds to the existing fault grounds,[19] it became apparent that a full hearing in court was no longer needed to process many undefended divorces. An affidavit procedure was introduced that allows for a divorce to be granted on the basis of written pleadings and affidavits from the pursuer and a witness, without either having to appear in court.[20] Later, a simplified procedure, known colloquially as the 'do-it-yourself' procedure, was added for divorces based on the non-cohabitation grounds provided that there are no children of the marriage under the age of 16; that neither party is applying for an order for financial provision; and that neither party suffers from a mental disorder.[21] Essentially, this

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17 Over the years, this statute had been amended extensively.
18 2007 Act, ss 88–104.
19 Divorce (Scotland) Act 1976, s 1.
20 Rules of the Court of Session, r 49.29; Ordinary Case Rules, r 33.28.
21 Evidence in Divorce Actions (Scotland) Order 1989, SI 1989/582.

procedure requires the completion of a form and it has proved popular, in part because it is the least expensive way to obtain a divorce.

When civil partnership was introduced, a similar simplified procedure was provided to enable civil partners to dissolve their relationships. It was only after the simplified procedure for civil partnership dissolution had been operating for several years that an inconsistency was noticed. Civil partnership dissolution under the simplified procedure required evidence from a third party, something not required in the parallel procedure for divorce.[22] However, in practice, civil partnership dissolutions were being granted without that third party evidence. The dissolution procedure has now been amended to remove the need for third party evidence,[23] but a question mark hangs over the validity of dissolutions granted prior to the amendment.

A further problem has been identified. Judicial disquiet had been expressed over the technical quality of legislation being passed by the Scottish Parliament. That the problem is not confined to family law was demonstrated by a complaint from the bench that the provision of the mental health legislation at issue was 'so resistant to ordinary comprehension'.[24] However, poorly drafted legislation has had a significant impact in child and family cases. One court noted that the way a provision dealing with the registration of a childcare facility had been framed resulted in the case being prolonged, leading to significant delay and expense, and expressed the hope that the legislature would take on board 'the desirability of avoiding similar uncertainties in the future'.[25] In another case, this time dealing with adoption law, the court lamented the fact that important transitional provisions had been relegated to a statutory instrument since they 'are not drafted by skilled parliamentary draftsmen and, moreover, are not subject to any parliamentary scrutiny'.[26]

III THE SOLUTION

Like other jurisdictions, twenty-first century Scotland needs a subtle and nuanced corpus of child and family law, balancing predictability and flexibility and capable of being applied to the rich variety of relationships in which people find themselves. In large part,[27] the actual content of the law is achieving these goals. The problem lies in the way the law is presented. It would

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22 Civil Evidence (Scotland) Act 1988, s 8.

23 Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012, SSI 2012/111.

24 *The Scottish Ministers v The Mental Health Tribunal for Scotland* [2009] CSIH 66; 2010 SC 56, per Lord Reed at para 5.

25 *Davies v The Scottish Commission for the Regulation of Care* [2012] CSIH 7; 2012 SLT 269, per Lord Marnoch at para 45.

26 *O* v *Aberdeen City Council* [2011] CSIH 43; 2011 SLT 1039, per Lord Hardie at para 18.

27 There are exceptions, of course, and the position of the non-marital father is ripe for re-examination. The present author has argued that the current legal provision for cohabitants should be revisited and revised: EE Sutherland 'From "Bidie-In" to "Cohabitant" in Scotland: the Perils of Legislative Compromise' (2013) 27(2) *International Journal of Law, Policy and the Family,* forthcoming.

be naive indeed to suggest that such sophisticated legal provision can be reduced to a simple set of rules, fully intelligible to the whole population without assistance. However, it would be possible to render the law more user-friendly and, thus, more accessible to lawyers and lay advisers by presenting it in a coherent package.

As we have seen, the limited statutory consolidation achieved in the Children (Scotland) Act 1995 was short-lived. That suggests the need for a firm commitment to the more comprehensive goal of codification, bringing all the existing child and family legislation together along with common law rules in a single statute or code. The process would be reasonably straightforward since most of the law in this area is already in statutory form with few common law rules remaining.

Back in the mists of 1992, the Scottish Law Commission – in reality, the lead commissioner on the project, Professor Eric M Clive – devised a blueprint for a Scottish Child and Family Code.[28] The idea was resurrected in the early years of this century, as part of a broader plan to draft a Civil Code, again under the auspices of Professor Clive who by that time had retired from the Commission and was a visiting professor at Edinburgh University.[29] He began fleshing out the blueprint and drafting the relevant child and family law provisions, but the results were never published. The idea of a more comprehensive civil code was shelved, at least for the time being, largely due to a lack of political will to do anything about it.[30] This governmental apathy, if not antipathy, towards codification is not confined to civil law. The Draft Criminal Code for Scotland with Commentary,[31] written by a group of respected Scottish academics, was published in 2003. A decade later, there are still no plans for legislation to implement it. Slightly more hope attached to codification efforts in respect of the law of succession (inheritance) when the Scottish Government responded in generally positive terms to the Scottish Law Commission's proposals,[32] but no draft legislation has yet been brought forward.

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28 *Report on Family Law*, Scot Law Com No 135 (1992), Part XIX, available at: www.scotlawcom.gov.uk/publications/reports/1990-1999/ (accessed May 2013).

29 EM Clive 'Current Codification Projects in Scotland' (2000) 4(3) *Edinburgh Law Review* 341, at p 343.

30 EM Clive 'Thoughts from a Scottish perspective on the Bicentenary of the French Civil Code' (2004) 8(3) *Edinburgh Law Review* 415, at p 418.

31 EM Clive, P Ferguson, C Gane and A McCall Smith *Draft Criminal Code for Scotland with Commentary* (Edinburgh, 2003). While not 'published' by the Scottish Law Commission, it is available on the Commission's website. Finding it is not altogether simple. Go to: www.scotlawcom.gov.uk/publications/consultation-papers-and-other-documents/, then scroll down to 2003 (accessed May 2013). For a discussion of the project's history and some of the Code's key features, see EM Clive 'Submission of a Draft Criminal Code for Scotland to the Minister for Justice' (2003) 7(3) *Edinburgh Law Review* 395.

32 *Report on Succession*, Scot Law Com No 215 (2009), available at: www.scotlawcom.gov.uk/publications/reports/2000-2009/ (accessed May 2013). The Report received a generally-positive response from the Scottish Government (accessible alongside the Report) only a few months after publication, albeit no bill has yet been introduced in the Scottish Parliament.

What is the source of this general reluctance to codify? A conspiracy theorist might claim that those who understand the law have an interest in retaining the privileged position their knowledge gives them.[33] So, for example, government agencies can keep the masses at bay if the latter do not understand their rights. Similarly, family lawyers derive status, power and employment from being privy to the complexities of the law that remain a mystery to others. Yet closer examination reveals any such interest to be illusory except in the most abstract sense. Dealing with confused and frustrated members of the public makes the job of overworked civil servants more, not less, difficult. Lawyers, often being paid on a 'block fee' basis,[34] gain nothing by expending time juggling complex, interlocking statutory provisions.

A more benign explanation is that the obvious agency to undertake a codification exercise, whether of child and family law or more widely, is the Scottish Law Commission and it does not have the time or resources to undertake projects of this magnitude.[35] But the Draft Criminal Code was produced without calling on those resources and there was tacit support for it from the Commission when it made the text available on its website. While the Commission noted that it was unable to commit resources to the Civil Code project, it was again supportive and agreed to have an observer on any steering committee.[36] Undoubtedly, shepherding any code through the Scottish Parliament would also take time, but so does passing an endless stream of ad hoc legislation.

A familiar argument against codification – that it would lead to stagnation of the law – has hardly proved to be the case in codified legal systems. So, for example, the Netherlands had no difficulty in becoming the first country in the world to introduce same-sex marriage and, in France, the pacte civil de

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33 For a discussion of 'the lure of ambiguity', replete with apposite and amusing quotations, see K Stevenson and C Harris 'Breaking the Thrall of Ambiguity: Simplification (of the Criminal Law) as an Emerging Human Rights Imperative' (2010) 74(6) *Journal of Criminal Law* 516, at pp 522–527.

34 In the past, solicitors undertaking legal aid work were paid an hourly rate for the work they did, albeit the rate was significantly lower than the rate charged to private (non-legally aided) clients. In 2003, all that changed and the Scottish Legal Aid Board moved to a new system whereby solicitors and advocates are paid 'block fees': that is, a fixed sum for the piece of work, like drafting pleadings or appearing in court, irrespective of how straightforward or complex the case. See Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2003, SSI 2003/178.

35 Cf the view of Lord Hope, referring to codification of the criminal law, when he opined: 'If such a vast undertaking as that is to be achieved it will certainly need to be done through the [Scottish Law] Commission.' Lord Hope of Craighead 'Do we still need a Scottish Law Commission?' (2006) 10(1) *Edinburgh Law Review* 10, at p 26. This was a curious statement for Lord Hope to make in 2006, given that the draft Criminal Code was published in 2003 and it is inconceivable that he was unaware of it. He may have meant that taking the project forward would require further consultation and that the Commission would be best placed to undertake the task. Had there been the political will, an ad hoc body could, of course, have been set up.

36 EM Clive 'A Scottish Civil Code' in HL McQueen (ed) *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (Edinburgh: W Green, 1996) and Clive 'Current Codification Projects in Scotland', n 29 above, at p 342.

solidarité was introduced without technical difficulty. Indeed, future law reform would be simpler and more comprehensive if it required amendment to a well-structured code since it would avoid the need to amend countless statutes with the inherent risk that something important will be missed in the process. Another argument against codification is that it would result in a radical shift in the legal culture.[37] But child and family law is already in statutory form so it is difficult to see how interpreting a comprehensive statute or code would differ from what is done at present.

There are, of course, many practical and policy questions to be answered before a civil code and the child and family part thereof is drafted. Should the process be approached incrementally, by means of codifying statutes on distinct aspects of child and family law, rather than all at once? Would a degree of 'tidying up', rationalising anomalies and inconsistencies, be part of the process? To what extent should it involve reform of the law as opposed to simple restatement?[38] Should the new statute or code aim to be expressed in simple language, accessible to the lay person, or is such a goal unattainable?[39] Many of these issues have been addressed by Professor Clive and others[40] and none is insurmountable.

In 2012, there was a glimmer of hope that the Scottish Government was becoming more sensitive to the problem created by fragmented legislation. The previous year, it had consulted on two areas where it was considering new legislation, proposing one bill dealing with children's rights and another seeking to improve services for children.[41] In 2012, at least in part as a result of submissions made during the consultation process,[42] it published a further consultation paper proposing a single statute, the Children and Young People (Scotland) Bill, combining the subject matter previously envisaged as appearing in the two bills.[43] The latest document addressed policy questions and specific proposals for legislation, but did not contain the draft of the actual bill.[44]

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37 Clive 'Current Codification Projects in Scotland', n 29, above, at 345–346.

38 Quite reasonably, Professor Clive is of the view that it would make sense to implement 'reforms desired on policy grounds' at the same time as codifying: Clive 'Current Codification Projects in Scotland', n 29, above, at p 343.

39 The present author is of the view that such a goal is unattainable.

40 See PT Richard-Clarke 'Access to justice: accessibility' (2011) 11(3) *Legal Information Management* 159 and W Voermans 'Styles of legislation and their effects' (2011) 32(1) *Statute Law Review* 38.

41 *Consultation on Rights of Children and Young People Bill* (Edinburgh: Scottish Government, 2011), at: www.scotland.gov.uk/Resource/Doc/357438/0120726.pdf and on the Proposed Children's Services Bill, see: www.scotland.gov.uk/Topics/People/Young-People/legislation/engagement-events/services-bill (both accessed May 2013).

42 *Consultation on Rights of Children and Young People Bill: Scottish Government Response* (Edinburgh: Scottish Government, 2012) pp 18–19, at: www.scotland.gov.uk/Resource/0039/00392992.pdf (accessed May 2013).

43 *A Scotland for Children: A Consultation on the Children and Young People Bill* (Edinburgh: Scottish Government, 2012), at: www.scotland.gov.uk/Resource/0039/00396537.pdf (accessed May 2013).

44 For non-confidential responses to the most recent consultation, see www.scotland.gov.uk/Publications/2012/10/5874 (accessed May 2013).

However, it is clear that any new statute will contain new provisions while continuing the old troublesome process of amending existing statutes further. The Scottish Government, it seems, has yet to grasp the pressing need for codification.

IV CONCLUSIONS

A modern deity would undoubtedly opt for a USB stick rather than tablets of stone when handing down a set of rules to the chosen one to pass along to the masses. Indeed, he or she might miss out the intermediary altogether and go straight for a website and a blog. Whatever the medium, confining the instructions to ten simple rules would present a significant challenge. Human relationships are complex and varied and the rules crafted by the legal system must necessarily be subtle and nuanced if they are to deal adequately with the range of situations presenting themselves. The system adopted in Scotland hitherto, whereby statutes are passed on specific aspects of family law, supplemented by secondary legislation, then amended regularly, has resulted in a proliferation of legislative instruments that renders the law less accessible than it needs to be.

A comprehensive child and family code offers something of a solution by drawing the whole body of law together and presenting it in a coherent and structured way. That is not to suggest that the whole corpus of child and family law could be presented in such a way that all members of the public would understand it without assistance, but it would make the law more accessible to lawyers and the lay advisers who, it is anticipated, will play an increasing role in assisting clients who have limited financial resources. There is no denying that the process of codification would take effort and time, but if that is the price of increasing accessibility, at least for lawyers and other advisers, then it is a price well worth paying.

South Africa

YOU REAP WHAT YOU SOW: REGULATING MARRIAGES AND INTIMATE PARTNERSHIPS IN A DIVERSE, POST-APARTHEID SOCIETY

Helen Kruuse[*]

Résumé

L'Afrique du Sud n'a pas vraiment de quoi être fière de son histoire. Englué dans son approche fondée sur la doctrine 'séparés mais (in)égaux', l'ancien système politique a eu des conséquences dévastatrices dans tous les secteurs, dont éminemment celui de la famille. L'auteure avance que le régime général d'apartheid en Afrique du Sud a été transposé dans le droit de la famille, marqué par la reconnaissance étatique du mariage blanc occidental monogamique et laissant les autres formes de conjugalité (coutumière, musulmane, homosexuelle, hors mariage, etc) largement dans l'ombre. Le présent chapitre fait état de la reconnaissance progressive des différents modèles de mariage, fondée sur le désir de donner, dans l'Afrique du Sud de l'après-apartheid, une protection égale à tous les couples. Mais l'auteure se demande si cette prolifération n'a pas, en réalité, occulté la principale question, soit celle de la protection des personnes vulnérables au sein des couples (habituellement les femmes). Le texte s'intéresse d'abord aux mariages coutumiers (avec une attention particulière au récent arrêt dans l'affaire *Ngwenyama* v *Mayelane*), mais il traite également des unions civiles et des mariages musulmans.

I INTRODUCTION

South Africa does not have a particularly proud history. Marred by the politics of separate but (un)equal treatment of its people, the country's past political system has had a damaging effect in all spheres, but specifically on that of the family. In the context of relationships, it is fair to say that the apartheid system was replicated in family law, with the Western 'white' monogamous marriage receiving the state's stamp of approval[1] – leaving other relationships (customary, Muslim, homosexual, cohabiting etc) largely out in the cold.

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1 The law of marriage in South Africa, as set out in the Marriage Act 25 of 1961, is a combination of Roman-Dutch law and legislation. See B Clark 'History of the Roman-Dutch

The purpose of this chapter is to examine recent legislative and judicial interventions seeking to provide equal protection to these relationships in post-apartheid South Africa, focusing on customary marriages. This examination uses South Africa's Supreme Court of Appeal's decision of *Ngwenyama v Mayelane*[2] as a point of departure. The basic premise of the chapter is that the way in which the state has sought to protect intimate partnerships in South Africa continues to rest on the presumption of the universality of marriage, and its form in the Judeo-Christian sense. As a result, the interventions in South Africa have been piecemeal and inconsistent, resulting in a proliferation of legislation which has created new forms of discrimination between different relationships not foreseen by drafters and decision-makers, and threatening the very people that they sought to protect: vulnerable parties.

II OF SILOS AND FORM: *NGWENYAMA V MAYELANE*

(a) The Recognition of Customary Marriages Act 120 of 1998 – the first silo

Before embarking on an account of the facts of the case, some consideration needs to be given to the Act on which it is based, and the context in which it was drafted and passed by the newly formed South African Parliament. With the dawn of democracy in South Africa, negotiators disagreed on many things, but the one issue agreed upon was the need for a decisive 'break from the past'. This was epitomised in President Nelson Mandela's inaugural address[3] when he stated: 'Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another …'. The Constitution of the Republic of South Africa, 1996 was drafted with this express intention. The Constitution has been described as a 'transformational' document, one which is based on the values of dignity, freedom and equality. While there is no 'right to family life' nor a 'right to marriage' per se, the constitutional drafters recognised the importance of recognising diverse family forms in the text of s 15(3). Up until this time, marriages could only be entered into in terms of the common law as amended by the Marriage Act.[4] The Act is generally only available to majors (ie those over the age of 18 years old) who wish to enter into a monogamous heterosexual marriage.[5] Section 15(3) anticipated recognition by the state of 'marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular

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law of marriage from a socioeconomic perspective' in DP Visser (ed) *Essays on the History of Law* (Cape Town: Juta & Co, 1989) 152–212 for a detailed discussion on the history of marriage in South Africa.

2 2012 (4) SA 527 (SCA).

3 Nelson Mandela, Inaugural Address, Pretoria 9 May 1994.

4 Act 25 of 1961.

5 See ss 24–26 of the Act which set out instances where those under the age of 18 years may get consent to enter into a marriage.

religion'. The section was however qualified by a requirement that such recognition had to be consistent with the provisions of the Constitution, including the rights of equality and dignity.[6] While academics and commentators began to discuss excluded forms of relationships as a general and shared problem soon thereafter, the non-recognition of customary marriages in particular was seen as a symbol of apartheid's racist policies. As a result customary marriage was seen as the natural and logical priority for reform, not only because it affected the most number of people, but also because it was central in the bigger question on the status of customary law in the post-apartheid order.[7] Despite some opposition on the form that such reform should take,[8] a separate and exclusive Act was drafted for customary marriages – co-existing alongside the Marriage Act.

The Recognition of Customary Marriages Act (RCMA), somewhat controversially,[9] allows polygany but – in keeping with attempts to equalise spousal rights – requires that a husband obtain a court order before entering a second marriage. The Act envisages that this court order will deal with the marital property regime of the future marriage.[10] In doing so, the court must ensure that the spouses' property is equitably distributed, taking into account all the relevant circumstances of the family groups affected.[11] Furthermore, it is envisaged that the present and future wives must be joined in the process.[12] While the Act provides for registration of the marriage,[13] the Act expressly states that registration is not a requirement of the marriage.[14] This provision was specifically aimed at the reality that many parties in customary marriages

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6 Sections 9 and 10 respectively.

7 Michael Yarbrough 'Toward a Political Sociology of Conjugal-Recognition Regimes: Gendered Multiculturalism in South African Marriage Law' (2013) (forthcoming in *Social Politics,* on file with author). Beth Goldblatt and Likhapha Mbatha 'Gender, culture and equality: reforming customary law' in *Engendering the Political Agenda: A South African Case Study* (Johannesburg: Centre for Applied Legal Studies, 1999) 83–110, Thandabantu Nhlapo 'Indigenous law and gender in South Africa: Taking human rights and cultural diversity seriously' (1994–1995) *Third World Legal Studies* 49–71. See ss 30–31 of the Constitution relating to the rights of persons to participate in the cultural life of their choice, subject to the other rights in the Constitution.

8 For example, there were a number of organisations who made submissions to the South African Law (Reform) Commission (which was commissioned to look into the issue) that creating a separate law for customary marriage would suggest that South Africa was still at the stage where it is unable to amalgamate under one unifying system – thus perpetuating racial divisions (see note on the Law Commission *Project 59*, below n 63). It was also suggested at the time that culturally specific laws would fossilise dynamic cultural practices into static rules, much like the colonial and subsequent policies earlier attempts at codification (see Centre for Applied Legal Studies, Gender Research Project 6, quoted in Yarbrough, above n 7, 36).

9 Felicity Kaganas and Christina Murray 'Law, Women and the Family: the Question of Polygyny in a new South Africa' (1991) *Acta Juridica* 116 at 125.

10 Section 7(6).

11 Section 7(a)(ii) and (iii). Jacqueline Heaton 'Family Law' in *Annual Survey of South African Law* (Cape Town: Juta & Co, 2010) 435 at 485.

12 Section 7(8).

13 Section 4(1)ff.

14 Section 4(9).

live in rural areas, are illiterate and most likely live in ignorance of the law.[15] In order to deal with the varied nature of customary law, the Act requires simply that parties 'comply with the requirements of customary law', those requirements being a matter to be determined by evidence.[16] As a result, courts are left to decide what, in a given case, are the essential requirements of custom and whether the parties have complied with them.

The problem with this provision is apparent from a number of conflicting court decisions as to what these requirements are, and what 'fulfilment' of these requirements requires.[17] It is generally accepted that *lobolo*[18] and a customary ceremony have to be performed (formal integration of a woman into her husband's family home)[19] in order for a relationship to be formally recognised as a marriage.[20] However, courts have differed as to whether full payment of the *lobolo* is necessary, and whether the formal integration of the bride has to take place. As will be clear from the discussion below, the attempt to fit the customary marriage into a civil marriage form with dichotomous terms such as married and unmarried has had unfortunate consequences. Especially so when a customary marriage in its true sense does not fit into one moment where the parties say 'I do'.[21] These decisions have often resulted in a woman finding

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15 B Goldblatt 'Regulating domestic partnerships – A necessary step in the development of South African family law' (2003) 120 SALJ 610 at 616.

16 Section 3(1)(b): 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'. *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 (18 July 2012) para 86: 'To consider whether a valid customary marriage has come into being …, requires a fact-intensive enquiry.'

17 For example, the cases of *Motsoatsoa v Roro* [2011] 2 All SA 324 (GSJ); *Fanti v Boto* 2008 (5) SA 405 (C); *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP) and *Mthembu v Letsela* 2000 (3) SA 867 (SCA).

