

THE INTERNATIONAL SURVEY OF FAMILY LAW 2012 EDITION

General Editor: Bill Atkin

ENGLISH ABSTRACTS

1. AUSTRALIA

Reflections on the Shared Parenting Experience

Lisa Young

Australia legislated to try to increase post-separation shared parenting in 2006. A key driver was the perception that children suffer when they have too little contact with one parent (typically their father). In fact, the research presents a much more complex picture than this, but it can safely be said that promoting high quality father-child relationships post-separation will benefit most children. The end of 2011 presents an opportune time to reflect on Australia's shared parenting. Australian researchers have been very active, both independently and at the behest of the government, in assessing the reforms. There are certainly some positives to be drawn from that research, but there have also been some very disturbing findings. Australia has in fact very recently passed some amendments to address issues to do with how the laws impact on the victims of family violence. This chapter briefly traces the history of the original amendments. It then discusses the research findings into the operation of these provisions, and in particular those aspects of the legislation that have raised concern. The very recent changes to the legislation directed to the family violence issue are considered. Finally, the chapter makes some comments on what can be learned from the Australian experience.

2. BOTSWANA

A New Children's Law in Botswana: Reshaping Family Relations for the Twenty-First Century

Julia Sloth-Nielsen

The Botswana Children's Act 2009 represents for the country a milestone in advancing children's rights generally, through its incorporation of a mini bill of child rights, its elaboration of the best interests principle and the attention to children in vulnerable situations (which are largely not dealt with in this chapter). The Act displays nuanced concern for local realities, through its assimilation of traditional leadership structures into Village Child Committees, its attention to furthering gender equality in a range of ways, and the concern for children's inheritance rights which loom large in the era of HIV/Aids. As regards the transformation of family law and family life, much new thinking is evident, including the careful elaboration of a variety of parental duties, the recognition of kinship ties and relative care, and by displaying groundbreaking concern for the promotion of child participation in a cultural setting in which children's voices were seldom brought to the fore. The Act is, for these reasons, destined to become a watershed in the reshaping of family

relations and practice in Botswana.

3. CANADA

Tourist Marriages, Separation Agreements and Polygamy

Martha Bailey

There were three major stories in Canadian family law in 2011. The first related to Canada's choice of law rules, under which some marriages that take place in Canada are not considered valid. A same-sex couple who came to Canada to get married because they were not legally permitted to do so in their home states found, when they returned to Canada to get a divorce, that their marriage was not recognized in Canada and that the Canadian court had no jurisdiction to grant them a divorce. The government introduced a Bill that provides that a marriage performed in Canada that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective states of domicile. The second major development was a decision by the Supreme Court of Canada clarifying the law relating to variation of spousal support orders that incorporate a spousal support agreement. And finally, the much anticipated decision of the British Columbia Supreme Court on the constitutionality of Canada's criminal prohibition of polygamy was handed down. The Court's ruling that the provision is largely constitutional has cleared the way for possible prosecutions, though no charges have yet been laid.

4. CHINA

Present Legislation on Adoption in China and Its Reform Proposals

Chen Wei and Shi Lei

The doctrine of the best interests of the child has been a guideline in adoption legislative reforms in many jurisdictions. Judging from this doctrine, there are shortcomings in the Chinese adoption legislation. Thus, the authors suggest that the child's best interests doctrine be expressly stated; that the conditions for being adopted and those for adopting a child be loosened appropriately; and that a probationary adoption period as well as an adoption supervision system be established in future legislation on adoption in China.

5. ENGLAND AND WALES

I Want to Go Home – Parent and Child Relocation Outside the Jurisdiction

Mary Welstead

We live in a world of international families; the ease