18 'Property in cash or in kind … which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage' (s 1 of the RCMA). DG Koyana *Customary Law in a Changing Society* (Cape Town: Juta & Co, 1980) at 5 observes that the *lobolo* custom is 'a thread through all Black nations of Southern Africa'. See also JC Bekker *Seymour's Customary Law in Southern Africa* (Cape Town: Juta & Co, 1989) 151 who has described *lobolo* as 'a rock on which the Africans' marriage is founded'. After the Act, Dlamini (cited by LL Mofokeng 'The lobola agreement as the silent prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriage Act' (2005) 68 THRHR 277 at 279) observed: 'Blacks in general: are unable to regard a relationship as a marriage even if there can be compliance with all legal requirements if lobolo has not been delivered or an agreement for its delivery [has not been] concluded.'

19 The South African Law (Reform) Commission set out in para 4.4.8 of its report that: 'customary law always tends to be flexible and pragmatic. Ceremonies may be abbreviated as circumstances dictate, and especially in urban areas, they may be ignored altogether. Even within a close-knit community, opinions may vary on how essential a ritual is and how it should be performed.' See South African Law Commission Report on Customary Marriages (1998) Project 90.

20 TW Bennett 'Legal Pluralism and the family in South Africa: Lessons from Customary Law Reform' (2011) 25 *Emory International Law Review* 1029 at 1046.

21 IP Maithufi and JC Bekker 'The Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa' 35 (2002) CILSA 182 who set out clearly that a customary marriage in true African tradition should be seen as not an event but a process that comprises a chain of events.

herself outside of the definition of 'marriage' due to a lack of compliance with form, despite many years within a so-called 'marriage'.[22]

(b) *Ngwenyama v Mayelane*

It is with this background that we turn back to the case of *Mayelane*. Ms Modjadji Mayelane alleged that she married Mr Mphephu Ngwenyama under Tsonga customary law in 1984, but the marriage was never registered. Three children were born of the marriage. After Mr Ngwenyama's death in 2009 Ms Mayelane tried to register her customary law marriage. While at the Department of Home Affairs, she was informed that Mr Ngwenyama had married another woman in 2008, also under customary law, and that such marriage was registered in terms of the Act's provisions. The primary issue before the court a quo was the interpretation of s 7(6) of the Act.[23] Ms Mayelane applied for the second marriage – which she did not know about – to be declared void as a result of a lack of compliance with the provision. As set out above, s 7(6) requires the man to apply to court to finalise a contract that will regulate the future matrimonial property system of the marriages before he enters into a subsequent marriage. The problem with the provision is that it does not set out the consequences of a failure to obtain a court-approved contract.[24] Mr Ngwenyama did not make such an application in respect of his 2008 marriage, and the question that the court had to address was whether the failure to do so rendered the second marriage void. In finding for the first wife, Bertelsmann J emphasised the prejudice likely to be suffered by her where the second marriage has not been disclosed, holding that:

> 'The failure to comply with the mandatory provisions of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect. Cronje and Heaton argue in *South African Family Law* 2ed at 204, that the court's intervention would be rendered superfluous – which the legislature could not have intended – if invalidity did not result from a failure to observe ss (6).'

The learned judge continued at para 25:

> 'A further argument, that failure to comply with the subsection leads to invalidity of the subsequent further customary marriage, arises from the peremptory language of the provision: the word "must", read with the provisions of subsection (7)(b)(iii), empowering the court to refuse to register a proposed contract, indicates that the legislature intended non-compliance to lead to voidness of a marriage in conflict with the provision.'[25]

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22 *Motsoatsoa*, above n 17.

23 The judgment in the court a quo is reported as *MM v MN & another* 2010 (4) SA 286 (GNP).

24 Section 7(6): 'A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act *must* make application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.' Emphasis added.

25 In this regard, Bertelsmann J cited *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith* 2004 (1) SA 308

On appealing the decision to void the second marriage to the Supreme Court of Appeal, the court came to a different conclusion. It found that s 7(6) was *not* peremptory and that it could not have been the intention of the legislature to effect so fundamental a change to the customary law of polygamy by subjecting the validity of a second marriage to prior consent by a court, which could withhold it. The court also highlighted the discrimination visited upon the *second* wife who would not have her marriage recognised but for the husband's conduct.

Notwithstanding the fact that the requirements of a customary marriage (as contemplated in s 3(1)(b)) was not the locus of debate in both the High Court and Supreme Court of Appeal (SCA), the Constitutional Court (CC) – on an appeal against the SCA decision – gave practice directions to the parties to deal with the issue: whether under Tsonga customary law the first wife's consent was required before the husband could enter a second marriage. If the appellant could establish that Tsonga law required the women's consent and as Ms Mayelane did not give her consent, it would follow that this would render the 2008 marriage void regardless of compliance with s 7(6).

In addition to issuing these practice directions, the Constitutional Court also admitted three amici curiae to assist it. In heads of argument filed with the court, the Women's Legal Centre Trust supported the findings of the SCA, and argued that the High Court's approach is 'unduly and unnecessarily harsh' on subsequent wives who do not have the consent of the first wife (this deprives the subsequent wives of important 'legal and constitutional protections'). The Rural Women's Movement and the Commission for Gender Equality submitted that insufficient evidence was presented at the High Court to entertain the question whether it was part of the customs of the Tsonga people to require the consent of the first wife. Accordingly, they argued the matter should be remitted back to the High Court for reconsideration.

While the matter was heard on 20 November 2012, the Constitutional Court has yet to deliver judgment on the issue.

(c) Of form and silos

The *Mayelane* case and the way in which various other courts have dealt with the issues of registration and requirements arguably demonstrate the shortcomings of the current approach to intimate partnerships in South Africa. The fall-back position has been to hide behind form without enquiring into the role played by the partnership and whether that valuable role should be protected. It shows how its marriage-centric approach has resulted in relegating the more important issues of vulnerability and dependency to the footnotes and obiter dicta of the courts, not just in respect of customary marriage, but in

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(SCA) para 32 where it was held that 'language of a predominantly imperative nature such as "must" is to be construed as peremptory unless there are other circumstances which negate this construction'.

respect of all forms of intimate relationships.[26] While the state and courts continue to espouse the importance of 'family' in all shapes and forms – especially in the context of welfare policy – they continue to require intimate relationships to resemble a particular form of a marriage before recognition and protection will be meted out. In the *Mayelane* case, remittal on form appears to be the easy route, since the remittal court can work on a technical evidential point about the formal requirements of customary law without contemplating the effect of such a test for the women in question who bona fide believed that they were married. While the courts can be faulted for obsessing with form, effectively they have been set up by the legislation they have to enforce. As explained below, an elaborate structure of marriage-form 'silos' has left them with little choice. This formalist way of organising intimate relationships undermines the very purpose for which the structure was set up.

What are these marriage-form silos? The sociologist, Yarbrough, aptly describes the 'silo technique' as a 'less-noticed' feature in South African law which allows for the recognition of newly incorporated conjugal forms but within their own statutory and administrative structures.[27] These silos set up similar-type form requirements to that of marriage, leaving out the more important issues of dependency and function. The result of such non-compliance with form has led to hardships for women – whether a first or second wife or only one wife – since the failure to comply with a form that is constantly evolving means that many women are left uncertain as to their status, especially as it appears as if the lack of protection of a first or second 'spouse' is directly dependent on the (in)action of the 'husband'. There is also the reality of differing consequences for differing types of marriages – when the woman may or may not know the legal consequences or differences between the two. It seems appropriate at this point to give a simple example of this consequence. One should keep this example in mind in the light of the widespread ignorance of the RCMA and marriage law generally.[28]

In the light of the Supreme Court of Appeal's relatively recent case in *Netshituka v Netshituka,*[29] I can make the broad statement: If a man has a customary marriage with A and, without or with A's knowledge, enters into subsequent civil marriage with B, the latter marriage is void. This much is set out in terms of s 3(2) of the RCMA which prohibits a spouse, who is a party to

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[26] Denise Meyerson 'Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa' (2010) 3 *Constitutional Court Review* 295.

[27] Yarbrough, above n 7, 5.

[28] In recent focus group interviews with women in a four rural villages in the Eastern Cape, South Africa in 2012 only one of 71 women in a customary marriage knew of the existence of the Recognition of Customary Marriage Act (transcripts on file with author, these focus group interviews are part of a bigger project on customary marriages conducted with Lea Mwambene, at the University of the Western Cape). This was foreseen by the authors, Maithufi and Bekker, above n 21, who suggested that the RCMA would be simply a 'paper law' (196–197).

[29] 426/10 [2011] ZACSA 120. See also *Thembisile v Thembisile* 2002 (2) SA 209 (T) para 32 which comes to the same conclusion.

a valid customary marriage, from entering into a civil marriage in terms of the Marriage Act. This also follows from the requirement that a 'civil' marriage is monogamous. However, one could compare the women in *Netshituka* with the women in the *Mayelane* case discussed above. Following the *Mayelane* case, I can make the following set of statements: Man has a customary marriage with A. With or without A's consent, man has a subsequent customary marriage with B. The latter marriage is valid – again according to the SCA. The comparison begs the question: what really is the distinction between the second spouses in each scenario? In fact, one could argue that the second 'wife' in *Netshituka* had more reason to believe that her marriage was 'valid' given the belief that conventional marriage or the 'white wedding' is 'official' or recognised. So it appears that it is inevitable that one of the 'wives' will be discarded in some way and that their status rests on the action or inaction of the husband. Part of the problem is tied to the attempt to situate customary marriages in a formal system with 'simple dichotomous terms such as married and unmarried'. Such attempts have been made without regard to the nature of customary law which is identified by so-called 'cultural elites'[30] and which is constantly in flux – even to the point that polygamy has become less of a key signifier of the customary law culture.[31]

III SILOED STATUTORY ARCHITECTURE

While South Africa has been hailed as having the world's most expansive marriage laws,[32] the way in which family forms have been recognised post-apartheid has – paradoxically – led to new, more nuanced forms of discrimination. While the South African Law Commission at the early stages suggested a default marriage mode for all types of intimate relationships, the politically important and urgent choice of producing a separate Act for customary marriages has directed future intervention. The result is piecemeal legislation and proposed legislation producing separate statutory and administrative structures for each previously unrecognised intimate partnership. Indeed this siloing technique is evident in the subsequent legislation which followed on from the RCMA, becoming the default approach. This is evident in two subsequent 'silos' and proposed legislation, as set out below.

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30 Yarbrough, above n 7, 41.

31 In a 2013 interview with the Chief and his elders in three of the four villages in the Eastern Cape, no elder could remember a polygamous marriage in the area – a time spanning almost 60–70 years given the estimated age of some elders as 80 years old (transcript on file with author). Interestingly, Stacey and Meadow document that historically, polygynous marriages were relatively rare in South Africa, but that colonial authorities and African male elders colluded in codifying a rigid form of customary law out of gender and family practices that had been fluid and less detrimental to women. See Judith Stacey and Tey Meadow 'New Slants on the Slippery Slope: The Politics of Polygamy and Gay Family Rights in South Africa and the United States' (2009) 37 *Politics & Society* 167 at 176.

32 Ibid at 175.

(a) Civil Union Act 17 of 2006 – the second silo?

In the last few years, debate about the recognition of the right of persons of the same sex to marry each other has dominated the family law sphere across jurisdictions.[33] Importantly, Stacey and Meadow have noted that South Africa is the world's only jurisdiction thus far to recognise customary (that is, potentially polygamous) marriages as well as same-sex marriages.[34] While customary marriages were recognised by legislative fiat, the right of persons of the same sex to marry was a product of the Constitutional Court's direction in *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others.*[35] In this judgment, the Constitutional Court declared the common law definition of marriage invalid insofar as it did not permit same-sex couples to enjoy the status, benefits and responsibilities accorded to heterosexual couples. To remedy this invalidity, the court directed the legislature to provide for recognition of same-sex unions. If it failed to do so within a year, the court held that same-sex couples could automatically marry in terms of the statute governing marriage in South Africa, namely, the Marriage Act. The adoption of the Civil Union Act[36] followed, literally a year later, again in an urgent manner but this time due to the time constraints imposed by the court.[37] The court gave the South African Parliament various options, one of them being to provide for one marriage Act to cover various different conjugal regimes. Notwithstanding, the legislature took its cue from the RCMA and passed a separate Act for same-sex partners. To remedy a possible constitutional challenge to this 'separate but equal' treatment, at the last minute Parliament amended the Act to give couples forming a civil partnership in terms of its provisions, the right to call their civil partnerships a 'marriage'.[38]

While the Act has been hailed as progressive – especially in the light of continuing debates in the United States about same-sex marriage recognition –

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33 See Jamie Gardiner 'Same-sex marriage: A worldwide trend?' in Paula Gerber and Adiva Sifris (eds) *Current Trends in the Regulation of Same-Sex Relationships* (2011) 28 *Law in Context* Special Issue 92.

34 Stacey and Meadow, above n 31, at 171.

35 2006 (3) BCLR 355 (CC).

36 Act 17 of 2006.

37 One year from date of judgment.

38 Section 11(1) of the Act states that '[a] marriage officer must inquire from the parties appearing before him or her whether their civil union should be known as a marriage or a civil partnership …'. The ability to call a civil partnership a 'marriage' was a late amendment to the Bill. It was strongly argued in Parliamentary debate that, without this ability, the Bill would be glaringly unconstitutional since it would create a separate and unequal regime – resonant with apartheid laws. It is interesting to note that the United Kingdom's Civil Partnership Act 2004 does exactly this: creates a regime for same-sex couples which is separate to marriage (and cannot be called same). See *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), where the Court noted at para 121 that the Act bestows upon civil partners 'effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name'. This view has also been propounded in a South African case, *AS v CS* 2011 (2) SA 360 (WCC) para 37: 'a civil partnership concluded under the English Act has all the hallmarks of a marriage, save that it may not be termed so under that act'.

the 'silo' it creates has resulted in some strange consequences. In the first place, the Act contains no transitional arrangements, with the result that same-sex partners who do not enter a civil partnership in terms of the Act continue to this day to benefit from 'interim' protections made by the court before the Act came into operation. The rationale for these protections at the time was that same-sex partners were unable to get married, and so these court-ordered interventions were deemed to be necessary. It is worth mentioning that the court on a previous occasion found that it would not recognise or protect opposite-sex life partnerships (ie heterosexual life partnerships or cohabitees) since the parties, despite being legally permitted to marry, chose not to do so.[39] The result was foreseen in *Gory v Kolver,*[40] a case involving the right to inherit intestate from a same-sex life partner. Decided 6 days before the Civil Union Act came into force (29 November 2006), the court found that a same-sex partner would be treated as the intestate heir where a life partnership existed and one of the partners passed away. Part of the rationale of the court was that since same-sex partners could not get married, they needed greater protection. However, the court continued to state (at para 29):

> 'Unless specifically amended, section 1(1) [of South Africa's Intestate Succession Act] will … also apply to permanent same-sex life partners who have undertaken reciprocal duties of support but who do not "marry" under any new dispensation.'

It followed this comment by stating that it saw 'no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession' once the impediment to marry was removed (as was the case 6 days later by the passing of the Civil Union Act). The court, no doubt, thought that Parliament would deal with this issue, something which it failed to do in its haste to create yet another silo. Seven years later, the position remains: while both same-sex and opposite-sex life partners have the opportunity to marry, partners who die in an opposite-sex non-marriage relationship will not be able to inherit intestate from each other, while a same-sex partner will be able to do so. This situation has been described as peculiar,[41] ironic,[42] paradoxical[43] and anomalous.[44] This is even more so the case, given other amendments post-Civil Union Act. One such law relates to the ability of a partner to be recognised as the parent of a child conceived of artificial insemination. Due to the introduction of new legislation, only a 'spouse' of a 'married couple' may register as parent where she (or he) is not the

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39 *Volks v Robinson* 2005 (5) BCLR 446 (CC) paras 55–60.

40 2007 (4) SA 97 (CC).

41 H Kruuse '"Here's to you, Mrs Robinson": peculiarities and paragraph 29 in determining the treatment of domestic partnerships' (2009) 25 SAJHR 380–391.

42 P De Vos 'Still out in the cold? The Domestic Partnerships Bill and the non-protection of marginalised woman' [*sic*] in J Sloth-Nielsen and Z du Toit (eds) *Trials & Tribulations, Trends & Triumphs* (Cape Town: Juta & Co, 2008) 129 at 129.

43 P De Vos and J Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: critical reflections on an ongoing saga' (2007) 124 SALJ 795 at 823.

44 F Du Bois and C Himonga 'Life Partnerships' in F du Bois (ed) *Wille's Principles of South African Law* (9ed, Juta & Co, 2007) 363 at 369. See also L Picarra '*Gory v Kolver NO* 2007 (4) SA 97 (CC)' (2007) 23 SAJHR 563 at 565.

birth mother.[45] Thus, those who have not formalised their relationship in terms of the Civil Union Act may inherit intestate from one another, but may not both be recognised as parents to a child which is artificially conceived. This is an inconsistency which simply cannot be explained.

The 'separate' nature of the Act then has resulted in the inconsistent and unequal treatment of partners in a variety of arrangements from the serious implications in one's ability to inherit intestate from one another; as evidenced in *Gory v Kolver,* recognition as a parent; as evidenced in s 40 of the Children's Act, uncertainty as to marriage regimes applicable,[46] to the more mundane surname choices available to partners.[47] The latter two issues have arisen due to the drafters' hasty efforts to mimic marriage in a separate 'silo' for same-sex partners – especially evident in s 13 of the Act which attempts to create a 'catch-all' for civil partnerships by setting out that:

> '(1) The legal consequences of a marriage contemplated in the Marriage Act apply, *with such changes as may be required by the context*, to a civil union.
>
> (2) With the exception of the Marriage Act and the Customary Marriages Act, any references to—
>
> a. Marriage in any other law, including the common law, includes, *with such changes as may be required by the context*, a civil union; and
> b. Husband, wife or spouse in any other law, including the common law, includes a civil union partner.'[48]

The idea that one can simply read in gender-neutral terms where necessary reveals a major concern. It obfuscates the reality that our marriage law assigns duties and responsibilities 'specifically and exclusively' to husbands and wives – unwittingly revealing the gender-discrimination inherent in the institution of marriage protected by the Marriage Act.[49] It is inevitable that absurdities will

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45 Section 40 of the Children's Act 38 of 2005 (which came into force on 1 July 2007). The situation was previously governed by s 5 of the Children's Status Act 82 of 1987. The section, which reads much the same as s 40 does now, was declared unconstitutional in *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC) since it did not permit a same-sex life partner to be regarded as the parent of a child born of artificial fertilisation where that partner was not the birth mother. While the return to the original position by Parliament has been called 'prima facie unconstitutional' by some, it has been justified on the basis of the coming into force of the Civil Union Act. See J Heaton *Family Law* (Durban: LexisNexis, 3rd edn, 2010) 251–252.

46 See example below.

47 Section 26(1) of the Births and Registration Act 51 of 1992 sets out that a woman may assume the surname of her husband or take on a double-barrel surname without official permission, but a man must obtain the consent of the Director-General to assume the name of his wife. This section would of course be applicable to those in a civil union by virtue of s 13. Notwithstanding the subordinate nature of regulations, the Minister of Home Affairs has purportedly created an entirely separate regime for the adoption of surnames of civil partners in regulations to the Civil Union Act, which supposedly place civil union partners in better position than men in civil marriages simpliciter.

48 Emphasis added.

49 E le Roux 'What a farrago' (2007) April *Without Prejudice* 71. See also Chris McConnachie

result. One such absurdity is the previously mentioned example of uncertainty regarding the application of a default marriage property regime. It is settled in South African private international law that, in the absence of an antenuptial agreement, the proprietary consequences of a marriage are determined by the legal system of the country where the husband was domiciled at the time of marriage (the *lex domicilii matrimonii*).[50] Applying s 13 to a scenario where same-sex partners are domiciled in different countries at the time of the marriage leaves same-sex partners with a conundrum: what matrimonial domicile applies when neither or both are 'husbands'? The only way to remedy this uncertainty is for partners to adopt and imitate heterosexual marriage roles, choosing whether they are a 'husband' or a 'wife'. The danger of this approach is plain: the need to simulate a heterosexual marriage to achieve certainty in a civil partnership implies that that civil partnership is not quite equal in worth and significance[51] to the 'original' Marriage Act-marriage.

It is perhaps in the sensitive area of religion that the state has implicitly declared its allegiance to heterosexual monogamous marriage as the norm and 'approved' structure of intimate partnership. Section 15 of the South African Constitution provides for freedom of conscience, religion, thought, belief and opinion. Given South Africa's 'suppressive' history, toleration of diversity and religion has been seen as an important positive social goal.[52] In the context then of same-sex marriages, it is arguably fair that marriage officers who are employed by religious associations instead of the state (ministers, rabbis and priests of the diverse religions who opt to become marriage officers) should not be forced to solemnise a same-sex union.[53] However, what about state employees who are de facto marriage officers by virtue of their position within state structures? Section 6 of the Civil Union Act is a type of 'conscientious objection clause' which exempts a state marriage officer by setting out that he or she:

> 'may in writing inform the Minister [of Home Affairs] that he or she objects on the ground *[sic]* of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.'

The clause is not in the form of a request, nor does the clause require the state official to substantiate the grounds for the objection or the reasons therefor. So

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'"With such changes as may be required by the context": the legal consequences of marriage through the lens of section 13 of the Civil Union Act' (2010) 127 *South African Law Journal* 424, 425 and 442.

50 *Frankel's Estate v The Master* 1950 (1) SA 220 (A).

51 P de Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) SAJHR 179 at 198. See also E Bonthuys 'Race and gender in the Civil Union Act' (2007) 23 SAJHR 526 at 538.

52 *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 170.

53 South Africa's Marriage Act provides for both civil and religious marriage officers to preside over marriages which have both religious and civil significance. Section 3(1) of the Act then provides for the appointments of officials of religious groups who conduct marriages according to 'Christian, Jewish or Mohammedan rites or the rites of any Indian religion'.

for example, where a state official is simply homophobic, detached from any religious belief, that official can refuse to marry a couple. This then is the 'face' of the state – the same-sex couple who are brave enough to publicly declare their commitment to each other[54] may still be denied by the state literally 'at the door', in the form of its objecting official. It is perhaps the comparison with the lack of a conscientious objection clause in the civil Marriage Act that is most troubling. In terms of the Marriage Act, a civil marriage officer may not object to marrying couples in terms of the Marriage Act on the basis of their conscience, belief and opinion – this is the case even if civil marriage officers have religious or other beliefs against inter-racial or inter-faith marriages; they must solemnise the union. The common example is that a devout and conservative Roman Catholic state official must solemnise a marriage between previously divorced partners even though it is clearly against his or her religious beliefs. The net result of s 6 is that the *only* ground upon which a state official can object to solemnising *any* marriage – be it a 'marriage' in terms of the Marriage Act or a 'marriage' in terms of the Civil Union Act – is the sexual orientation of the couple. Sexual orientation is thus singled out for particular (exclusionary) treatment. This is despite the fact that discrimination on the basis of sexual orientation is a listed ground in the constitution's equality clause.[55] The exemption clause then suggests that sexual orientation is in some way different to other equality categories (such as race and faith). It also suggests that the state endorses the view that same-sex relationships merit different treatment as compared with heterosexual relationships.[56]

(b) Proposed legislation: the Muslim Marriage Bill 2003, 2010 and the Domestic Partnerships Bill[57]

And so it goes. The siloed statutory architecture, commencing with the RCMA and then the Civil Union Act, has set the scene for proposed legislation in the form of the Muslim Marriage Bill drafted initially in 2003, with a new draft circulated in 2010. And so too the Domestic Partnerships Bill, circulated in

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[54] 'Brave' in the sense that, despite South Africa's unambiguous and wide-ranging protections and rights, patriarchy and homophobia are intense and widespread. 'Coming out' in South Africa, especially in contemporary black culture, has had dire results in 'gay bashing' including the phenomenon of 'curative rape' of lesbians and occasional homicides. See Jacklyn Cock 'Engendering Gay and Lesbian Rights: The equality clause in the South African Constitution' 26 (2003) *Women Studies International Forum* 35 at 40–44, and Stacey and Meadow, above n 31, at 178. See also Michael Cameron Wood-Bodley 'Intestate succession and gay and lesbian couples' (2008) 125 SALJ 46.

[55] Section 9. South Africa was the first country in the world to prohibit discrimination on the basis of sexual orientation in its Constitution. See M Gevisser 'A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from the 1950s to the 1990s' in M Gevisser and E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (New York: Routledge, 1995) 14–86.

[56] David Bilchitz and Melanie Judge 'For Whom Does the Bell Toll? The Challenges and Possibilities the Civil Union Act Creates for Family Law in South Africa' (2007) 23 *South African Journal of Human Rights* 491.

[57] *Government Gazette* No 30633 of 14 January 2008.

2008, and still awaiting its first reading. While space does not allow for a full analysis of these Bills, a few comments are apposite.[58]

(i) The Domestic Partnerships Bill – a third silo?

First, and as way of background and as alluded to above, South Africa does not provide protection to heterosexual life partners since they have an election to marry, but choose not to do so. This much is clear from the highly criticised decision of the Constitutional Court in *Volks NO v Robinson and others*.[59] Despite the recognition of the *Volks* court that there was a need to protect these types of intimate partnerships,[60] the court commented that it was 'up to the legislature to make provision for this'.[61]

Even before this Bill, the protection of opposite-sex life partnerships was contemplated in the Civil Union Bill 26 of 2006 published on 31 August 2006. However, any reference to domestic partnerships was deleted in the final version of the Bill[62] and the subsequent Act. This is presumably because the legislature ran out of time due to the *Fourie*-deadline which required it to adopt measures to protect same-sex couples by the end of November 2006. So while the state has shown a willingness in draft legislation to do so, it has failed to provide effective protection of opposite-sex couples.

(ii) The Muslim Marriage Bill 2010 – a fourth silo?

The Muslim Marriage Bill that is currently being debated has a long history – with an initial Bill being drafted as far back as 2001, just one year after the RCMA.[63] The Bill is similar in structure to the RCMA in that it purports to

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58 See Bradley Smith's chapter on South Africa's Domestic Partnerships Bill: 'The Statutory Domestic Partnership Cometh' in B Atkin (ed) *International Survey of Family Law 2010 Edition* (Jordan Publishing, 2010) 297.

59 2005 (5) BCLR 446 (CC). See in particular, para 92 of the judgment. The issue of choice is critiqued in the minority judgment of Sachs J who reflects at para 225: 'While it is necessary to emphasise the importance of people taking responsibility for their lives, and to acknowledge the extraordinary self-reliance shown by many women in the face of extreme hardship, the law cannot ignore the fact that lack of resources has left many women with harsh options only. Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other.'

60 Skweyiya J (writing for the majority) at para 65 stated: 'I accept that laws aimed at regulating these relationships in order to ensure that a vulnerable partner within the relationship is not unfairly taken advantage of are appropriate.'

61 Para 67. See further para 68: 'The answer [to addressing the concerns of vulnerable women in cohabiting relationships] lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive.'

62 Bill 26B of 2006.

63 See South African Law Commission *Issue Paper 15 Project 59 Islamic Marriages and Related Matters* (May 2000), SALRC *Project 59 Discussion Paper 101 on Islamic marriages and related matters* (2001) and SALRC *Project 59 Islamic Marriages and Related Matters Report* (2003). The reports contained both the 2001 and 2003 Bills (134 and 110 respectively). For a summary of how the investigations fared in the early 1990s, see Rautenbach et al 'Constitutional Analysis' in Bekker et al *Introduction to Legal Pluralism in South Africa* (South Africa:

deal with the requirements of a marriage, the matrimonial regime applicable and dissolution of the same. No doubt the drafters thought the RCMA example could be followed 'with such changes as are required by the context'. It is clear from the recent experiences with the Civil Union Act that this approach inevitably produces practical challenges, if not reproducing even more serious equality concerns not only between the parties within the marriage, but as compared to parties in similar intimate partnerships (viz marriage, civil partnerships etc).[64] Over 10 years later, and a failed court-intervention in 2009,[65] a new Bill is currently being discussed but is far from being finalised, given the lack of consensus about its content. This is simply because the Bill has attempted to reconcile the rules and principles of classical or traditional Islamic family law with South African constitutional values, no doubt because it will have to operate in that environment.[66] The result is a religion versus law debate, with Muslim clerics objecting inter alia that the Bill subordinates Islamic law to the state. This is evident in its requirements that secular courts (and not religious authorities) handle disputes and divorces. This has been commonly referred to as 'secular interference in matters religious'.[67]

The issues of equality across each type of intimate partnership results in anomalies, similar to those found in the comparison between same-sex and opposite-sex life partnerships, between rights of married couples and those married in terms of a civil partnership, and as between those married in terms of customary law and those married in terms of the Marriage Act. These

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LexisNexis, 2nd edn, 2006) 162ff. See also Rautenbach 'Some comments on the current (and future) status of Muslim Personal Law in South Africa' 2004 PER 1 and N Moosa *Unveiling the Mind. The Legal Position of Women in Islam – A South African Context* (Cape Town: Juta & Co, 2nd edn, 2011) 143–162 discussing the South African Law (Reform) Commission's work with Islamic law.

64 Shachar 'The puzzle of interlocking power hierarchies: sharing the pieces of jurisdictional authority' (2000) *Harvard Civil Rights – Civil Liberties Law Review* 385, 406–426 poignantly argues that '[w]ell-meaning accommodation policies by the state, aimed at leveling the playing field between minority communities and the wider society, may unwittingly allow systematic maltreatment of individuals within the accommodated minority group – an impact, in certain cases, so severe that it nullifies these individuals' rights as citizens' (386). Shachar suggests that '[a] truly comprehensive multicultural citizenship model must identify and defend only those group based accommodations that coherently coalesce with the improvement of the status of traditionally subordinated classes of individuals within minority group cultures' (389).

65 In *Women's Centre Legal Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC), the Trust sought to force the President and Parliament, through the Constitutional Court, to prepare, initiate, enact and implement 'an Act of Parliament providing for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa and regulating the consequences of such recognition' within 18 months (para 1). The application failed on the issue of direct access (see s 167(4)(e) of the Constitution).

66 Jan L Neels 'Constitutional Aspects of the Muslim Marriages Bill' (2012) TSAR 486–506 at 486.

67 Navsa (SCA judge and Committee Leader for the SALRC Project Committee on Muslim Marriages) commented in 2004 that '[w]hilst there are parties … who do not see any value in secular interference in matters religious, the majority of the participants in the process … are intent on engaging with others to achieve a workable and generally acceptable statutory system of regulation of Muslim marriages' (Navsa 'Muslim personal law – an update' in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations: Trends and Triumphs* (Cape Town: Juta & Co, 2008) 113 at 115).

anomalies will multiply if the Muslim Marriage Bill is passed. There is a certain irony that the Bill may grant more protection and relief to Muslim women in certain contexts (for example, maintenance post-divorce) than women married in terms of the Marriage Act,[68] while granting them fewer rights in other contexts (for example, freedom to marry!).[69]

Perhaps the most puzzling of all the examples of differential treatment that will come about if the Muslim Marriage Bill is passed is on the issue of the default matrimonial property regime that will be applicable to the marriage. In South Africa, the primary matrimonial property system is universal community of property.[70] This means that when a couple enters into a civil marriage, a rebuttable presumption arises that the parties are marrying in community of property.[71] When the RCMA came into force, it provided that monogamous marriages concluded after the Act were deemed to be concluded in community of property, unless the parties concluded an antenuptial contract specifically choosing another matrimonial property regime.[72] However, proprietary consequences of customary marriages concluded before commencement of the Act would still be governed by traditional customary law.[73] In *Gumede v President of the Republic of South Africa*,[74] the Constitutional Court found that the application of different matrimonial property regimes based on the timing of the Act was unconstitutional and accordingly ordered that all monogamous marriages before the commencement of the Act must also be regarded as concluded *ex lege in community of property,* unless the parties indicated otherwise.

Why is this relevant to the Muslim Marriage debate? Clause 8(1) of the Bill sets out that all marriages concluded in terms of the Bill will be deemed to be *out of community of property*, unless the parties chose another matrimonial property

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68 See, for example, clause 11(2)(c) of the Muslim Marriage Bill which provides for the payment of *iddah* (that is, compulsory maintenance for 3 months after the divorce) and remuneration *ujrah al-hadānah* (during the breastfeeding period, not exceeding 2 years). These payments may well be more than what a Muslim woman would be granted in terms of secular law, where, strictly speaking, the duty of support terminates on the date of the court order for divorce unless s 7 of the Divorce Act is invoked. See *Strauss v Strauss* 1974 3 SA 79 (A) and *Botha v Botha* 2009 3 SA 89 (W) at para 30. Even if s 7 is invoked, the courts have been reluctant to grant long-term maintenance, preferring no, rehabilitative, or token maintenance – depending on the spouses' circumstances.

69 Clause 5(8) of the Bill states that '[t]he prohibition of a Muslim marriage between persons on account of their relationship by blood or affinity or fosterage, or any other reason, is determined by Islamic law'. Neels, above n 66, at 493–494, points out that the clause fails to expressly refer to the prohibition of marriages on religious and gender bases. According to Islamic law, Muslim men may marry Muslim, Jewish or Christian women, but Muslim women are only allowed to marry Muslim men; non-Muslim men are therefore not allowed to marry Muslim women. The prohibition – although concealed under the broad reference to 'other reasons' – treats married women in different contexts differently as well as treating parties within a marriage differently. See Moosa, above n 63, at 33–37.

70 Heaton, above n 45, at 65.

71 *Edelstein v Edelstein* 1952 (3) SA 1 (A).

72 Section 7(2).

73 Section 7(1).

74 2009 (3) SA 152 (CC).

regime in an antenuptial contract. Thus marriages under this new Bill will not lead to the community of property regime. Why commit the same error? Did the drafters learn nothing from the *Gumede* case? It is highly likely that the provision will be dealt with in a similar fashion to that in the *Gumede* case: indeed, the unfair discrimination in *Gumede* was based on a direct comparison between the legal position of women married under customary law and women married in terms of the Marriage Act. If the clause remains, it will mean that the socio-economically weaker party (usually the woman) in a Muslim marriage is worse off than the socio-economically weaker party in both customary and 'civil' marriages.[75] This example brings to mind a saying commonly ascribed to Albert Einstein: 'Insanity: doing the same thing over and over again and expecting different results.' Yet another silo brings yet another differentiation issue.

IV CONCLUSION: THE MONOLITH OF MARRIAGE

In a seminal article,[76] Justice Froneman reflected on the South African legal culture and legal reasoning in general by noting that:

> 'We [South African lawyers] analyse the body of law into compartments and concepts in order to make sense of the whole. As reasoning humans we can hardly do otherwise. So we divide the law into public and private law, into contract, delict, family law, succession and the like; and then we create concepts in each category to explain the workings of the categories … All this is necessary but there is a danger too, namely that we forget that our compartmentalisation and conceptualisation are in the end merely constructs of our own reason. We begin to think that the compartments and concepts actually have lives of their own, that somehow they exist outside our construction of them. They, the systems and concepts, then start to rule us and we absolve ourselves from the responsibility of making the actual legal decisions. When that happens, the reality of actual social and judicial choices on contested issues becomes hidden from scrutiny.'[77]

While Froneman was certainly not considering the regulation of intimate partnerships in this article, his sentiments certainly resound in the family law context, especially as he goes on to state:

> '[South Africa's] past legal tradition and culture is strong on the analytical part; weak on the critical part flowing from a realistic look at how the practice of law worked on the ground; and forgetful of its own heritage on the substantive, normative part.'[78]

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[75] It has been argued that the possibility of a court order for the redistribution of assets upon divorce ameliorates the position of the weaker party. This is not a convincing solution given that the possibility of redistribution does not feature during the marriage or at death, and relies on the discretion of the court.

[76] JC Froneman 'Legal reasoning and legal culture : our "vision:" of law' (2005) 16 *Stellenbosch Law Review* 3–20.

[77] Ibid 16.

[78] Ibid 16–17.

While various factors have contributed to the proliferation of legislation and proposed legislation governing intimate partnerships, by far and away the most important factor contributing to the structure has been an obsession with marriage as the only normative structure of an intimate relationship worthy of recognition by the state.[79] With the initial construct of marriage in place, the decision to construct separate silos for different types of intimate partnerships – once a contested space when contemplating the 'first silo' of the RCMA – has now been taken for granted as the most suitable form[80] with the impending passage of the Domestic Partnerships Bill and the Muslim Marriage Bill. These separate silos are schizophrenic in nature: while purporting to expand protection for intimate partnerships, the state will only do so if these partnerships replicate the 'original' marriage, with concessions being made to 'culture' and 'religion' as determined by those in authority and with a 'voice'.[81]

What is the alternative? Perhaps it is time to consider crossing the divide between matrimonial law and welfare law, and start looking at the way in which welfare law in South Africa has expanded the meaning of family to incorporate dependency and not form as a guiding principle.[82] Why not intimate partnerships as well? In fact, as the *Mayelane* case exposes, the question of remittal to the High Court to decide on formalities avoids the hard question of whether the law adequately protects those in intimate partnerships, whatever 'name' we ascribe to the partnership. There are various options: an attractive suggestion has been made that 'a single new measure can be enacted which regulates the solemnization, consequences and dissolution of all types or forms of recognized marriage in South Africa'.[83] While this suggestion will deal with the plethora of legislation and Bills recognising different types of relationships, it still places 'marriage' at its centre, and therefore potentially leaves women in non-formalised intimate relationships out in the cold.[84] A better suggestion, if not more complex, would be to go back to the 'judicial discretion' model originally proposed by the SALRC in relation to unregistered domestic

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79 For instance, the Constitutional Court has been accused of adopting a 'constricted marriage model' Meyerson, above n 26, at 312 and 'putting marriage on a pedestal', B Meyersfeld 'If you can see, look: Domestic Partnerships and the Law' (2010) 3 *Constitutional Court Review* 271 at 289. See also Lea Mwambene and Helen Kruuse 'Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa' (2013) forthcoming in *Acta Juridica*.

80 Yarbrough, above n 7, at 37.

81 Ibid 43. Another consequence of the current silo structure is the awkward and embarrassing racialised character of various marriage options. This consequence is explored in Marius Pieterse 'It's a Black Thing: Upholding culture and customary law in a society founded on nonracialism' (2001) 17 *South African Journal of Human Rights* 364–391.

82 See, for instance, the South African Law Commission's *White Paper for Social Welfare* (1997) which recognised that families take myriad forms: 'The social, religious and cultural diversity of families are acknowledged as well as the effects of social change on the nature and structure of families' and defined the family in its glossary as 'individuals who either by a contract or agreement choose to live together intimately and function as a unit in a social and economic system …'.

83 IP Maithufi and GMB Moloi 'The need for the protection of rights of partners to invalid marital relationships: A revisit of the "discarded spouse" debate' (2005) 38 *De Jure* 144 at 153.

84 Lea Mwambene and Helen Kruuse, above n 79.

partnerships[85] as a prototype for all intimate partnerships and leave 'marriage per se' to the private domain.[86] This is a long-term project which no doubt has vast practical difficulties, historical legacies and cultural and religious issues to navigate. However, to stay on a trajectory that is bound to exacerbate divisions cannot be the answer. Perhaps the crafters of the law should have considered Chanock's remarks on the issue of customary marriages as far back as 1991 when he stated: 'defining a form of marriage is not really vital.'[87] Given the difficulties our courts have faced as a result of differing forms in differing structures, is it not time we found a way to recognise and regulate important intimate relationships without the baggage of marriage?[88] As Chanock goes on to say: 'we should concentrate on a family law system which embodies only those necessary protections to those vulnerable in family relationships, thereby abjuring cultural symbolism of any kind.'[89]

V POSTSCRIPT: A TALE OF TWO WIVES

On 30 May 2013, and after completion of this chapter, the Constitutional Court handed down their decision in the case of *Mayelane v Ngwenyama and Another*.[90] Fortunately, the court decided against remittal to the High Court, and heard evidence itself on the question (unrelated to the statutory question decided in the High Court and Supreme Court of Appeal) of whether Tsonga customary law required the consent of the first wife in order for the second marriage to be valid. The majority (three judges, with three concurring on a different basis and three dissenting) found that the Tsonga law requires the first wife be 'informed' about the second marriage (para 87). Given that Ms Mayelane knew nothing of the second marriage, Ms Ngwenyama's marriage was held to be invalid. The court further held that – going forward – the lack of consent by the first wife in Tsonga customary marriage would invalidate any further marriage. The court held that this development of Tsonga customary law was 'in accordance with the demands of human dignity and equality' set out in both the Constitution and the RCMA itself.

While the decision is to be applauded for its sensitivity to the first wife's rights of dignity and equality, the decision raises two immediate areas of concern.

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85 South African Law Reform Commission (Project 118) *Report on Domestic Partnerships* (2006) 366–367.

86 A good comparative investigation to consider would be the Law Commission of Canada's report: *Beyond Conjugality: Recognising and Supporting Close and Personal Adult Relationships* (2001). See discussions of this report in N Polikoff 'All Families Matter: What the Law Can Do About It' (2004) 25 *Women's Rights Law Reporter* 205; and N Polikoff 'Ending Marriage as We Know it' (2003–2004) 32 *Hofstra Law Review* 201.

87 M Chanock 'Law, State and Culture: Thinking about "Customary Law" after Apartheid' (1991) *Acta Juridica* 52 at 68.

88 P de Vos 'Time for a rethink on marriage, my China' available at http://constitutionallyspeaking.co.za/ (accessed June 2013).

89 M Chanock 'Law, State and Culture: Thinking about "Customary Law" after Apartheid' (1991) *Acta Juridica* 52 at 68.

90 CCT 57/12) [2013] ZACC 14.

First, it revives what academics have described as 'the discarded wife debate', being the rights of equality and dignity of the second wife. In this context, equality becomes a much harder right to give substance to when there are three (or more) parties involved. This gives way to a related concern: what if there are more wives? Would the consent of the second and third wife be required for the valid conclusion of subsequent marriages? The court expressly avoided this question. In addition, would a first wife in another custom be required to go to court to ask for the same consent development to apply in her custom?

Secondly, whether the decision will change current practice and force men to request consent from their first wives is debatable, given the hold that cultural elites have over the form and content of customary law marriages. In this regard, Nkosi Patekile Holomisa recently responded to the court decision – in his capacity as the President of the Congress of Traditional Leaders of South Africa (CONTRALESA) – as follows: 'It's going to force men to divorce and marry again, which is not how it's done in African culture.' And further: '[t]here is no limit to polygamy except being able to provide for the family.'[91] Incidentally, CONTRALESA is the same organisation (which calls itself 'the sole and authentic representative of the progressive traditional leadership of South Africa') who submitted a proposal to the South African parliament in 2012 for the removal of the anti-discrimination clause against sexual orientation in the Constitution. But that is a discussion for another day.

[91] Available at www.legalbrief.co.za/article.php?story=20130611120140758 (accessed June 2013).

South Korea

THE REFORM OF ADOPTION LAW IN KOREA

Jinsu Yune[*]

Résumé

En 2011 et 2012, le droit de l'adoption a connu deux réformes majeures. Premièrement, la Loi spéciale sur l'adoption fut adoptée le 4 août 2011. Deuxièmement, le chapitre du Code civil sur l'adoption fut considérablement modifié le 10 février 2012 et les nouvelles dispositions entreront en vigueur le 1er juillet 2013. L'objectif principal de ces changements est de mieux servir l'intérêt de l'enfant et d'harmoniser le droit interne aux principes internationaux, notamment ceux mis de l'avant par la Convention internationale sur les droits de l'enfant. Pour atteindre ce but, l'adoption d'enfants mineurs devra désormais être autorisée par le tribunal de la famille. De plus, le nouveau Code civil abolit la possibilité d'une révocation consensuelle de l'adoption d'un enfant mineur. Ce chapitre explore les points saillants de ces réformes.

I INTRODUCTION

In 2011 and 2012, there were two major changes in Korean Adoption Law. First, the Special Act on Adoption (SAA) was enacted on 4 August 2011. This Act replaced the former Special Act on the Promotion and Procedure of Adoption (SAPPA) and came into force on 5 August 2012. Secondly, the part of the Civil Code regulating adoption was thoroughly revised on 10 February 2012 and will come into force on 1 July 2013. The main aim of these changes was to serve the interests of the child better and match international standards such as the UN Convention on the Rights of the Child (UNCRC).

The chapter discusses the main features of the reform.

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II THE SITUATION BEFORE THE REFORM AND THE NECESSITY OF THE REFORM

(a) The Civil Code

(i) The Simple Adoption

The Korean Civil Code was enacted in 1957 and came into force on 1 January 1960. At that time, the basic idea of adoption law was that the institution of adoption was not for protecting the interests of the child, but rather for the interests of the family itself or, more precisely, the preservation of the family. To understand the notion of 'the preservation of the family', one must understand the *hoju* system. Before 2008, the Korean Civil Code employed the *hoju* (meaning 'master or head of the family') system, which conferred privileges upon each family's respective *hoju*, including certain enumerated powers over members of his family.[1] *Hoju* status itself and its inheritance were reserved for males in principle. The main social function of *hoju* was to hold *jaesa.*[2] For many Koreans, *jaesa* was the symbol of the continuity of the family and regarded as the most important matter in the realm of the family. In recent years, this way of thinking has weakened somewhat, but is still important as a social phenomenon.

So, if a *hoju* had no son to be the next *hoju* and hold *jaesa*, it was an urgent problem. The usual solution for this was for the *hoju* to select a boy among his relatives and adopt him. Not every adoption was used for this purpose, but the preservation of the family was the main concern of the legislator.

This was well illustrated by the recognition of adoption after the adoptive parent's death. There were two kinds of adoption for this purpose. One was posthumous adoption. When a *hoju* had died without an issue, his spouse, (grand)parents or council of relatives, in turn, could adopt a child for the deceased *hoju* (former art 867). The other was testamentary adoption. A testator could prescribe in the will that a child should be adopted for him or her (former art 880).

As formation adoption was possible if there was an agreement between adoptive parents and adopted child, without any intervention of the court or other governmental authority, only when a guardian wanted to adopt his or her ward was the permission of the family court necessary (former art 872). If the child was under 15, the present parent(s) – usually the biological parents – would need to consent to adoption in lieu of the child (former art 869). If no parent was present, the guardian of the child would need to consent to adoption. Moreover, the approval by biological parents or grandparents was always necessary regardless of the child's age (former art 870). Thus, even

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1 See Jinsu Yune 'Tradition and Constitution in the Context of the Korean Family Law' (2005) 5 *Journal of Korean Law* 197.

2 It means the ritual of ancestor worship.

adults required approval by parents or grandparents to become adopted. Finally, a report of adoption to the local mayor was (and still is) necessary for the adoption to be effective (art 878).

Adoption in the original Civil Code was simple adoption. Adoption did not terminate the former parents–child relationship. Former parents remained as parents. The child gained new parents in addition to the former parents.

The dissolution of an adoption was possible without the intervention of the court, if both parties to the adoption agreed to the dissolution (consensual dissolution, former art 898). Only when there was a disagreement between parents and child would the family court decide whether the adoption was to be dissolved (former art 905).

In 1990, posthumous adoption and testamentary adoption were abolished, and in doing so, the character of adoption for the family was somewhat diminished. The notion of adoption for the interests of the child was not, however, fully accepted.

(b) Introduction of the full adoption

In 2005, the full adoption system was introduced for the first time. This was a major change in the adoption law. It should be noted that the simple adoption system as described previously was retained as well. A full adoption is formed by the order of the court based on a petition, not by the agreement of the parties. Once the full adoption is formed, the parents–child relationship before the adoption is terminated.

Conditions for the formation of a full adoption are as follows. Only a married couple can adopt a child. The marriage must have lasted at least 3 years. However, if one adopts his or her spouse's child, then one year is enough. The prospective adopted child must be younger than 15 years old. The former parents must consent to the adoption, unless their parental authority has been revoked or they are deceased. The court can dismiss the adoption petition if the adoption is contrary to the interests of the child when considering the state of rearing, the motive for the adoption, and the rearing capacity of the prospective adoptive parents (art 908–2).

The dissolution of a full adoption is possible only when adoptive parents act grossly contrary to the interests of the adopted child through abuse, neglect, etc, or when the adopted child's behaviour towards the adoptive parents is so negative as to make it impossible to continue the parents–child relationship. Dissolution is possible only by the court order.

In addition, the *hoju* system was abolished in the same year.[3] On 3 February 2005, the Korean Constitutional Court declared that the *hoju* system was

[3] See Hyunah Yang 'Vision of Postcolonial Feminist Jurisprudence in Korea: Seen from the

incompatible with the Constitution.[4] Following the mandate of the Constitutional Court, the National Assembly abolished the *hoju* system on 31 March 2005 at the same time as recognising the full adoption system.[5]

(c) The Special Act on the Promotion and Procedure of Adoption

The SAA is for the adoption of orphans or other children whom the parents or other relatives cannot rear. There were several predecessors of the SAA. The first was the Special Act on the Adoption of Orphans on 30 September 1961. It was superseded by the Special Act on Adoption on 31 December 1976. The last was the SAPPA. I explain the last one.

A child who could be adopted under this Act should be (i) one in a child protection facility as a result of parental desertion or incapacity to rear the child, or (ii) one whose parents, grandparents or guardian had consented to adoption and requested a child protection facility to protect the child or admitted the child to an adoption agency (art 4). The prospective adoptive parents should have assets sufficient to raise the adopted child, be ready to acknowledge the freedom of religion of the child and to rear and educate the child so as to become a member of society, live in a harmonious family, and have no serious mental or physical handicap that would be detrimental to raising the child (art 5).

Moreover, the approval of present parents, grandparents or guardian was necessary (art 6).[6] The permission of the court was no prerequisite to adoption. Only when foreigners living in Korea wanted to adopt a child was the permission of the family court needed (art 16). This Act had a provision concerning intercountry adoption. When a director of the adoption agency received a request for adoption from a foreigner, the director had to seek the permission of the Minister of Health and Welfare for the child to emigrate abroad (art 17). For other matters not regulated by this Act, the provisions of the Civil Code were to be applied.

(d) The necessity of the reform

The regulation of adoption according to the old law was much criticised as inadequate for protecting children's interests. In particular, the absence of

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"Family-Head System" in Family Law' (2006) 5 *Journal of Korean Law* 12; Jinsu Yune 'CEDAW, CRC and the Korean Family Law' (2009) 1 *UT Soft Law Review* 79.

4 The decision of the Korean Constitutional Court on 3 February 2005, case no 2001 heonga 9 et al, Report of Constitutional Court Decision (*Heonbeopjaepansopanryejip*), vol 17, no 1, 1ff.

5 As a matter of fact, at the time of the Constitutional Court's decision, the parliamentary work of abolishing the *hoju* system was in its last stage, so the decision was only a nail in the coffin of the *hoju* system.

6 The guardian for the child in the child protection facility is the director of the facility or one designated by the governor as a guardian. The director of the adoption agency could perform the role of guardian for the prospective adopted child as well.

intervention by the court or any other governmental authority in the process of adoption was regarded as a major shortcoming. As a result, it was asserted that whether a couple who wanted to adopt were fit for the adoption from the perspective of child's interest could not be checked beforehand. This was all the more problematic, as art 21(a) of the UNCRC requires that the adoption of a child be authorised only by competent authorities who do so in accordance with applicable law and procedures and on the basis of all pertinent and reliable information.

Korea made reservation to art 21(a) at the time of ratifying the UNCRC. This reservation was much criticised. The UN Committee on the Rights of the Child expressed concern that domestic adoptions may be arranged without authorisation or involvement of competent authorities and that such arrangements do not necessarily take into account the best interests of the child or, where appropriate, the views of the child.[7]

The National Human Rights Commission of Korea made a recommendation on 11 April 2005 to the Korean Prime Minister and the Minister of Foreign Affairs and Trade that adoption should be permitted only after review by competent authorities, and the dissolution of adoption should be permitted only for the interests of the child.

Furthermore, the regulation of intercountry adoption in Korea was problematic as well. Article 21 of the UNCRC prescribes that intercountry adoption should be considered as an alternative means of a child's care if the child cannot be cared for in the child's country of origin; a child subject to intercountry adoption should still enjoy the safeguards and standards equivalent to those existing in the case of national adoption. There are many Korean children adopted by foreigners abroad.[8] However, Korea is not a contracting state of the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption ('Hague Adoption Convention'). On this point, The UN Committee on the Rights of the Child urged the ratification of the Hague Adoption Convention[9] and expressed concern about the absence of a clearly mandated central authority to provide

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7 Concluding Observations: Republic of Korea, 18 March 2003, CRC/C/15/Add.197, para 42; Concluding Observations: Republic of Korea, 2 February 2012, CRC/C/Kor/CO/3–4, paras 8, 9.

8 In 2010, there were 1,013 adopted children adopted by foreigners abroad. See www.index.go.kr/egams/stts/jsp/potal/stts/PO_STTS_IdxMain.jsp?idx_cd=2708&bbs=INDX_001 (accessed May 2013). In the same year, the number of reported domestic adoption is 3,570 (simple adoption), 1,251 (full adoption) and 56 (adoption under SAPPA). Source: Judicial Yearbook 2011 (in Korean). How many minors were among simply adopted children is not known exactly, but presumably more than half. One curious thing is that the number of domestic adoptions under the SAPPA was 1,462 according to the statistics of the Ministry of Health and Welfare. This number is much bigger than the officially reported number. This discrepancy can be explained by the so-called 'de facto adoption'. De facto adoption means that the prospective adoptive parents register the births of the adopted children as their own biological children instead of by means of an adoption report. See Part III(b) below.

9 Concluding Observations: Republic of Korea, 18 March 2003, CRC/C/15/Add.197, para 43.

regulatory oversight on adoptions and legislation codifying the obligation of the state party's competent authorities to intervene in intercountry adoption procedures.

Against this backdrop, it can be said that the overall reform of the adoption law was inevitable.

III REFORM OF THE CIVIL CODE

(a) Overview of the reform

The Reform of the Civil Code was initiated by the Korean Ministry of Justice. In November 2010, the Ministry of Justice organised a Special Committee for the Revision of the Family Law for the draft of the new family law. The committee was composed of four family law professors, one senior judge, one attorney and one family law legal aid expert. The author was the chairperson of the committee. One other family law professor was an observer, but acted in a capacity similar to that of a committee member.

In June 2011, the committee had sent the draft for the revision of the adoption law to the Ministry of Justice, and the Government had proposed the draft as a bill to the National Assembly. With exceptional speed, the National Assembly passed the bill with only slight modifications on 29 December 2011. The law was enacted on 10 February 2012 and will come into force on 1 July 2013.

The main focus of the reform was simple adoption. The most important point was to require the permission of the family court for every minor child adoption. There were other important changes as well. The prospective adoptive parents can be exempted from getting the consent or approval of parents or guardians when the denial of consent or approval is contrary to the interest of the child. The consensual dissolution of adoption was abolished in cases of minor adopted children (as opposed to the adoption of adult children). The rules for full adoption were also modified.

(b) Permission of the family court for adoption

As explained before, the permission of the court for adoption was not necessary in cases of simple adoption except for the guardian–ward adoption. However, regarding cases of simple adoption, there were reports that adoptive parents had abused or neglected their adopted children. To prevent this problem, the revised law requires that the permission of the family court be required in every minor child adoption. The family court can dismiss the adoption petition if the adoption is contrary to the interests of the child considering the state of rearing, the motive for the adoption, and the capacity of the prospective adoptive parents for rearing (art 867). Through this legislation, the Korean adoption law was brought into line with the UNCRC and the withdrawal of the reservation of art 21(a) became possible.

Furthermore, when either party to the adoption is a ward, the permission of the family court is also necessary regardless of the ward's age (art 873).[10]

The pattern of adoption by agreement is still retained in simple adoption. The permission of the family court is an additional condition for simple adoption. For simple adoption to be fully effective, the report of adoption to the mayor is still necessary.

One thing is worth noting. The adoption of minor children without the permission of the family court is not to be annulled, but void ab initio (art 883(2)). This is important in connection with de facto adoption.[11] The Korean Supreme Court had declared that the legal effect of adoption could be conferred on a de facto adoption if other conditions for the adoption except the report to the mayor were fulfilled.[12] This precedent has been much criticised, as this interpretation has no textual basis and is contradictory to the purpose of the report requirement (the purpose being to enhance the legal certainty by ascertaining whether there was a valid formation of adoption). The new law has made it clear that de facto adoption should not be treated as a substitute for proper adoption.

(c) Exemption from consent or approval by parents

As explained before, if the child was under 15,[13] the present parents should consent to adoption in lieu of the child according to the former law (former art 869). Where no parent was present, the guardian of the child should consent to adoption. Moreover, the approval by parents or grandparents was always necessary regardless of a child's age (former art 870). But there were cases where the parents or guardians had denied consent or approval without reasonable cause. For example, in the case of the Constitutional Court decision of 31 May 2012,[14] a woman had divorced her husband and remarried another man. The woman and her new husband had been rearing the children born between the woman and her ex-husband. The ex-husband did not pay the promised child support and there was no meaningful relationship between him and children. The new husband sought full adoption of the children, but the ex-husband denied consent without any reasonable cause. In response, the new husband raised a constitutional complaint to the Constitutional Court against the provision requiring the consent of the present parents.[15]

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[10] The Civil Code revised on 7 March 2011 distinguishes three kinds of ward: full ward (*piseongnyonhugyeonin*), limited ward (*pihanjeonghugyeonin*) and ward on specific occasions (*teugjeonghugyeonin*). The permission of the court is necessary only in the case of full ward.

[11] See n 8 above.

[12] Since the plenary decision of the Supreme Court on 26 July 1977, case no 77da492, Reports of the Supreme Court (*daebeobwonpanryejib*) vol 25, no 2 Min211.

[13] The new law has lowered this age to 13.

[14] Case no 2010 heonba87.

[15] The Constitutional Court has rejected the constitutional complaint, but noted that the revised adoption law recognised an exception in such a circumstance.

The new law has introduced exemption provisions for consent or approval. When a guardian denies consent or approval for adoption of children without reasonable cause, the family court can permit the adoption nonetheless. In this case, the family court should hear the reasoning of the guardian or parents (art 869). If parents deny consent to or approval for adoption of minor children, a stricter standard for unreasonableness is adopted. In this case, the denial is deemed unreasonable only when parents did not pay child support for more than 3 years, or abused, neglected or infringed the interest of the child grossly in other ways (art 870).

The same is true of the denial of a guardian or parents for the adoption. Only one condition is a little different. Besides abuse or neglect, the denial by parents is deemed unreasonable if they did not pay child support through their fault and did not visit or contact their children for more than 3 years (art 908–2(2)). This difference can be explained by the fact that the formation of the full adoption carries with it the severe result of terminating the former parent–child relationship.

(d) The abolition of consensual dissolution in cases of minor child and ward adoption

As explained before, the consensual dissolution of adoption was possible regardless of the adopted child's age. This was problematic from the perspective of the interests of the minor child, as the counterpart of the adoptive parents is the adopted minor child. When the child was under 15, one who had consented to the adoption should consent to the dissolution of adoption. When the child was over 15, the approval of the (grand)parents or the guardian was necessary. However, this was insufficient to guarantee the interest of the child. Seeking to remedy this, the National Human Rights Commission of Korea made a recommendation on 11 April 2005 that the dissolution of adoption should be permitted only for the interests of the child.

The new law complied with this recommendation by abolishing consensual dissolution of adoption in cases of the minor child and ward. According to the new art 898, consensual dissolution of the adoption is possible only when the adopted child is not a minor or a ward. In these cases, dissolution of adoption is possible by the order of the family court.

(e) The revision of the full adoption law

There were two changes to the full adoption law. One is the exemption of the consent or approval requirement clause (art 908–2(2)). It is the same as simple adoption.[16] Another change is that all minor children regardless of age can be adopted under the full adoption system (art 908–2(1)). Originally, the government's draft introducing the full adoption system in 2004 had limited the

[16] See Part III(c).

age of adoptable child to under 7. The law of 2005 finally enacted had raised the age limit to 15. It was the result of compromise. However, there was no persuasive reason to prohibit the adoption of minor children over 15. This is a welcome change for the interests of minor children.

IV THE SPECIAL ACT ON ADOPTION

(a) Overview of the legislation

The SAA was based on the draft proposal of assembly-person Yeonghi Choi, supported by others, in 2010. The draft was passed by the National Assembly with important modifications on 29 July 2011 and was enacted on 4 August 2011. This act came into force one year later, on 5 August 2012. One aim of the SAA is to protect the best interest of the child. Article 4 of the SAA declares that an adoption under SAA should serve the best interest of the child. Another aim is to try domestic adoption first and pursue the intercountry adoption if domestic adoption is not feasible (art 7). The reasoning for this is that the government should try to reduce intercountry adoption (art 8). There is still another, albeit implicit, aim, that is to prepare to ratify the Hague Adoption Convention. This aim was not explicitly mentioned through the legislative process. However, assembly-person Choi, who had proposed the bill, had also proposed a resolution urging the ratification of the Hague Adoption Convention on 11 May 2010. This proposal was passed by the National Assembly on 9 March 2011. Moreover, the Hague Adoption Convention was mentioned several times during the legislation process. In particular, it was pointed out that the foundation of the Central Authority was required by the Hague Adoption Convention.[17]

(b) The regulation of adoption under the SAA

The qualifications of the prospective adoptive parents and child (arts 9 and 10) are almost identical as those prescribed by the SAPPA.[18] There are two small changes regarding the qualifications of the prospective adoptive parents: instead of the requirement of living in a harmonious family, and having no serious mental or physical handicaps that would be detrimental to raising the child, the prospective adoptive parents should have no history of crime such as child abuse, domestic violence, sexual assault, narcotic-related crime, or alcohol and drug addiction. Also the prospective adoptive parents should receive instruction beforehand from the adoption agency.

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[17] Review Report of the SSA by the Health and Welfare Committee in April 2011 p 17 (in Korean).
http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_Q1D0F0G5Y1S1G1G8M3P4M3D3J2L3B5 (accessed 16 June 2012).

[18] See Part II(c) above.

Adoption under the SAA requires the permission of the family court, like the revised Civil Code. The requirement of parental approval is almost the same as prescribed by the SAPPA (art 12).[19] There are two additional changes regarding the approval. First, the approval should be given more than one week after the child's birth. Secondly, the approval is freely revocable until permission is granted by the family court.

The adoption becomes effective with the permission of the family court (art 15). This adoption is a full adoption (art 14). It is a major change.

The regulation of intercountry adoption has not changed significantly. Only the power of permission was transferred from the Minister of Health and Welfare to the family court.

(c) The foundation of the Central Adoption Authority

The Hague Adoption Convention has required that a contracting state designate a Central Authority to discharge the duties that are imposed by the Convention upon such authorities (art 6). Various functions have been imposed upon Central Authorities. For example, they shall take appropriate measures to provide information as to the laws of their states concerning adoption and other general information, to collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, to facilitate, follow and expedite proceedings with a view to obtaining the adoption, to promote the development of adoption counselling and post-adoption services in their states, to provide each other with general evaluation reports about experience with intercountry adoption and so on (arts 7, 8, 9). The SAA provides that the Minister of Health and Welfare should found the Central Adoption Authority. Its functions are (i) the operation of the integrated database for the information of adopted children and family, and for finding the blood relatives; (ii) building the database for the adopted children; (iii) study and research of the domestic and international adoption policy and service; (iv) co-operating with other countries in relation to international adoption (art 26).

(d) Disclosure of adoption information

The SAA confers on the child adopted under the SAA the right to know information about the adoption. An adopted child can ask the Central Adoption Authority or the adoption agency to disclose information about the adoption. Upon request, the director of the Central Adoption Authority or adoption agency should disclose the adoption information, provided that the biological parents consent. Without their consent, adoption information except the parents' identities can be disclosed. However, the information including the parents' identities can be disclosed provided that, in addition to reasons to

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[19] See Part II(c) above.

disclose the information (such as medical purposes for the child), the parents cannot give consent because of death or other reasons (art 6).

Article 7(1) of the UNCRC requires state parties to ensure the right of the child to know his or her family. With this disclosure provision, Korea has fulfilled the requirement of the UNCRC.

V CONCLUSION

The reform of adoption law in Korea has made it clear that adoption should serve the best interests of the child, not the interests of the family or parents. In this sense, the reform marked another epoch in the history of Korean family law. At the same time, it can be deemed as a step toward the ratification of the Hague Adoption Convention.

As a final comment, I would like to address the international perception of Korea's intercountry adoption practices over the past several decades. Korea is blamed for 'exporting babies' despite its considerable economic development. This phenomenon is related not so much to economy, but to Korean culture. Traditionally, Korean people have regarded adoption as a means to preserve the continuity of the family. Therefore, the ideal candidate for the prospective adopted child was a blood relative's child. To them, a parent–child relationship not linked by the blood ties seemed unnatural. Many parents who have adopted children would keep the fact a secret from the adopted child, the concern being that the parent–child relationship cannot be sustained if the child knew about the adoption. To maintain this secret, the fact of adoption was also hidden from neighbours as well. In extreme cases, prospective adoptive parents have faked pregnancy to hide the adoption. This prejudice against adoption made many people hesitate to adopt. Fortunately, the attitude toward adoption in Korea is changing for the better. Combined with this change of attitude, the reform of the adoption law will create a friendlier environment for adoption.

Switzerland

A NEW LAW FOR THE PROTECTION OF ADULTS

*Ingeborg Schwenzer and Tomie Keller**

Résumé

Le nouveau droit sur la protection des adultes, intégré dans le Code civil suisse, entrera en vigueur le 1er janvier 2013. Dans le respect du droit à l'autodétermination, il prévoit des règles en matière de mandat et de directives médicales. En l'absence de mandat ou de directives, la solidarité familiale prend le relais: le consentement peut être donné par l'époux ou le partenaire enregistré de la personne inapte ou, à défaut, le partenaire non enregistré, un enfant ou un parent. Lorsque la personne vit en centre d'hébergement, l'institution a l'obligation légale de détailler les services et les moyens d'assistance, dans un contrat écrit. Lorsqu'une personne n'est pas ainsi hébergée et qu'elle n'est pas adéquatement protégée, l'Autorité de protection des enfants et des adultes doit établir un plan d'intervention individualisé. Un représentant social peut être nommé: il en existe plusieurs sortes, avec des pouvoirs différents. Cette nouvelle Autorité, établie dans chaque canton, doit être professionnelle, spécialisée et interdisciplinaire. La réforme est considérable et représente une importante avancée. Il reste à voir si les objectifs en seront atteints.

I INTRODUCTION

On 1 January 2013 the revised law for the protection of adults entered into force in Switzerland.[1] The law for protection of adults is provided for in the

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1 Articles 360–456 CC; cf Message of the Federal Council of 28 June 2006 on the Swiss CC (adult protection, law of persons and child law) (Schweizerisches Zivilgesetzbuch (Erwachsenenschutz, Personenrecht und Kindesrecht)), Bundesblatt 2006 7001 et seq, cited as Msg Protection of Adults.

Swiss Civil Code (CC).[2] This revision is the last in a series of major reforms. Since the 1970s the Swiss Civil Code, with regard to family law, has been amended step by step. The first step addressed the rules on adoption of children in 1973,[3] followed by the general rules on the law of children in 1978.[4] In 1988 the rules on the law in marriages[5] and in 2000 the rules on divorce law[6] entered into force.

The law for the protection of adults had remained almost untouched since the Swiss Civil Code came into force in 1912. There was only one minor revision of the law for committal on social welfare grounds (*Fürsorgerische Freiheitsentziehung*) in 1981,[7] which had been introduced in the Swiss Civil Code in order to conform to the European Convention on Human Rights (ECHR).

The law for the protection of adults began its revision in 1993 and has since undergone many debates and discussions. The new law is now regulated in arts 360–456 CC. It was the aim of the legislator to bring the law into line with modern circumstances and today's opinions.[8] This chapter will give an overview of the main goals[9] and major changes of the revised law for the protection of adults.

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2 Swiss Civil Code (CC) of 10 December 1907 (Schweizerisches Zivilgesetzbuch (ZGB)), SR 210.

3 Articles 264–269 CC; cf Message of the Federal Council of 12 May 1971 on amendments to the Swiss CC (adoption and art 321) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Adoption und Arts 321 ZGB)), Bundesblatt 1971 I 1200 et seq.

4 Articles 252–327 CC; cf Message of the Federal Council of 5 June 1974 on amendments to the Swiss CC (child law) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Kindesverhältnis)), Bundesblatt 1974 II 1 et seq.

5 Articles 159–251 CC; cf Message of the Federal Council of 11 July 1979 on amendments to the Swiss CC (marriage law, marriage property law and inheritance law) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht)), Bundesblatt 1979 II 1, 191 et seq.

6 Articles 111–149 CC; cf Message of the Federal Council of 15 November 1995 on amendments to the Swiss CC (divorce law) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft und Ehevermittlung), Bundesblatt 1996 I 1 et seq.

7 Article 397(a)—397(f) CC; cf Message of the Federal Council of 17 August 1977 on amendments to the Swiss CC (committal on social welfare grounds) (Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Fürsorgerische Freiheitsentziehung)), Bundesblatt 1977 III 1 et seq.

8 Msg Protection of Adults, above n 1, 7002; for an overview of the revision see Häfeli 'Der Entwurf für die Totalrevision des Vormundschaftrechts. Mehr Selbstbestimmung und rein rhetorisches (?) Bekenntnis zu mehr Professionalität' *Die Praxis des Familienrechts* (FamPra ch 2007) 1 et seq; Biderbost 'Der neue Erwachsenenschutz im Überblick' *Schweizerische Juristen-Zeitung* (SJZ 2010) 309 et seq.

9 Cf Msg Protection of Adults, above n 1, 7011 et seq.

II ENCOURAGEMENT OF SELF-DETERMINATION[10]

The revised law aims at enhancing the right of a person's self-determination[11] by introducing two new institutions; the durable power of attorney in case of incapacity (*Vorsorgeauftrag*) and the advance health care directive (*Patientenverfügung*).

(a) Durable power of attorney in case of incapacity (*Vorsorgeauftrag*)

A person with legal capacity can issue a directive, determining a person who will be responsible for questions of personal and financial affairs as well as legal representation in the event of his or her incapacity.[12] The power of attorney can be entrusted to a natural person, for example to a spouse, a child, a close friend or a lawyer, but can also be assigned to a legal entity, such as a bank or an association.[13] Furthermore, the person issuing the power of attorney has to describe the duties and responsibilities of the appointed person and give instructions how to approach those tasks.[14] It is also possible to appoint more than one person and thus to assign certain duties to a particular person.[15]

As the durable power of attorney in the case of incapacity concerns regulations with significant consequences, it must be in the form of a public deed or in holographic form.[16] The latter must be written entirely by the person issuing the durable power of attorney and must be dated and signed by him or her.[17] The new law does not regulate where the durable power of attorney has to be deposited.[18] The fact that such a power of attorney has been issued and its place of deposit, however, can be registered at a central data bank[19] upon request.[20] Yet, the content of the directive cannot be registered in this data bank.[21]

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10 For further reading, Fountoulakis and Gaist 'Les mesures personnelles anticipées: les directives anticipées du patient et le mandat pour cause d'inaptitude' *Die Praxis des Familienrechts* (FamPra ch 2012) 867 et seq.

11 Msg Protection of Adults, above n 1, 7011, 7012.

12 Article 360(1) CC.

13 Fountoulakis and Gaist, above n 10, 876; Msg Protection of Adults, above n 1, 7025.

14 Article 360(2) CC.

15 Fountoulakis and Gaist, above n 10, 876 et seq.

16 Article 361(1) CC; Msg Protection of Adults, above n 1, 7026.

17 Article 361(2) CC.

18 Fountoulakis and Gaist, above n 10, 882 et seq.

19 Msg Protection of Adults, above n 1, 7026, 7027: The fact that a mandate in case of incapacity has been issued and its place of deposit can be registered in the central data bank 'Infostar' at the civil registry office (*Zivilstandsamt*).

20 Article 361(3) CC.

21 Widmer Blum in Breitschmid and Rumo-Jungo (eds) *Handkommentar zum Schweizer Privatrecht* (Zürich: Schulthess, 2012), cited as CHKomm, art 362 para 4.

In the case of incapacity of a person, the Child and Adult Protection Authority (CAPA)[22] has to determine whether a durable power of attorney has been registered.[23] If such a power of attorney exists, the authority (CAPA) has to examine its validity and issue an order with regard to the power of the now responsible person.[24] In cases where the durable power of attorney is ambiguous, the authority (CAPA) may help to interpret and supplement the durable power of attorney.[25] Furthermore, the authority (CAPA) can determine whether and to which amount remuneration is adequate.[26] If, however, no durable power of attorney exists or if the assigned person does not accept its mandate, the authority (CAPA) has to act according to arts 388 CC et seq.[27]

As the person issuing the durable power of attorney can no longer supervise the appointed person or his or her compliance with the instructions in the directive, the authority (CAPA) has to intervene ex officio or upon request of a party close to the issuing person, in cases where the interests of the person now lacking capacity need protection.[28] In particular, the authority (CAPA) may make instructions and require the appointed person to submit an inventory, to periodically provide financial statements and reports, or can even partially or fully revoke the appointed person's authority.[29]

(b) Advance health care directive (*Patientenverfügung*)

The new law for the protection of adults further introduced provisions on advance health care directives, which until then had been legally regulated only in some Swiss cantons. Accordingly, a person with legal capacity can also issue an advance directive, stating which medical treatments he or she does or does not consent to in case of incapacity.[30] Furthermore, the person issuing an advance directive may appoint a person responsible to discuss medical treatment with the attending physician and to consent to such treatment on his or her behalf.[31]

The formal requirements for the advance health care directive are less strict than those of the durable power of attorney. The advance directive has to be in writing, dated and signed by the person issuing it.[32] Again, it is up to the

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22 *Kindes- und Erwachsenenschutzbehörde (KESB)*, art 440(1) and (3) CC; see Part VI below.
23 Article 363(1) CC.
24 Article 363(2) and (3) CC.
25 Article 364 CC.
26 Article 366 CC.
27 Msg Protection of Adults, above n 1, 7027; Widmer Blum in CHKomm, above n 21, art 363 para 6 et seq. For information about arts 388 et seq; see Part V below.
28 Article 368(1) CC.
29 Article 368(2) CC.
30 Article 370(1) CC.
31 Article 370(2) CC.
32 Article 371(1) CC. Only the signature has to be in handwriting according to art 14(1) of the Code of Obligations (CO) of 30 March 1911 (Schweizerisches Obligationenrecht (OR), SR 220.

respective person to decide where to deposit his or her advance health care directive (e g with his or her physician or relatives). The law, however, provides for the possibility to register the existence of such an advance directive and the place where it has been deposited on one's medical insurance card.[33]

If a patient has lost his or her capacity to consent, the attending physician must determine whether an advance health care directive has been issued, either by checking the medical insurance card[34] or by inquiring with the family or other persons close to the patient.[35] In cases of urgency such a clarification can be disregarded.[36] The physician must comply with the dispositions of the advance directive of his or her patient, except where doing so would breach statutory provisions (e g direct active euthanasia)[37] or where there is reasonable doubt that the advance directive no longer corresponds to the will of the patient.[38]

The authority (CAPA) does not have to verify the formal requirements nor the content of the advance health care directive.[39] The patient or any person close to the patient, however, can make a written request to the authority (CAPA) addressing failure to comply with an advance health care directive, endangerment of the interests of the person lacking capacity to consent, or lack of free will when issuing the advance directive.[40]

III FAMILY SOLIDARITY

The new law aims at strengthening the solidarity of family and relatives of a person lacking capacity and thereby attempts to prevent the authorities from systematically having to invoke the official assistance system.[41]

Where the person lacking capacity to consent has neither issued a durable power of attorney nor has been assigned a welfare advocate (*Beistand*),[42] the spouse or the registered partner of this person has the right to represent his or her partner in certain situations.[43] In order to ensure that the relationship between the partners is real and lived out, art 374 CC further requires that the partners lived together in a common household, or that the partner regularly

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33 Article 371(2) CC.
34 Article 372(1) CC.
35 Fountoulakis and Gaist, above n 10, 873 et seq.
36 Article 372(1) CC.
37 For example art 114 of the Swiss Criminal Code of 21 December 1937 (Schweizerisches Strafgesetzbuch (StGB)), SR 311.0.
38 Article 372(2) CC; Msg Protection of Adults, above n 1, 7033.
39 Msg Protection of Adults, above n 1, 7031; Biderbost, above n 8, 313; Affolter 'Eckpfeiler einer Qualitätsentwicklung zum neuen Erwachsenenschutzrecht' *Die Praxis des Familienrechts* (FamPra ch 2012) 841 et seq, 848.
40 Article 272 CC.
41 Msg Protection of Adults, above n 1, 7013, 7014.
42 See Part V below.
43 Article 374(1) CC.

and personally assisted the affected person.[44] The representation under art 374 CC, however, is limited to matters concerning everyday life. It includes all legal acts normally required in order to cover the affected person's maintenance needs and the administration of the income and other financial assets.[45] Finally and where necessary, the right of representation of the partner includes the authority to open and take care of the mail of the affected person.[46] Any further legal acts of the spouse or registered partner have to be approved by the authority (CAPA).[47]

Furthermore, in cases where no (sufficient) advance directive with regard to health care has been issued, the revised law empowers certain persons to consent to medical treatment on behalf of the affected person. Article 378(1) CC lists the legally entitled persons to authorise or refuse any medical treatment in descending order. If the affected person has not appointed a person and if no welfare advocate has been assigned, the law provides for the spouse or registered partner either living in a common household with the person lacking capacity, or regularly and personally assisting the affected person, to consent on behalf of this person.[48] In a next step, art 378 CC further empowers persons who live in a common household with the affected person and in addition regularly and personally assist this person (in particular unmarried partners) to represent the affected person.[49] Furthermore, descendants, parents or siblings who regularly and personally assist the person lacking capacity are entitled to represent this person.[50]

In art 420 CC the new law further supports family solidarity in cases where a relative of the person having lost capacity has been appointed as welfare advocate. This article replaces the institution of extended parental responsibility, which formerly had been issued after majority of an incapacitated child and instead of a legal guardian.[51] Where justified under the circumstances, the authority (CAPA) may release the spouse, registered partner, parents, descendants, siblings or de facto partner from the obligation to produce inventories, to provide periodical reports and financial statements, or from the obligation to obtain consent for certain transactions.[52]

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44 Msg Protection of Adults, above n 1, 7034, 7035.
45 Article 374(2) CC.
46 Article 374(2) CC.
47 Article 274(3) CC; Häfeli, above n 8, 6.
48 Article 378(1) No 3 CC.
49 Article 378(1) No 4 CC; Fankhauser in CHKomm, above n 21, art 378 para 3.
50 Article 378(1) No 5–7 CC.
51 Article 385(3) CC before 2013, Msg Protection of Adults, above n 1, 7017, 7018.
52 Article 420 CC; Affolter, above n 39, 849.

IV PROTECTION OF PERSONS IN RESIDENTIAL AND NURSING HOMES[53]

Persons lacking capacity to consent for a longer period of time and living in residential or nursing homes are not always being sufficiently protected legally and psychosocially.[54] The revision partly eliminates this risk by requiring the institution to provide a written contract, determining the scope of the assistance provided by the institution and stipulating what remuneration is owed in advance.[55] This ensures transparency of the assistance and service offered by that institution for all, the patient, the relatives of the patient and the authority (CAPA). The written contract shall thus prevent abuse and serve as evidence in case of ambiguities.[56]

When determining the scope of the assistance by the institution, regard has to be given to the wishes of the affected person to the greatest extent possible.[57] The person responsible for representation of the protected person in the context of concluding, amending or revoking the respective contract has to be established according to the provisions on representation in medical matters.[58]

Moreover, the new law regulates the limitation of the freedom of movement (such as bed rails or locked doors) of the person lacking capacity.[59] According to art 383 CC the institution may only restrict the freedom of movement where less intrusive measures have been proven insufficient or offer little prospect of being adequate. Additionally, the intended measures must either avert a serious threat to life or bodily harm to the affected person or others, or remove a serious disruption to the life of the community.[60]

The institutions must keep a protocol of each measure that limits the freedom of movement of their patients.[61] In the case of (unjustified) limitation of freedom, the patient or any person close to him or her can make a written complaint to the authority (CAPA), which can modify or revoke any measure or issue an official measure of protection.[62] The new law further requires supervision of such institutions by the cantons of Switzerland.[63]

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53 For further reading, Breitschmid and Wittmer 'Pflegerecht – eine Standortbestimmung' *Pflegerecht – Pflegewissenschaft* (Pflegerecht 2012) 2 et seq.
54 Msg Protection of Adults, above n 1, 7014.
55 Article 382(1) CC; Breitschmid and Wittmer, above n 53, 5.
56 Msg Protection of Adults, above n 1, 7038, Breitschmid and Wittmer, above n 53, 6.
57 Article 382(2) CC.
58 Article 383(3) CC referring to arts 377 CC et seq.
59 Msg Protection of Adults, above n 1, 1039; Biderbost, above n 8, 315.
60 Article 383(1) CC.
61 Article 384 CC.
62 Article 385 CC.
63 Article 387 CC.

V CUSTOMISED MEASURES[64]

The authority (CAPA) has to impose measures in cases where a person is no longer able to handle his or her own affairs and the support of family, private volunteers or public services are insufficient[65] and where the person has not determined (adequate) measures while having capacity to consent.[66]

One of the main points of criticism of the old law was the lack of flexibility of the measures the authorities could take. Instead of standardised measures, the new law requires the authority to 'tailor a support package' for the person requiring assistance. It was the aim of the legislator to avoid unnecessary interventions and to therefore uphold the principle to do 'as little as possible and as much as necessary'.[67] By requiring the authorities (CAPA) to impose only customised and individualised measures, care by the state is limited to what is genuinely needed.[68]

The new law for protection of adults provides four kinds of welfare advocates (*Beistandschaften*) with different degrees of power.

The supporting welfare advocate (*Begleitbeistandschaft*)[69] is the least invasive one. It is applied in cases where the affected person requires accompanying support in order to attend to certain matters (eg advice for legal transactions, help and control in the use of medication)[70] and can only be appointed with the consent of the person requiring assistance.[71] Importantly, a supporting welfare advocate does not in any way limit the affected person's capacity to act.[72]

The welfare advocate with power of representation (*Vertretungsbeistandschaft*) can be established where the person requiring assistance is not able to handle certain matters by him or herself and thus needs representation.[73] With this kind of welfare advocate, the authority (CAPA) may limit the affected person's capacity to act accordingly.[74] Even where the affected person's capacity to act is not subject to such limitation, he or she has to accept and can even be bound by the acts of the welfare advocate.[75] Special regard to customised measures is given to the field of administration of the affected person's finances and assets.

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64 For further reading, Biderbost 'Beistandschaft nach Mass – das revidierte Handwerkszeug des Erwachsenenschutzes' *Aktuelle juristische Praxis* (AJP 2010) 3 et seq.
65 Article 389(1) No 1 CC.
66 Article 389(1) No 2 CC.
67 Affolter, above n 39, 849 et seq.
68 Msg Protection of Adults, above n 1, 7003.
69 For further reading, Rosch 'Die Begleitbeistandschaft – Per aspera ad astra' *Die Praxis des Familienrechts* (FamPra ch 2010) 268 et seq.
70 Rosch, above n 69, 283.
71 Article 393(1) CC.
72 Article 393(2) CC.
73 Article 394(1) CC.
74 Article 394(2) CC.
75 Article 394(3) CC.

The authority may place parts of or the entire income, or parts of the assets or all of it under administration of the welfare advocate.[76]

The welfare advocate with consenting power (*Mitwirkungsbeistandschaft*) can be appointed where certain acts of the affected person need the consent of the welfare advocate in order to safeguard this person's interests.[77] The capacity to consent of the person requiring such assistance is automatically limited accordingly.[78] It is up to the authority (CAPA) to determine what kinds of acts need consent of the welfare advocate.[79] Within the range of those determined acts neither the affected person nor the welfare advocate can act alone.[80]

The general welfare advocate (*umfassende Beistandschaft*) entirely ceases the person's capacity to act.[81] A general welfare advocate can only be appointed where a person is in particular need of assistance, due namely to a lasting loss of capacity to consent.[82] This measure extends to all matters of the affected person's personal care, management of his or her assets and legal matters.[83]

Corresponding with the aim of customised measures, the functions of a supporting welfare advocate, a welfare advocate with powers of representation and a welfare advocate with consenting power (but not a general welfare advocate) can be combined.[84]

Moreover, the authority (CAPA) must not only determine what kind of welfare advocate is necessary but also must stipulate the duties and responsibilities in accordance with the needs of the affected person.[85] The duties and responsibilities encompass the personal care, the management of assets, or the legal representation of the affected person.[86] The scope of a duty has to be clearly and comprehensively defined (eg management of salary or approval of donations at a specific amount).[87] The authority (CAPA) therefore must issue an individual and customised order for every person requiring assistance, defining what kind of welfare advocate is necessary and exactly stipulating the scope of the welfare advocate's duty.

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76 Article 395(1) CC.
77 Article 396(1) CC.
78 Article 396(2) CC.
79 Msg Protection of Adults, above n 1, 7048; Fountoulakis in CHKomm, above n 21, art 396 para 1.
80 Fountoulakis in CHKomm, above n 21, art 396 para 4.
81 Article 398(3) CC.
82 Article 398(1) CC; Msg Protection of Adults, above n 1, 7048 states that this measure shall be ordered as *ultima ratio*.
83 Article 398(2) CC.
84 Article 397 CC; Msg Protection of Adults, above n 1, 7048.
85 Article 391(1) CC; Msg Protection of Adults, above n 1, 7044.
86 Article 391(2) CC.
87 Msg Protection of Adults, above n 1, 7044.

VI PROFESSIONALISED AND SPECIALISED AUTHORITIES (*FACHBEHÖRDEN*)

One of the major changes of the new law for protection of adults was the introduction of professionalised and interdisciplinary authorities. Until the revision, the authorities for protection of children and adults in the different cantons of Switzerland highly varied with regard to quantity, organisation and in questions of professionalism.[88] Especially in rural areas, where often the local council was appointed as the authority responsible for matters of child and adult protection, laypersons with no respective expertise were responsible for such cases.[89]

Unfortunately, again the time seemed not to be ripe to establish specialised family courts in Switzerland.[90] An attempt to at least introduce specialised courts for matters of child and adult protection was also unsuccessful.[91] Nevertheless, the legislator realised that the necessity of professionalised and interdisciplinary authorities was of utmost importance especially since these authorities have to make decisions with major consequences.[92]

Article 440(1) CC now requires the cantons to appoint specialised authorities for matters concerning the protection of adults. Additionally and most welcome, the legislator decided to have matters of child protection regulated by the same and therefore also specialised and professionalised authority.[93] The new law led to major changes and reforms of child and adult protection authorities in Switzerland. As a result, the numbers of these authorities in Switzerland were reduced from more than 1,400 to approximately 150 authorities.[94] It was however, up to the cantons to decide how many and what kind of authority they wanted to establish.[95] Most of the cantons introduced administration authorities. Only six cantons decided to have courts as Child

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88 Msg Protection of Adults, above n 1, 7004 and 7020 et seq; Biderbost, above n 8, 311; Affolter, above n 39, 845 et seq.

89 Msg Protection of Adults, above n 1, 7020.

90 Neither the divorce reform in 2000 (see above n 6), nor the introduction in 2011 of the new Swiss Code of Civil Procedure (CCP) of 19 December 2008 (Schweizerische Zivilprozessordnung (ZPO)), SR 272, could successfully establish specialised family courts in Switzerland.

91 Draft of art 443 CC in 2003; Häfeli 'Familiengerichte im Kanton Aargau' *Die Praxis des Familienrechts* (FamPra ch 2012) 1001 et seq.

92 Msg Protection of Adults, above n 1, 7020; Biderbost, above n 8, 311.

93 Article 440(3) CC.

94 Häfeli, above n 91, 1005.

95 Msg Protection of Adults, above n 1, 7073; recommendations were made by the Conference of the Cantons for Children and Adult Protection (Konferenz der Kantone für Kindes- und Erwachsenenschutz (KOKES) (old name: Konferenz der kantonalen Vormundschaftsbehörden (VKB)) 'Kindes- und Erwachsenenschutzbehörde als Fachbehörde (Analyse und Modellvorschläge)' *Zeitschrift für Kindes- und Erwachsenenschutz* (ZKE 2008) (old name: *Zeitschrift für Vormundschaftswesen* (ZVW 2008)) 63 et seq; Vogel and Wider 'Kindes- und Erwachsenenschutzbehörde als Fachbehörde – Personelle Ressourcen, Ausstattung und Trägerschaft' *Zeitschrift für Kindes- und Erwachsenenschutz* (ZKE 2010) 5 et seq; see also www.kokes.ch (accessed May 2013).

and Adult Protection Authorities (CAPA).[96] As the first and currently only canton in Switzerland to do so, Aargau even decided to establish a specialised family court and to thereby consolidate all cases concerning family matters.[97]

The new authority (CAPA) must be interdisciplinary.[98] The members of the authority have to be appointed according to their expertise, which has to be acquired by initial education or by continuing education and practical experience.[99] The authority (CAPA) usually has to take decisions with a quorum of three members.[100] According to the legislator a lawyer must be responsible for the correct application of the law, supported by persons with the respective expertise depending on the circumstances of the case. This includes among others legal, psychological, social, pedagogical, fiduciary or medical expertise.[101] Furthermore, the cantons have to appoint a supervision authority (*Aufsichtsbehörde*).[102]

Finally, the new law introduced fundamental procedural rules for procedures before the authority (CAPA).[103] An attempt to have the procedure regulated in a separate federal procedure law was not successful.[104] Instead the federal legislator decided to incorporate minimal standards for the procedure in the new law.[105] Most notably are the introduction of the possibility of the authority (CAPA) to request parents to engage in mediation,[106] the child's right to be heard[107] and the representation of the child[108] in a procedure not only before a court but also before the authority (CAPA).[109] Subsidiary to the procedural rules in the new law, the Swiss Code of Civil Procedure (CCP) applies unless the cantons have not stipulated otherwise.[110]

VII CONCLUSION

The law for protection of adults has (almost) remained without revision for 101 years. All the more reason the revision was necessary in order to reflect today's

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96 Häfeli, above n 91, 1005; detailed information can be found at www.kokes.ch/de/04-dokumentation/06-umsetzung-in-den-kantonen.php?navid=19 (accessed 21 December 2012).

97 Häfeli, above n 91, 1001 et seq.

98 The French version of the legal text describes the authority as '*autorité interdisciplinaire*', the German version of the legal text uses the word '*Fachbehörde*'.

99 Msg Protection of Adults, above n 1, 7073.

100 Article 440(2) CC, however, for certain actions the cantons may provide exceptions.

101 Msg Protection of Adults, above n 1, 7073.

102 Article 441(1) CC.

103 For further reading, Cottier and Steck 'Verfahren vor der Kindes- und Erwachsenenschutzbehörde' *Die Praxis des Familienrechts* (FamPra ch 2012) 981 et seq.

104 Häfeli, above n 8, 22; Cottier and Steck, above n 103, 984.

105 In particular arts 443 CC et seq; for child protection procedures art 324(1) CC refers to arts 443 CC et seq.

106 Article 314(2) CC.

107 Article 314a CC.

108 Article 314(a) bis CC.

109 Cottier and Steck, above n 103, 990 et seq.

110 Article 450(f) CC.

circumstances and to bring law and reality together. The revision that has taken place is considerable and has been a big step forward. In many aspects the new law caused major changes, such as more flexibility with regard to measures that can be taken by the authority (CAPA) or by requiring the cantons to establish professionalised and specialised authorities (CAPA).

It has yet to be shown whether the aims of the new law will be realised. Among others, the new institutions introduced to enhance self-determination have to be accepted and used in practice. The new authority (CAPA) is required to implement the principle of customised measures. Finally, but even more importantly, the authorities (CAPA) have to reflect the aim of the legislature of being more professional and interdisciplinary.

United States

THE PAST, PRESENT AND FUTURE OF THE MARITAL PRESUMPTION

*June Carbone and Naomi Cahn**

Résumé

La présomption matrimoniale est profondément ancrée dans le droit anglo-américain: un mari et son épouse sont supposés être le père et la mère de l'enfant né pendant le mariage. Cependant, avec l'avènement de tests génétiques sophistiqués, le divorce sans faute et l'évolution des structures familiales, les États américains s'interrogent sur la validité de la présomption. La paternité peut désormais être déterminée avec certitude et la stigmatisation liée aux circonstances de la naissance d'un enfant a en grande partie disparu. Face à ces changements, la présomption a été présentée comme une sorte de fiction juridique sans signification, même si elle continue de conférer un statut parental: dans tous les États, les couples mariés, qu'ils soient hétérosexuels ou homosexuels, sont présumés être les parents légaux de l'enfant avec lequel ils sortent de l'hôpital. Cet article explore la manière dont les États s'efforcent de concilier les fortes politiques publiques en faveur du mariage avec de nouvelles connaissances relatives aux faits biologiques.

I INTRODUCTION

The marital presumption – children born within a marriage are children of the spouses – is deeply rooted in Anglo-American law. Marriage has historically served as a system designed to channel childrearing into two parent families and keep it there. Within this system, the marital presumption was virtually irrebuttable. Husbands who wished to leave their wives might be tempted to allege that the wife had been unfaithful, but such a charge, even if untrue, could destroy the wife's reputation and, if established, would make the child a 'bastard'. The courts closed the door to the entire inquiry by precluding testimony about the wife's adultery, keeping open the possibility of rebuttal only where the husband had been 'beyond the four seas' or proven to be impotent.

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With the advent of sophisticated genetic testing, no-fault divorce and changing family structures, American states are now questioning the continued validity of the presumption. Paternity can be determined with certainty and much of the stigma associated with the circumstances of a child's birth has disappeared. In the face of these changes, the presumption has been exposed as a legal fiction without a simple meaning, even as it continues to confer parenthood: in all states, married couples, gay or straight, who walk out of the hospital with a child are legal parents. What is in doubt is the role of the presumption in settling disputes where a challenge to parenthood occurs.

The uncertainty in the role of the marital presumption arises because of the lack of agreement on the purpose the presumption should serve. The presumption continues to establish parenthood without bureaucracy or genetic testing, but there is less agreement on whether the presumption can or should serve to channel parenthood into marriage. Indeed, the state decisions are deeply divided. The majority of states allow challenges, with many effectively saying that biology confers parenthood, and that an unmarried father has a right to a relationship with the child, particularly if he insists on doing so with a short time after the child's birth. Some states have reformed the marital presumption to recognise functional parenthood, using the presumption to establish legal parenthood where the husband has in fact assumed a parental role and the biological father has not. A number of these states, however, increasingly recognise functional parenthood whether or not the parents marry, so that the underlying principle may become protecting the child's extant relationships rather than marriage itself. A third group of states upholds the marital presumption because of these states' commitment to marriage, but without agreement on what that means.[1]

In this chapter, we review the most recent decisions that govern the use of the marital presumption to establish parentage. Part II addresses the marital presumption, Part III analyses the use of estoppel to lock in parenthood upon divorce and finally, in Part IV we consider the areas where there is some agreement, and the likelihood of continuing disagreement in the allocation of responsibility for children.

II THE MARITAL PRESUMPTION: DETERMINING THE FACTS OF BIOLOGICAL PATERNITY

Common law has generally used the 'marital presumption' as a starting point to identify parents. That is, married parents are assumed to be the parents of any child born into the marriage. Before the advent of reliable blood and DNA tests, the only way to rebut the marital presumption involved testimony to the husband's absence or impotence or the wife's infidelity; maternity was

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[1] See Naomi Cahn and June Carbone *Red Families v Blue Families: Legal Polarization and the Creation of Culture* (Oxford University Press, 2010) ch 4; June Carbone and Naomi Cahn 'Marriage, Parentage, and Child Support' (2011) 45 Fam LQ 219, 224.

established by a woman's giving birth to a child. One of the most important parts of the marital presumption served to bar testimony as to infidelity, which would also have established grounds for divorce.[2] Today, paternity tests are easily available to anyone in contact with the child. Indeed, even though the Supreme Court in *Michael H* denied standing to Michael in his efforts to establish legal paternity, the parties had already undergone tests indicating that Michael was the probable father. Nonetheless, the opinion reinforced the California courts' finding that the marital presumption is substantive, expressing the legislative determination that, 'as a matter of overriding social policy … the integrity of the family unit should not be impugned'.[3]

Most states today continue to combine the procedural issue of standing to seek paternity tests with the substantive issue of recognition of parenthood. In Pennsylvania, for example, the only way to rebut the marital presumption is by showing impotency, sterility or non-access to the wife during conception; blood tests can never be offered to rebut the presumption.[4]

In contrast, those states that place more emphasis on the biological tie also create greater opportunities for paternity tests to establish that tie.[5] Disagreements about the marital presumption tend to be substantive ones that connect genetic knowledge of the facts of biological paternity to the legal assignment of parental roles.[6]

(a) The source of paternal rights

(i) US Constitutional law

Among the substantive disagreements between states about determinations of parenthood are disputes about the source of family identity.[7] A majority of the justices have held that the US Constitution confers rights on legal parents, but the Court has never resolved the question of how free the states are to define who those rights-bearing parents are.[8] Does the US Constitution or any of the

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2 See e g Mary Kay Kisthardt 'Of Fatherhood, Families and Fantasy: The Legacy of *Michael H v Gerald D*' (1991) 65 Tul L Rev 585.

3 *Michael H v Gerald D*, 491 US 110, 119–120 (1989) (citations omitted). Scalia stated further that: '[W]hat is at issue here us not entitlement to a state pronouncement that Victoria was begotten by Michael' at 127.

4 See *L Vargo v K Schwartz*, 940 A2d 459, 463 (Pa Super Ct 2007); see also *Pearson v Pearson*, 182 P3d 353, 355–356 (Utah 2008) (rejecting paternity tests during an ongoing marriage).

5 *Courtney v M Roggy*, 302 SW3d 141, 149 (Mo Ct App 2009) (emphasis in case).

6 Determining paternity, however, is a different issue than informing the child. Compare *Callender v Skiles*, 623 NW2d 852 (Iowa 2001) (ordering father not to inform child) with *Re Richard W*, 212 AD2d 89, 629 NYS2d 512, 514 (NY App Div 1995) (presumption of legitimacy should not be used to perpetuate a falsehood).

7 On the relationship between parenthood and identity, see June Carbone 'The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity' (2005) 65 La L Rev 1295.

8 The Supreme Court's decision in *Troxel v Granville* grants those defined as 'parents' greater rights, making it more difficult for the states to choose to recognise 'step-parents' or grandparents, 530 US 57, 72–73 (2000). Compare Emily Buss '"Parental" Rights' (2002) 88 Va L Rev 635, 657–658 (arguing that Troxel depends on the legal definition of parenthood

states confer rights on adults as 'parents' on the basis of form (marriage or adoption), function (assumption of a parental role) or biology? In *Michael H v Gerald D*, Justice Scalia's plurality opinion privileged the marital family over other 'unitary families' that might receive constitutional protection[9] and found that it was not unconstitutional for the state to give categorical preference to the former.[10] Justice Brennan's dissent, in contrast, emphasised the need to recognise a variety of family forms and to protect the underlying father–daughter relationship that had been established in the case[11] while Justice White's dissent placed greater emphasis on biology.[12]

Michael H did not mandate that states use the marital presumption to determine paternity. Instead, the Court left the matter to the states, which in the absence of federal guidance have split in ways that echo the emphasis on marriage, function and biology from the differing Supreme Court opinions.

(ii) States equating biology with parenthood

All states continue to recognise at least a rebuttable presumption that a child born within marriage is the child of the husband,[13] and many limit the circumstances in which it can be rebutted.[14] Several states, however, grant the biological father a right under the state constitution to rebut the presumption and establish a relationship with the child. Iowa and Texas provide notable examples. In *Callender v Skiles*, involving a non-marital father's claims against the married mother and her husband, the Iowa Supreme Court acknowledged that scientific advancements have 'made the identity of a biological parent a virtual certainty' and social stigmas against divorce and non-marital births have weakened.[15] The court emphasised the importance of encouraging the

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provided by the states and imposes no constitutional limits on how the states choose to define parenthood), with David D Meyer 'Constitutional Pragmatism for a Changing American Family' (2001) 32 Rutgers LJ 711, 714, 718 (asserting that the Troxel plurality's approach amounted 'to an implicit rejection of strict scrutiny,' but read in light of other Supreme Court decisions on parental rights, does not give the states unlimited discretion in defining parents).

9 Justice Scalia describes the rights of biological father v husband as a choice between ruling that 'Michael … being unable to act as father of the child he has adulterously begotten, or Gerald … being unable to preserve the integrity of the traditional family unit he and Victoria have established' *Michael H v Gerald D* at 130.

10 *Michael H v Gerald D* at 127.

11 See e g his references to Scalia's 'pinched conception of "the family"' *Michael H v Gerald D* at 145, and 'rhapsody on the unitary family' as 'out of tune' with prior decisions.

12 *Michael H v Gerald D* at 157–158.

13 See Leslie J Harris, June Carbone and Lee E Teitelbaum *Family Law* (New York: Aspen, 4th edn, 2010) 887.

14 UPA, s 204. For varying perspectives on the marital presumption, see e g Laura Morgan 'Child Support Fifty Years Later' (2008) 42 Fam LQ 365, 372–373; Mary Patricia Byrn and Jenni Vainik Ives 'Which Came First: The Parent or the Child?' (2010) 62 Rutgers L Rev 305, 337 (the presumption 'is not in the child's best interest and does not guarantee the child's fundamental right to legal parents at birth'); Jana Singer 'Marriage, Biology and Paternity, the Case for Revitalizing the Marital Presumption' (2006) 65 MD L Rev 246 (critiquing the recent changes to the marital presumption and arguing that the policy goals of the presumption continue to be valid).

15 *Callender v Skiles*, 591 NW2d 182, 190 (Iowa 1999).

truth about paternity[16] and expressed concern that 'denying a putative father standing to challenge paternity conflicts with our societal goal of encouraging fathers to take responsibility for their children'.[17] Texas similarly recognises the biological father's right to establish paternity despite the marital presumption.[18] Like the Iowa courts, the Texas courts treat biology as determinative of parenthood and accord the biological father the constitutional rights of a parent.

Other states have statutorily limited the marital presumption.[19] Missouri, for example, provides that 'a man *alleging himself to be a father* … may bring an action *at any time* for the purpose of declaring the *existence* or *nonexistence* of the father and child relationship'.[20] In *Courtney v M Roggy*, the court of appeals concluded that the alleged father's right to contest paternity was not subject either to a best interest test or to limitations on the basis of waiver and estoppel and that once a man is recognised as a biological father, he is entitled to visitation unless 'visitation would endanger the child's physical health or impair his or her emotional development'.[21]

All of these approaches turn on the notion that parenthood is a biological fact and that state policy lies with encouraging a relationship between parents and their biological children.

(iii) States continuing to recognise the marital presumption

Other states continue to uphold the marital presumption by limiting the circumstances in which it can be rebutted.[22] In an era in which biology can be determined with certainty, courts have articulated two rationales to support continued application of the marital presumption: the state interest in

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16 Ibid at 191.

17 Ibid.

18 *In the Interest of JWT*, 872 SW2d 189, 198 (1994). The majority rejected the dissent's argument for privileging the marital tie, objecting that, to the dissent, the relationship between the mother and the biological father, 'is morally judged, rather than legally judged, being dismissed as a mere "dalliance"'.

19 Approximately two-thirds of the states similarly allow the non-marital father to challenge the marital presumption through either statute or case-law. See e g Uniform Parentage Act (UPA), Comment at s 607; see also *Fisher v Tucker*, 388 SC 388, 697 SE2d 548 (SC 2010) (South Carolina's statutory presumption of paternity within marriage can be rebutted by blood tests); *Watermeier v Moss*, 2009 Tenn App LEXIS 718 (2009) (Tennessee requires that, for the marital presumption to preclude paternity for biological father, the married couple needed to have lived together at the time of conception, remained together through the filing of the petition, and the husband needed to sign an affidavit attesting to biological paternity). The UPA limits challenges to within 2 years of the child's birth. See s 607: Limitation: child having presumed father.

20 Missouri Revised Statutes (RSMo) (2010), § 210.826(1), cited in *Courtney v M Roggy*, 302 SW3d 141, 146 (Mo Ct App 2009) (emphasis added in opinion).

21 Ibid at 151.

21 RSMo (2010), § 210.826(1), cited in *Courtney v M Roggy*, 302 SW3d 141, 146 (Mo Ct App 2009) (emphasis added in opinion).

22 See e g UPA, s 608 (limiting circumstances in which the court will allow blood tests to rebut the presumption of paternity).

upholding the sanctity of marriage and a preference for function over biology. The two rationales overlap to a degree, but the difference in emphasis varies from state to state and from case to case. For example, courts in Pennsylvania have reaffirmed the strength of the presumption when the marital family remains intact and the husband has assumed parental responsibilities, but handled cases at or after divorce on an estoppel basis that, as discussed later, depends on the husband's continuing assumption of a parental role.[23]

Michigan, in contrast, protects the marital presumption even after the marriage ends and even if the husband does not have an ongoing relationship with the child.[24] The courts there have interpreted state law to deny standing to the biological father to contest paternity of a child conceived within marriage and held that the law applies in cases where the mother had divorced the father by the time of the child's birth and the divorce decree indicated that there were no children born to the marriage or where the biological father had lived with mother and child for several years and the husband had died.[25]

The most fascinating defence of marriage has come from Louisiana. The marital presumption has historically been so strong there that the state Supreme Court observed in 1972 that the court had never allowed a husband to disavow paternity.[26] Under pressure, however, to recognise the facts of biological paternity,[27] the Louisiana courts responded with a notion of dual paternity that granted legal recognition to both the husband and the biological father. The issue first arose in context of inheritance,[28] but in a subsequent action, the Louisiana Supreme Court further held that where the child had lived for several years with his mother and biological father, he could seek child support from the father notwithstanding his status as the child of the mother's marriage to another man.[29] In 2004, however, the Louisiana legislature also amended the underlying statute to require that an unmarried father bring suit within one year of the child's birth to gain parental recognition, limiting the significance of dual paternity.[30]

In contrast to the relatively strong promotion of marriage in Michigan, Pennsylvania, and Louisiana, a large number of other states continue to apply the marital presumption in a manner that is far more dependent on context.

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23 *Vargo v Schwartz*, 940 A2d 459, 463 (Pa Super 2007); see also *Brinkley v King*, 701 A2d 176, 180 (Pa 1997). Cf *Pearson v Pearson*, 182 P3d 353 (Utah 2008) (protecting the husband's ongoing relationship with the child even though mother had the biological father); see also *Pecoraro v Rostagno-Wallat*, 2011 WL 148784, *1 (Mich App 18 January 2011).

24 *Barnes v Jeudevine*, 718 NW2d 311 (Mich 2006).

25 Ibid. See also *Mattei v Ott*, 2012 WL 1449118 (Mich App).

26 *Tannehill v Tannehill*, 261 So2d 619, 621 (La 1972).

27 State laws addressing inheritance from unmarried fathers had been declared unconstitutional in *Levy v Louisiana*, 391 US 68 (1968).

28 *Warren v Richard*, 296 So2d 813 (La 1974).

29 *Smith v Cole*, 553 So2d 847, 855 (La 1989).

30 Louisiana Civil Code (2010), arts 187, 189; see Rachel L Kovach 'Comment, Sorry Daddy – Your Time is Up: Rebutting the Presumption of Paternity in Louisiana' (2010) 56 Loy L Rev 651.

California courts, for example, often use the marital presumption not to promote the importance of marriage per se, but to protect a child's ongoing relationship with adults who have played a parental role.[31]

In order to protect these functional relationships, whether they exist inside or outside of marriage,[32] the California courts have done what *Michael H* did not; they have modernised family understandings to channel family relationships into a two-parent model, but one that relies less directly on marriage.[33]

Other courts make application of the marital presumption dependent on a best interest analysis; that is, they will not allow the presumption to be rebutted unless it is in the child's interests.[34] These rulings, while they often result in decisions upholding application of the marital presumption, defy any simple equation of parental function with either marriage or biology. Ultimately, disagreement on the purpose of the presumption and the complexity of the facts makes legal consistency and predictability difficult and often undesirable.[35]

(iv) The marital presumption and assisted reproductive technology

Technological advances have also enabled the use of surrogacy, donor eggs and donor sperm. Gaps in existing state regulations are vast; while virtually all states have addressed sperm donation to some degree, many states have yet to decide whether the same laws apply to donor eggs and embryos.[36]

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31 For a more complete explanation of California parentage law, see June Carbone 'From Partners to Parents Revisited: How Will Ideas of Partnership Include the Emerging Definition of California Parenthood?' (2007) 7 Whittier J Child & Fam Advoc 3.

32 *Gabriel P v Suedi D*, 141 Cal App 4th 850, 865–866 (Cal App 2d Dist 2006).

33 See *Re Jesusa V*, 85 P3d at 13, 15 (stating that biological paternity does not necessarily rebut another man's presumption, depending instead on all the circumstances of the case); *Re Nicholas H*, 46 P3d at 933–934 (finding that the ex-husband, who was not the biological father, still established parental rights over the child because he received the child into his home and held the child out as his own). The California legislature also updated the marital presumption statute to permit the mother greater latitude in rebutting the presumption of paternity. See California Family Code, s 7541(c).

34 See e g *Hardy v Hardy*, 2011 Ark 82 (2011) (applying res judicata where the trial court in the initial divorce proceeding refused to permit paternity tests because they were not in the child's best interest); *Chanthoan v David F*, 907 NYS2d 436 (Fam Ct 2009) (allowing blood tests to establish paternity of unmarried father where court concludes it would not disrupt marital relationship and husband and wife both approved of them); Kamp v Dep't of Human Servs, 980 A2d 448 (Md Ct App 2009) (holding that trial court should apply a threshold best interest determination before ordering blood tests that would rebut marital presumption); *Williamson v Williamson*, 690 SE2d 257 (Ga App 2010) (applying best interest of the child standard).

35 See Ruth Padawer 'Who Knew I Was Not the Father?' NY Times Mag, 17 November 2009, available at www.nytimes.com/2009/11/22/magazine/22Paternity-t.html (accessed May 2013) (emphasising the intertwined nature of the lives of the people involved in paternity disputes).

36 See Naomi Cahn 'The New Kinship' (2012) 100 Geo LJ 367, 388.

No uniformity exists among states concerning the legal relationships established through collaborative reproduction,[37] although the Uniform Law Commission has twice attempted to develop comprehensive model parenthood legislation: the 1973 and the 2002 Uniform Parentage Acts (UPAs).[38] The 1973 UPA, still followed by many states, addressed artificial insemination.[39] It applied only to married couples, providing that if (1) the husband's consent was given in writing; and (2) the insemination was done under the supervision of a licensed physician, then the husband would be the legal father.[40]

Consequently, the 1973 UPA, as originally drafted, was limited to parentage determinations for children conceived through donor insemination by married women. The 2002 Act clarifies that an egg or sperm donor is not a parent when a child is conceived through 'assisted reproduction', meaning reproduction not involving sexual intercourse,[41] regardless of whether a physician is involved.[42] However, uniformity remains elusive. Relatively few states have adopted the 2002 UPA, and many which have done so have amended or deleted the provision dealing with assisted reproduction.[43]

III BEYOND THE PRESUMPTION: ESTOPPEL AND MULTIPLE PARENTS

If the marital presumption protects intact marriages, it might, perhaps, be easier to challenge as the relationship dissolves. As we have argued elsewhere,[44] couples who want a relationship to last have an incentive not to inquire too closely into paternity. In contrast, couples who are parting must decide how hard they are going to work to share a relationship with the child. If they have

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37 Eg Lori B Andrews and Nanette Elster 'Regulating Reproductive Technologies' (2000) 21 J Legal Med 35, 49; Courtney G Joslin 'Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology' (2010) 83 S Cal L Rev 1177, 1184–1188; Kira Horstmeyer 'Note, Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction' 64 Wash & Lee L Rev (2007) 671, 684–690.

38 See John J Sampson 'Amendments to the Uniform Parentage Act as Last Amended in 2002 with Prefatory Notes and Comments' (2003) 37 Fam LQ 5; see UPA, Prefatory Note (2002), available at www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf (accessed June 2013).

39 UPA (1973), s 5.

40 The states vary substantially even among those states adopting a version of the uniform act. As of 2009, 21 states adopted a version of the UPA terminating the parental status of the donor with use of a physician, 13 states had statutes that terminated the parental status of the donor without reference to the marital status of the recipient, and 16 states had no legislation on the subject. See Leslie J Harris, June Carbone, and Lee E Teitelbaum *Family Law* (New York : Aspen, 4th edn, 2010).

41 UPA (1973) at art 1, s 102(4), art 7, s 702.

42 UPA (2002),s 702 Comment, available at www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf atb63 (accessed June 2013).

43 See National Conference of Commissioners on Uniform State Laws, Uniform Law Commissioners, A Few Facts About the Uniform Parentage Act, www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp.

44 June Carbone and Naomi Cahn 'Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty' (2003) 11 Wm & Mary Bill Rts J 1011.

doubts about paternity, men may choose to resolve those doubts, and women may use those doubts to exclude their ex-mates from their lives. The significance of the marital presumption accordingly changes and even those states that view it as close to absolute during an ongoing relationship may not apply it at all when the parties divorce. Instead, the states may use the husband's assumption of the parental role to estop either the husband or the wife from denying the husband's paternity, but the states no more agree on the meaning or use of estoppel than they did on application of the marital presumption.

The relationship between estoppel and the marital presumption thus further confuses determination of paternity. As we have observed above, some states use a best interest test to determine whether to permit paternity tests at all. In these states, if the courts preclude the tests, the marital presumption cannot be rebutted and the husband is treated as the child's legal and biological father.[45] In other states, however, the courts may readily allow paternity testing or other testimony that rebuts the marital presumption, and then frame the question at divorce in terms of use of equitable principles to estop the 'step-parent' from denying paternity.[46] For all intents and purposes these cases may be indistinguishable, but the courts that preclude testing often go to great lengths to preserve the fiction that the husband may be the child's biological father while the estoppel cases more directly address the circumstances in which a functional parent may be treated as legal father without a biological tie.[47] In an era of increasingly unstable relationships, therefore, estoppel is often the doctrine that cleans up messy relationships and imposes family obligations.

(a) Equitable estoppel at divorce

While all states recognise use of estoppel to some degree, not all, however, embrace the same policies determining when its use is appropriate. Although Pennsylvania views the marital presumption as virtually irrefutable during an intact relationship, it does not apply at divorce. Instead, the courts use estoppel to determine paternity.[48] As a practical matter this means that a husband whose wife has misled him may be able to escape liability for child support if he discontinues his relationship with the child, but will continue to be financially responsible if he 'does the right thing' and continues to act as a parent after he learns the truth.[49] The case-by-case adjudication of these disputes after the relationship ends simply introduces greater uncertainty into children's lives.

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[45] See eg *Hardy v Hardy*, 2011 Ark 82 (2011) (trial court denied paternity testing on a best interest basis where boy was 8 at the time of the divorce and the husband was the only child the father had known).

[46] See eg *Wiese v Wiese*, 699 P2d 700, 701 (Utah 1985).

[47] Some states, however, distinguish between parenthood by estoppel, which estops a legal parent from denying the other parent's visitation or custody rights, and equitable estoppel, which estops a person who had held himself out as a parent from denying the obligation to pay child support. See *Janice M v Margaret K*, 948 A2d 73, n 14 (Md 2008).

[48] *Warfield v Warfield*, 815 A2d 1073, 1077 (Pa Super 2003).

[49] Compare *Duran v Duran*, 820 A2d 1279 (Pa Super 2003) (husband not liable for child support

In Kentucky, the court estopped a former husband from denying paternity who had waited until 6 years after the divorce to have the child tested. In concluding equitable estoppel barred the ex-husband's claim, the Court of Appeals recognised that 'the relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted'.[50] Two facts were particularly critical to the outcome: the child did not know the truth about paternity and because the husband had assumed the parental role, 'he has prevented [the child] from having a relationship, financial or otherwise, with her natural father'.[51]

Similarly, most states will equitably estop a husband from denying paternity when he fails to raise the issue before the divorce decree becomes final.[52] In Florida, for example, the state Supreme Court emphasised the child's need for finality in holding that a mother's failure to disclose the possibility that the husband was not the father of the child was intrinsic, not extrinsic, fraud and therefore could not be a basis for challenging a child support award more than a year after the divorce.[53] Utah, unlike most other states, however, permits fathers to escape support liability if they claim paternity fraud.[54]

(b) Multiple parents

In principle, the relaxation of the marital presumption and the use of estoppel could produce more than two adults with parental rights or responsibilities, but the courts rarely entertain the possibility.[55] Louisiana, as noted above, is the only state to recognise dual paternity, although other jurisdictions, including DC, have the possibility of recognising multiple parents.[56]

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where he removed himself 'as gently as possible' from the child's life) with *JC v JS*, 826 A2d 1 (Pa Super 2003) (husband who was 'justly proud' of the fact that he continued to treat child as his son in every way held liable for support).

50 *SRD v TLB*, 174 SW3d 502, 510 (KyApp 2005). In a later case, however, a Kentucky appellate court refused to apply estoppel where the effect would be to establish a step-parent as a father. *JRA v GDA*, 314 SW3d 764 (Ky Ct App 2010).

51 *SRD v TLB* at 510. Courts have also used the doctrines of res judicata and collateral estoppel to prevent relitigation of custody issues where a man had an opportunity to challenge paternity and failed to do so. See e g *Godsoe v Godsoe*, 995 A2d 232 (Me 2010).

52 See e g *Martin v Pierce*, 370 Ark 53, 257 SW3d 82 (Ark 2007); *Hardy v Hardy*, 2011 Ark 82 (2011); *Re Marriage/Children of Betty LW v William EW*, 212 W Va 1, 10, 569 SE2d 77, 86 (W Va 2002). See also Maegan Padgett 'The Plight of a Putative Father: Public Policy v Paternity Fraud' (2005) 107 W Va L Rev 867, 889.

53 *Parker v Parker*, 950 So 2d 388 (Fla 2007); see also *Walker v Walker*, 280 SW3d 634 (Mo App 2009) (refusing to grant husband post-dissolution relief in the absence of extrinsic fraud).

54 *Masters v Worsley*, 777 P2d 499 (Utah 1989).

55 For more discussion of the issue, see Susan Frelich Appleton 'Parents by the Numbers' (2008) 37 Hofstra L Rev 11; Nancy E Dowd 'Multiple Parents/Multiple Fathers' (2007) 9 JL & Fam Stud 231; Melanie B Jacobs 'Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents' (2007) 9 JL & Fam Stud 209; see also *CL v YB (In re DL)*, 938 NE2d 1221, 1225 (2010) (finding that although putative father had waived ability to contest judgment establishing paternity, establishing paternity in another man through paternity tests automatically disestablished his parental standing).

56 See Nancy D Polikoff 'A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century' (2009) 2 Stan J CR & CL 201, 208–210.

Pennsylvania, in the first reported case of its kind, recognised multiple parents where a lesbian couple, who had entered into a civil union in Vermont, were jointly raising four children and the biological father of two of the children, who had acted as a sperm donor but never sought to sever his parental standing, provided support and saw the children on a regular basis.[57] New Jersey, has also ordered two men – the husband and the biological father – to pay support.[58]

IV SAME-SEX MARRIAGES

With the increasing number of children raised by same-sex parents, American states have struggled with issues involving the recognition of second parents. As more states allow their residents to enter into same-sex marriages and accept same-sex marriages from other jurisdictions, they have expanded the marital presumption. A 2012 Massachusetts case held that parents who had entered into a domestic partnership in California were entitled to rights analogous to those of a Massachusetts same-sex marriage, including parenthood recognition.[59] Some states have agreed to issue birth certificates with the names of both spouses,[60] although the road has been bumpy.

Iowa, for example, which recognises same-sex marriage as the result of a 2009 court case, had initially refused to issue a birth certificate to recognise Heather Martin Gartner and Melissa Gartner as the parents of their daughter, MacKenzie, born into their marriage.[61] While Iowa requires that both spouses be listed as the child's parents on the child's birth certificate, regardless of the child's genetic relationship to them, the state's Department of Public Health refused to apply this law to the Gartners unless they went through an adoption proceeding. A trial court judge cited earlier state court cases reinforcing the utility of the presumption in protecting the integrity of the marital unit, and ordered the state to place both women's names on the birth certificate. Although the Department of Public Health appealed the decision, the state's principles of non-discrimination between same-sex and heterosexual marriages suggest that the trial court's approach was appropriate.

V CONCLUSION

As these cases indicate, the law governing parentage is undergoing substantial revision based on changes in American marital and sexual behaviours. Courts

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57 *Jacob v Shultz-Jacob*, 923 A2d 473 (Pa Super 2007).

58 *JR v LR*, 902 A2d 261 (NJ Super 2006).

59 *Hunter v Rose*, 975 NE2d 857 (Mass 2012).

60 See Movement Advancement Project, Family Equality Council, and Center for American Progress *Securing Legal Ties for Children Living in LGBT Families: A State Strategy and Policy Guide* App 2 (2012), www.lgbtmap.org/file/securing-legal-ties.pdf (accessed May 2013).

61 *Gartner v Iowa Dept of Public Health* (D Ct Iowa 2012), www.desmoinesregister.com/assets/pdf/0104rulingonpetitionforjudicialreview.pdf (now on appeal) (accessed May 2013).

struggle to reconcile the strong public policies supporting marriage with new knowledge about biological facts. The marital presumption is a legal fiction that protects the parents of children born into same-sex marriages. In heterosexual marriages, however, it simply protects the state's image of the marital relationship, and, as some states have become more flexible in their approaches to non-marital relationships, so too does the marital presumption. We suspect that, if the states were to create greater incentives to determine the truth when children are young, stronger and longer lasting bonds would result.[62]

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[62] See June Carbone & Naomi Cahn 'Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty' (2003) 11 Wm & Mary Bill Rts J 1011 (2003).

Vanuatu

FINDING THE LAW ON ADOPTION IN VANUATU

Jennifer Corrin[*]

Résumé

Le système juridique du Vanuatu est fait d'un pluralisme législatif complexe. Depuis l'indépendance, le 30 juillet 1980, la constitution a été déclarée la source de droit la plus élevée (*loi suprême*). Une autre source de droit écrit provient des actes du Parlement du Vanuatu et des décisions des juridictions du Vanuatu. Egalement, certaines lois britanniques et françaises s'appliquent. En addition à ces sources de droit écrit, du droit coutumier, appelé localement droit 'Kastom', reste très présent. L'ampleur de l'application du droit britannique, du droit français et du droit 'Kastom' fait l'objet d'un débat, mais en tout état de cause ces droits ne s'appliquent pas si un acte du Parlement du Vanuatu régit la matière. Malheureusement, le Parlement de Vanuatu n'a pas passé de loi réglementant directement la matière de l'adoption. Ceci soulève donc la question de savoir laquelle des autres sources de droit (loi britannique, française et/ou 'Kastom') s'applique. Ce chapitre traite de cette question et expose un certain nombre de cas d'espèce du Vanuatu qui illustrent les difficultés du problème. En particulier, deux décisions de la Cour suprême du Vanuatu seront analysées. Ces cas ont suivi deux approches très différentes dans l'application de la loi nationale du Vanuatu et ont mis en lumière certaines des incertitudes, les plus marquantes, à propos de la loi et des procédures en matière d'adoption.

I INTRODUCTION

Vanuatu is a small island country in the South-West Pacific, about three-quarters of the way from Hawaii to Australia.[1] It has a land area of 12,189 sq km, made up of more than 80 islands.[2] The indigenous peoples, known collectively as Ni-Vanuatu, form the majority of the population,[3] which

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1 CIA, *Vanuatu* (6 November 2012) The World Factbook: https://www.cia.gov/library/publications/the-world-factbook/ (accessed June 2013).

2 Vanuatu National Statistics Office, 2009 National Population and Housing Census, Basic Tables Report (Vanuatu National Statistics Office, 2009) vol 1: www.vnso.gov.vu/images/stories/2009_Census_Basic_Tables_Report_-_Vol1.pdf (accessed June 2013).

3 About 95% of the population are Ni-Vanuatu.

totals about 230,000.[4] The official languages are Bislama, English and French.[5] In addition, there are over 100 local languages. Formerly known as the New Hebrides, Vanuatu became independent on 30 July 1980.[6] It has a Westminster style of state government,[7] co-existing with a traditional chiefly system.[8]

Vanuatu's legal system is one of complex legal pluralism. Since Independence, on 30 July 1980, the Constitution is stated to be the Supreme law.[9] Other written laws are provided by Acts of the Vanuatu Parliament,[10] and decisions of the Vanuatu courts.[11] Additionally, laws in existence at independence continue in force until repealed by Parliament. These were made up of King's (or Queen's) Regulations made by the Resident Commissioner, in the case of Britain,[12] and Regulations made by the High Commissioner in New Caledonia, in the case of France.[13] During the Condominium the High Commissioners of Britain and France were empowered to make Joint Regulations.[14] As well as these locally made 'colonial laws', certain British and French laws were part of the law at Independence, and thus remain in force.[15] In addition to these written laws, customary laws[16] known locally as 'Kastom' laws, remain in force.[17] Another layer of complexity is introduced through relevant international law.

The extent of the application of British and French laws and of Kastom laws is a matter of some debate, but it is clear that such laws do not apply if an Act of the Vanuatu Parliament covers the field.[18] Unfortunately, Parliament has not passed an Act directly governing adoption. This then raises the question of which of the other sources of law (British law, French law and/or Kastom laws) apply. This chapter considers this question and discusses a number of Vanuatu

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4 CIA, *Vanuatu* (6 November 2012) The World Factbook: https://www.cia.gov/library/publications/the-world-factbook/ (accessed June 2013).

5 Constitution of Vanuatu 1980 (Vanuatu) ('Constitution'), art 3.

6 The Constitution was brought into force by an Exchange of Notes between the governments of the United Kingdom and France, 23 October 1979.

7 Constitution, arts 4, 7, 8.

8 Constitution, art 5 acknowledges the chiefly system and gives it a role in state government through a National Council of Chiefs.

9 Constitution, art 2.

10 Constitution, art 16.

11 Constitution, art 47(1).

12 The High Commissioner of the Western Pacific was authorised to make these regulations: New Hebrides Order 1911 (UK). In practice they were made by the Resident Commissioner and subject to disallowance by the High Commissioner: Kenneth Roberts-Wray *Commonwealth and Colonial Law* (London: Stevens and Co, 1966) 904.

13 Arrete No 777–20 CG, 9 September, Journal Officiel de la Nouvelle Calédonie, 1 October 1909, 339, Art 1, cited in Marcin Pruss *French Law in the New Hebrides* (LLM Thesis, University of the South Pacific, 2011) 57 fn 366.

14 *Protocol between Great Britain and France respecting the New Hebrides,* Great Britain–France, signed 6 August 1914 (entered into force 18 March 1922), art 7.

15 Constitution, art 95(2).

16 Constitution, art 95(3).

17 See further, Miranda Forsyth *A Bird that Flies with Two Wings: the kastom and state justice systems in Vanuatu* (Canberra: ANU E-Press, 1996) 76–80.

18 Constitution, art 95(2).

cases which illustrate the complexities of the situation. In particular, two decisions of the Vanuatu Supreme Court are discussed. These cases have taken very different approaches to the application of the state law on adoption in Vanuatu and highlight some of the uncertainties regarding adoption procedure and laws.

II THE LAW GOVERNING ADOPTION

(a) Vanuatu laws

Like most of its small island neighbours, Vanuatu does not have its own modern legislation governing adoption.[19] Nor is there is any colonial legislation governing adoption. From a broad perspective, the Constitution does have some bearing on the matter. It sets out that every person has a fundamental duty 'to support, assist and educate all [their] children, legitimate and illegitimate, and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of Vanuatu'.[20] Whilst this duty is non-justiciable, it is provided that all public authorities have a duty to encourage compliance, insofar as this lies within their respective powers.[21]

Although Vanuatu has not passed an adoption Act, it has ratified the United Nations Convention on the Rights of the Child (UNCRC). As ratification took the form of legislation,[22] the UNCRC is part of domestic law. The UNCRC is discussed further below at Part II(d).

In the absence of specific locally made legislation, the sources of adoption law are: written law in the form of British or French laws, unwritten Kastom laws, and international law.

(b) British and French laws

Whilst the Constitution clearly provides in art 95(2) that British or French laws continue in force, it does not say to whom such laws apply. Prior to Independence in 1980, British laws applied to British citizens and 'optants' and French laws applied to French citizens and 'optants', optants being those present in the country who chose to be subject to British or French laws.[23] Disputes between indigenous and non-indigenous parties were governed by the

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19 Only Samoa and Solomon Islands have passed recent legislation: Infants (Adoption) Amendment Act 2005 (Samoa); the Infants (Adoption) Regulations 2006 (Samoa); and Adoption Act 2004 (Solomon Islands).

20 Article 7(h).

21 Article 8.

22 Convention on the Rights of the Child (Ratification) Act 1992. The Act commenced on the date it was gazetted: 3 May 1993.

23 *Protocol between Great Britain and France Respecting the New Hebrides,* Great Britain–France, signed 6 August 1914 (entered into force 18 March 1922), art 1.1.

laws of the country to which the non-indigenous party belonged (or had opted to belong).[24] Where the dispute was between two non-indigenous parties, it was governed by the law applicable to the defendant.[25]

However, the status of 'optant' no longer exists in Vanuatu, as the 1914 Protocol which provided for this was revoked at Independence.[26] Since that time, the case-law has done little to clarify the matter. There is no dispute that French law is still an option for the courts to employ, but the grounds on which the choice is to be made are unclear. Does French law automatically apply to French citizens and British law to English citizens or is this a choice for a party to make in a civil case? In *Mouton v SELB Pacific Limited*,[27] French law was specifically stated by the Supreme Court of Vanuatu to apply to adoptions involving French nationals or 'optants'. The Chief Justice stated that, 'there being no Vanuatu laws covering those subjects, the Courts of Vanuatu would be bound to apply the French laws that existed prior to independence'.[28] However, as mentioned above the status of 'optant' no longer exists in Vanuatu. This opens up the question of whether the decision on British or French law is one for the court or whether the applicant may make the choice. If it is the court's decision, what are the factors to be taken into account?

In the event that British law applies, this includes English statutes 'of general application in force in England on the 1st day of January 1976',[29] provided that it has not been expressly or impliedly revoked by the Parliament of Vanuatu.[30] Tracing this legislation forms a good illustration of the problems involved in the practical application of the conditions attached to the transplanted legislation.[31] First, the phrase 'general application' is not defined by legislation. In *Harrisen v Holloway No 2,*[32] the Vanuatu Court of Appeal was of the view that the subject matter of the Act must operate in the same way in Vanuatu as in England in order to qualify as an Act of general application. Some English legislation relevant to family law has been accepted as applicable in Vanuatu. Thus, for example, some provisions of the United Kingdom Matrimonial Causes Act 1973 (UK) have been accepted as applicable.[33] This is in spite of the

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24 *Protocol between Great Britain and France Respecting the New Hebrides,* Great Britain–France, signed 6 August 1914 (entered into force 18 March 1922), art 13(1)(b).

25 *Protocol between Great Britain and France Respecting the New Hebrides,* Great Britain–France, signed 6 August 1914 (entered into force 18 March 1922), art 21(2).

26 *Exchange of Notes on the Independence of the New Hebrides between Great Britain and France,* Great Britain and France 23 October 1979, [1979] PITSE 3.

27 Unreported, Vaudine d'Imecourt, CJ, 13 April 1995, accessible via www.paclii.org at [1995] VUSC 2.

28 Unreported, Vaudine d'Imecourt, CJ, 13 April 1995, accessible via www.paclii.org at [1995] VUSC 2, 13.

29 *High Court of the New Hebrides Regulation 1976*, SR & O 1976/3, s 3, which is kept in force by Constitution, art 95.

30 Constitution, art 95.

31 See further Jennifer Corrin 'Discarding Relics of the Past: Patriation of Laws in the South Pacific' (2009) 39 (4) *Victoria University of Wellington Law Review* 635–658.

32 (1984), [1980–88] 1 VLR 147.

33 *Joli v Joli* (Unreported, Lunabek CJ, Robertson, Von Doussa, Fatiaki, Saksak, Treston, JJA, 7 November 2003), accessible via www.paclii.org at [2003] VUCA 27.

fact that Vanuatu has passed its own Matrimonial Causes Act[34] covering much of the same ground, but in the eyes of the Court of Appeal, not the whole field.[35]

Another problem is the 'cut-off' date, as it has become known. The English law was consolidated just after that date by the Adoption Act 1976 (UK), but this does not form part of Vanuatu law. Rather, its predecessor, the Adoption Act 1958 (UK) ('Adoption Act'), applies in Vanuatu[36] as amended by Adoption Amendment Acts and the Children Act 1975 (UK). An added complexity lies in the fact that not all of the Children Act came into force before the cut-off date.[37] A procedural error during the passage of the Children Bill, relating to s 29, resulted in s 34A(3) of the Adoption Act 1958 being less flexible than it would have been but for the error.[38] However, any amendment by the British Parliament after 1 January 1997 to rectify that error would not be part of the law of Vanuatu. The cut-off date also prevents the Adoption Agencies Regulations 1976 (UK) from applying.[39] These regulations implement part of the Children Act 1975, covering two main points. First, they govern the registration, duties and operation of adoption societies. The other aspect is more controversial, as regs 13 and 14 implement s 26 of the 1975 Act which gives adopted persons access to birth records.

In accordance with the condition discussed above, the Adoption Act and the 1939 Regulation will only apply if they are of general application. The Adoption Agencies Regulations 1976, even if made before the cut-off date, might well have fallen foul of the test in *Harrisen v Holloway No 2,*[40] at least in respect of regulation of adoption societies. It would be particularly difficult to establish that the British regulations could 'operate in the same way' in Vanuatu as there are no adoption societies in the country. Whilst the Adoption Act and the 1939 Regulation seem better candidates to qualify as including subject matter which operates in the same way in Vanuatu as in England, this is still questionable having regard to the widespread practice of Kastom adoptions,

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34 Cap 192. Note that Vanuatu Statutes are cited by chapter numbers in the latest consolidation, which is currently 2006: see Revision and Consolidation of the Laws Act 185.

35 *Joli v Joli* (Unreported, Lunabek CJ, Robertson, Von Doussa, Fatiaki, Saksak, Treston, LLJ, 7 November 2003), accessible via www.paclii.org at [2003] VUCA 27.

36 *Re Estate of Molivono,* (Unreported, Court of Appeal, Vanuatu, Lunabek, CJ, Robertson, von Doussa, Bulu, Tuohy. JJA, 30 November 2007), accessible via www.paclii.org at [2007] VUCA 22 [6].

37 Under s 108 of the Children Act 1975 (UK), ss 71, 72, 82, 108, 109 and para 57 of Sch 3 came into effect when the Act was passed. Sections 3, 8(9) and (10), 13, 59, 83 to 91, 94, 98, 99, 100 and 103 to 107; Schs 1 and 2; Sch 3, paras 1, 2, 3, 4, 6, 8, 9, 13(6) 15, 17, 18, 19, 20, 21(1) (2) and (4), 22 to 25, 27(b), 29, 33, 34(b), 35, 36 (b), 38, 39(c), (d) and (e), 40, 43, 48, 49, 51(a), 52(f)(ii) and (g)(ii), 54, 55, 58 to 63, 65 to 70, 75(3), 77, 78, 81 and 83 and Parts I, II and III of Sch 4 came into effect 1 January 1977. The remaining provisions came into effect by several orders of the secretary of state, after the 'cut-off' date.

38 *HC Deb* 26 January 1977 vol 924 c693W.

39 SI 1976/1796, 27 October 1976.

40 (1984), [1980–88] 1 VLR 147.

which are discussed further in the next section. Notwithstanding, Vanuatu courts have accepted that the Adoption Act applies.[41]

The above discussion has proceeded on the basis that subsidiary legislation is included in the transplanted law. However, this is far from certain. A literal interpretation of the phrase 'statutes of general application in force in England' suggests that it is not. On the other hand, it could be argued that, as a matter of common sense, statutes carry with them the subsidiary legislation made under their authority. This question has not been expressly determined by Vanuatu's courts.

In the event that French law applies, adoption may be governed by the applicable French Civil Code as it stood at 30 July 1980.[42] French legislation operating outside France is subject to the principle of legislative specialty.[43] Generally, this principle means that French law is not in force in a French overseas territory unless it is specifically stated in the legislation to apply, or extended by a later text.[44] The principle is based on recognition of the necessity for legislation to be adapted to the 'geographical, political and social conditions peculiar to the territory'.[45] However, it is doubtful whether law on adoption would be subject to the principle of legislative specialty as 'laws of sovereignty', which include laws relating to personal status, are exempted from it.[46] These include laws on affiliation, divorce and parental authority.[47] If the law in question is not a law of sovereignty, then the corollary to the principle of legislative specialty means that the law must be promulgated in the overseas territory in order to commence and be published in that country before it can apply. French legal texts for the New Hebrides were promulgated in the Official Journal of New Caledonia.[48]

Assuming the French law on adoption to be a law of sovereignty, it appears to consist of arts 343 to 372 of the Civil Code. This law is significantly different from the British law. In particular, French law distinguishes between full and simple adoption,[49] the former equating more closely to an adoption under

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41 See eg *Re Estate of Molivono,* (Unreported, Court of Appeal, Vanuatu, Lunabek, CJ, Robertson, von Doussa, Bulu, Tuohy. JJA, 30 November 2007), accessible via www.paclii.org at [2007] VUCA 22; *Re M* (Unreported, Supreme Court, Vanuatu, Spear, LJ, 15 March 2011) [5], accessible via www.paclii.org at [2011] VUSC 350.

42 Constitution, art 95(2).

43 Yves-Louis Sage 'The Application of Legislation in the French Overseas Territories of the Pacific' (1993) VUWLR Monograph 8, 15–18.

44 Yves-Louis Sage 'The Application of Legislation in the French Overseas Territories of the Pacific' (1993) VUWLR Monograph 8, 15–18.

45 Jean-Yves Faberon *Le Statut des Territories d'Outre Mer*, Les Petites Affiches, 9 August 1991 n 95, 7.

46 Yves-Louis Sage 'The Application of Legislation in the French Overseas Territories of the Pacific' (1993) VUWLR Monograph 8, 21.

47 Yves-Louis Sage 'The Application of Legislation in the French Overseas Territories of the Pacific' (1993) VUWLR Monograph 8, 21 fn 29.

48 Yves-Louis Sage 'The Application of Legislation in the French Overseas Territories of the Pacific' (1993) VUWLR Monograph 8, 24–26.

49 Civil Code, arts 363–368.

British law. Simple adoption, which would appear to equate more closely to most Kastom adoptions, does not sever all links with the natural parents, the adopted child retaining inheritance and other rights. Simple adoption of adults is also allowed in certain circumstances,[50] whereas British law does not accommodate such an arrangement.

(c) Kastom laws

Whilst this chapter concentrates mainly on plural regimes applying in state adoptions, something must be said about the third applicable legal regime in Vanuatu. Kastom laws on adoption, as on many other matters, often vary from island to island and even as between villages. However, there are certainly some commonalities. The contrast with state law is much more significant. Differences extend beyond procedure to the concept of adoption itself, and to its consequences. The concept of adoption in Kastom does not involve severing the ties between the child and the biological parents or broader family. It is more akin to fostering than to Western style adoption.[51] Under customary laws, adoption of children by persons outside the family is rare[52] and intercountry adoptions unknown.[53] As noted by Brown, 'the dominant motives are to maintain family links, assist childless kinfolk or invest a successor'.[54]

With regard to procedure, Kastom adoption is a private arrangement, which usually takes place within the extended family, as opposed to an arrangement overseen by the state. It is a more flexible procedure, but other than this, it is hard to generalise as to the formalities required. In *M v P*,[55] the court accepted that a Kastom adoption had taken place even though there had been no formal ceremony; in fact the evidence from the natural mother was that she had not even received notification of the intended adoption.

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50 *Monassah v Koko* (Unreported, Island Court, Vanuatu, Macreveth M, Obediah, William, Arhambat, Assessors, 9 November, 2005), accessible via www.paclii.org at [2005] VUIC 3.

51 For an explanation of the conceptual differences in Samoa, which have many similarities with the Kastom laws regime in Vanuatu, see Jennifer Corrin and Lalotoa Mulitalo 'Adoption and "Vae Tama" in Samoa' in Bill Atkin (ed), *The International Survey of Family Law, 2011 Edition* (Jordon Publishing Limited, 2011) 313–334.

52 See Sebastian Poulter *Family Law and Litigation in Basotho Society* (Oxford: Clarendon Press, 1976) 236.

53 In the context of Papua New Guinea, *Elijah v Doery* (Unreported, National Court, Papua New Guinea, Woods J, 19 October 1984), accessible via www.paclii.org at [1984] PGNC 16, which notes the magistrate's finding that the Australian applicant could not have adopted a child in custom.

54 Kenneth Brown *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* (Charles Darwin University Press, 2005) 142–144.

55 [1980–88] 1 VanLR 333.

With regard to consequences, a Kastom adoption does not normally entitle the adopted child to inherit the Kastom land rights of the adoptive parents. As stated by the Island Court in *Manassah v Koko*:[56]

> 'it is traditional and highly recognized that adoption is secondary or an exception to the general rule regarding land ownership. In custom, having being adopted such acceptance cannot be construed to have being integrated into or be part of a tribe or bloodline. Adoption is only a sign of acceptance to live under the guardianship of another family. An acceptance would only exten[d] to the right to use the land excluding ownership. The principal rule is that a patrilineal bloodline from nasara cannot be modified or transferred to another tribe. Such bloodline remains the root of one's heritage to the land. Adoption will only [be] accepted provided it is made within the family bloodline.'

Generally, Kastom adoptions occur in accordance with the Kastom rules of the area in which all parties live and do not give rise to disputes. However, given the increase in mobility and in relationships between people from different Kastom groups, questions have begun to arise. This is strikingly illustrated by *Re P,*[57] which arose on the island of Santo. In that case, the petitioner alleged that her brothers had forced her to allow her sister to adopt her illegitimate child. The father was not from the same Kastom group. When she complained, they kidnapped her and took her to the family village where she was effectively held captive for nearly 6 months. The Court of Appeal remitted the case to a single judge of the Supreme Court for further evidence to be taken. Unfortunately, the outcome of the hearing is not reported, which may mean that it was settled in Kastom.

There is also the question of whether Kastom adoptions can occur where one of the natural parents is not indigenous. In the case of *M v P*[58] the child was half French, but the Supreme Court accepted evidence that Kastom adoption had taken place under the law of Erakor, which was the adoptive parent's home area. It is unclear whether a Kastom adoption is allowed if one of the adoptive parents is a foreigner. The answer may be that this is not a bar if the Kastom of the area allows it.[59]

Courts in Vanuatu recognise customary adoptions.[60] However, difficulties may arise where the adoption is required to be recognised by the state or by a country outside the region.[61] In particular, what is the position if a passport is required? In practice, a formal document will usually be demanded. In another

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56 (Unreported, Island Court, Vanuatu, Macreveth M, Obediah, William, Arhambat, Assessors, 9 November, 2005), accessible via www.paclii.org at [2005] VUIC 3.

57 [1980–88] 1 VanLR 130.

58 [1980–88] 1 VanLR 130.

59 Cf *Elijah v Doery* (Unreported, National Court, Papua New Guinea, Woods J, 19 October 1984), accessible via www.paclii.org at [1984] PGNC 16. Compare *Chow v Chow* [2002] 4 LRC 226, where a Kastom marriage between a Solomon Islander and an expatriate was accepted as binding.

60 See eg *M v P* [1980–88] 1 VanLR 130.

61 *R v Takabea* (Unreported, High Court of Solomon Islands, Palmer J, 23 December 1993), accessible via www.paclii.org at [1993] SBHC 81.

Melanesian country, Papua New Guinea, this problem has been dealt with by legislation which empowers a district court[62] to grant a certificate of customary adoption.[63] This certificate provides the basis for the issue of formal documents such as a passport. There is no such legislation in Vanuatu, but one way of dealing with this appears to be to have a declaration of the adoption registered on the Register of Births, as occurred in *M v P*.[64] Another method, more akin to the Papua New Guinea process, may be to obtain a consensual guardianship order from the court.[65]

(d) International law

The UNCRC was signed by Vanuatu in 1990[66] and ratified in 1993.[67] In addition to filing an instrument of ratification,[68] the UNCRC was ratified by legislation,[69] rendering it part of domestic law. Vanuatu is not a signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 ('the Hague Adoption Convention').

III TWO ILLUSTRATIVE CASES

The uncertainly as to the law which applies to adoption proceedings in Vanuatu creates tension between the different legal systems. It also allows room for the court process to be manipulated in an attempt to obtain a more favourable result for a party who is willing to exploit the system. The following state adoption applications provide examples of the very different approaches taken to intercountry adoptions. The first case also shows the dangers involved in having a choice of laws available, which allow scope for the manipulation of proceedings to avoid conditions imposed by the court.

(a) *Re C*[70]

In the case of *Re C* an adoption petition was originally filed in 2007 in the Supreme Court under the Adoption Act. This Act requires the applicant to

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62 Jurisdiction resided in the Local Courts until their repeal by the Local Courts (Repeal) Act 2000.

63 Adoption of Children Act Cap 275, s 54(1).

64 [1980–88] 1 VanLR 130. The Civil Status (Registration) Act Cap 61 does not expressly provide for registration of adoption, but s 19(1)(b), requires the entry of a birth in the register to state the parentage of the father and mother and the 'relationship of the declarant'.

65 Kenneth Brown, *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* (Charles Darwin University Press, 2005) 144.

66 30 September 1990.

67 7 July 1993.

68 As required by art 47.

69 Convention on the Rights of the Child (Ratification) Act 1992. The Act commenced on the date it was gazetted: 3 May 1993.

70 Unreported, Supreme Court, Vanuatu, Dawson J, 22 June 2010.

prove that he or she is domiciled and resident in Vanuatu. The applicant was a French citizen and single. She lived and worked in France but resided from time to time in New Caledonia. The child was Ni-Vanuatu. A memorandum (in French) was prepared by Tuohy J, requiring the applicant to come to Vanuatu and reside there with the child for 3 months. The memorandum provided that once she attended court in person an interim order would be made and then after the 3 months residence in Vanuatu a final order would be made.

The applicant did not comply with the terms of the memorandum. Instead, in February 2010, an application was made to amend the petition to apply for an adoption order under French law on the grounds that under art 95(2) French law applied as the applicant was a French citizen. The application was supported by an affidavit from Paul Montgolfier, a francophone lawyer residing in Vanuatu. The affidavit alleged that as the applicant was a French citizen she was entitled to apply under French law.

An adoption order was made under the Civil Code in June 2010 by Dawson J. However, the order did not satisfy the French authorities as French law required confirmation that there was no pre-arrangement for the adoption from the court before they would allow the child to be taken back to France. Later in June, a minute was issued to satisfy this requirement.

It would appear from the facts of this case that the applicant had never resided in Vanuatu and had no intention of doing so. When the court made 3 months' residence a condition precedent to an adoption order, the applicant changed to a more favourable system of law. This case seems to suggest that the choice of law is a matter for the applicant, at least in the case of a French citizen.

(b) *Re M*[71]

The case of *Re M* involved an application by a married French couple, resident in New Caledonia, to adopt a 13-year-old Ni-Vanuatu girl. The application was made under the Adoption Act. It was argued for the applicants that s 12 of the Act specifically allowed intercountry adoptions. This provides:

> 'Modification of foregoing provisions in the case of applicants not ordinarily resident in Great Britain
>
> (1) An adoption order may, notwithstanding anything in this Act, be made on the application of a person who is not ordinarily resident in Great Britain; …'

Spear J refrained from ruling on this point, concentrating instead on international law and setting out in his judgment the preamble, objects and part

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[71] Unreported, Supreme Court, Vanuatu, Spear, J, 15 March 2011, accessible via www.paclii.org at [2011] VUSC 350.

of the outline of the Hague Convention.[72] Spear J acknowledged that Vanuatu is not a signatory to the Hague Adoption Convention. However, as the judge pointed out, the Convention is designed to give effect to art 21 of the UNCRC, which was, as discussed above, ratified by Vanuatu in 1993.[73] France has also ratified the UNCRC,[74] and that ratification would appear to bind New Caledonia.[75] France has also ratified the Hague Adoption Convention,[76] but that ratification was specifically stated not to apply to France's overseas territories,[77] which then included New Caledonia.[78]

Spear J relied on art 21 as committing Vanuatu to give paramount consideration to the rights of the child in adoption proceedings. The need for Vanuatu courts to take account of the UNCRC in all proceedings had already been stressed by the Court of Appeal[79] and in previous decisions of the Supreme Court.[80] In custody proceedings, the courts have referred to art 3 which provides that in all actions concerning children 'the best interests of the child shall be a primary consideration'. Quite apart from the UNCRC, Vanuatu courts were already bound by the welfare principle in proceedings relating to the 'upbringing' of a minor by virtue of the Guardianship of Minors Act 1971 (UK),[81] as amended by the Guardianship Act 1973 (UK), and the common law.[82]

The difficulty with the welfare principle is in its application to factual situations. In this respect, Spear J provided guidance for future cases. Spear J considered that it was now 'well understood' that the rights of children are best be protected by:[83]

> 'a. First considering national solutions – that is, the placement for adoption in the country of origin;

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72 *Re M* (Unreported, Supreme Court, Vanuatu, Spear, J, 15 March 2011), accessible via www.paclii.org at [2011] VUSC 350, [8]–[12].

73 Convention on the Rights of the Child (Ratification) Act 1992.

74 7 August 1990.

75 Assuming such International Law to be a law of sovereignty. Since 21 April 1988 this has been affirmed by a 'Circulaire'.

76 30 June 1998.

77 Declaration on Article 45.

78 New Caledonia was classified as an overseas territory from 1946, but gained special status in 1999 as a result of the Nouméa Accord 1998. It is now a special overseas collectivity.

79 *Kong v Kong* (Unreported, Court of Appeal, Vanuatu, Hon Von Doussa, Hon Fatiaki, Saksak, Coventry, JJA, 6 December 2000), accessible via www.paclii.org at [2000] VUCA 8.

80 *Molu v Molu No 2* (Unreported, Supreme Court, Vanuatu, Lunabek ACJ 15 May 1998), accessible via www.paclii.org at [1998] VUSC 15.

81 Section 1. This Act has been held to apply as an Act of general application in the neighbouring country of Solomon Islands: *K v T* [1985–6] SILR 49. There does not appear to be any direct authority to that effect in Vanuatu. From the full title of the action in *Re Chelsea Lee* (Unreported, Supreme Court, Vanuatu, Coventry J, 5 May 2000), accessible at www.paclii.org: [2000] VUSC 22, it seems that the Act was accepted as applicable.

82 *Kong v Kong* (Unreported, Court of Appeal, Vanuatu, Hon Von Doussa, Hon Fatiaki, Saksak, Coventry, JJA, 6 December 2000), accessible at www.paclii.org: [2000] VUCA 8.

83 *Re M* (Unreported, Supreme Court, Vanuatu, Spear, J, 15 March 2011) [14], accessible at www.paclii.org: at [2011] VUSC 350.

b. Ensuring that the child is "adoptable";
c. Ensuring that information about the child and his/her parents is preserved;
d. Ensuring that the prospective adoptive parents are evaluated thoroughly by an independent, responsible and competent government agency in their country;
e. Ensuring that the match of adoptive parents and child is suitable;
f. Imposing additional safeguards where required;
g. Ensuring that the placement in the foreign country will be monitored and generally supervised by a responsible and appropriate arm of that foreign country.'

These 'guidelines' are very general, and make no mention of preservation of cultural ties, although (a) and (f) could be regarded as relevant to this. Art 20(3) of the UNCRC specifically requires due regard to be given to 'the child's ethnic, religious, cultural and linguistic background' in considering care arrangements for a child. Maintaining an environment where a child is able to obtain 'a true understanding of their … culture and customs' is also required by the Constitution.[84] As mentioned above, all public authorities have a duty to encourage compliance with this duty, and this would apply to a court exercising judicial powers in adoption proceedings.[85]

In *Re M*, Spear J did take account of the fact that the proposed adoption would see the child move from Vanuatu and from her extended family to New Caledonia. Spear J was of the view that there was no guarantee that any responsible and suitable government body in that country would undertake any ongoing monitoring of the adoption arrangements. However, whilst France's ratification of the Hague Adoption Convention[86] was specifically stated not to apply to France's overseas territories,[87] which then included New Caledonia,[88] France has also ratified the UNCRC.[89] That ratification would appear to bind New Caledonia.[90] Accordingly, New Caledonia would in theory be bound in the same way as Vanuatu to act in accordance with the principle embedded in the UNCRC.

Spear J also pointed out that, if an adoption order were made, as things stood at the date of the hearing, the nationality of the child would also be uncertain. Accordingly, the judge ordered that if the applicants wished to proceed with the application they should file a memorandum with a proposal as to how the difficulties identified would be addressed. In that event, the court would invite the Attorney-General to intervene so that full consideration could be given to the implications and international responsibilities arising out of the proposed adoption.

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84 Article 7(h).
85 Article 8.
86 30 June 1998.
87 Declaration on Article 45.
88 Above n 78.
89 7 August 1990.
90 Assuming such international law to be a law of sovereignty. Since 21 April 1988 this has been affirmed by a 'Circulaire'.

Spear J also noted that the applicants had first considered applying for the adoption order in New Caledonia, but were discouraged from doing so by 'the apparent complexities of the local adoption requirements'.[91] Accordingly, like *Re C*,[92] this is another case of forum shopping, although in this case British law was regarded as more favourable than French Law. It is interesting that, although the applicants in this case were French and resident in a French territory, the court made no reference to the possible application of French law. This supports the contention that, unless one of the parties takes the initiative in claiming under French law, courts in Vanuatu often apply the common law without question.

However, this decision indicates that, whichever system of law is being applied, the welfare of the child will be the main consideration in adoption proceedings. In intercountry adoptions the law 'must be exercised in conformity with Vanuatu's international obligations particularly under the Convention for the Rights of the Child'.[93] In fact, given that the UNCRC has been incorporated into domestic law by an Act of the Vanuatu Parliament, this has to be the case as such Acts are superior to both British and French law and Kastom laws.[94]

IV CONCLUSION

Well over 30 years after Independence, choice of law questions posed by the plural legal regimes endorsed by the Constitution remain unanswered. It is clear that adoption proceedings with a strong French connection, including applications by French nationals living in France or a French collectivity,[95] may be instituted under either British or French law. However, the reverse may not be true; that is, it seems unlikely that British applicants would be allowed to apply under French law. To date this does not appear to have been attempted and it is unlikely to occur given the dominance of Commonwealth lawyers in Vanuatu.[96]

Even where the appropriate system is not contentious, the actual laws within the system which apply may be difficult to ascertain, given the conditions which apply to the application of British and French laws. There are also unresolved questions regarding Kastom adoptions, particularly where parties come from different Kastom groups or where the child or a party is not indigenous. Given the increase in mobility and in exogenous marriages, the number of disputes is likely to increase.[97]

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91 At [19].
92 Unreported, Supreme Court, Vanuatu, Dawson J, 22 June 2010.
93 At [16].
94 Constitution, art 95(2).
95 Above n 78.
96 There are currently only two legal practitioners in Vanuatu with any significant civil law legal training: Interview with Vanuatu legal practitioners (Port Vila, 7–11 January 2013).
97 See e g *Re P* [1980–88] 1 VanLR 130.

In adoption cases, legal pluralism has resulted in delays and a situation where the appropriate system is not always clear. As illustrated by *Re C*, this has allowed room for the court process to be manipulated to obtain a more favourable result for a prospective adoptive parent who is willing to exploit the system.

The case of *Re M*, whilst again illustrating that uncertainties may encourage forum shopping, signals a new approach, which centres on the child regardless of the procedure employed. This approach may take away the incentive and opportunity to manipulate the system by choosing the more favourable regime for those seeking to adopt.

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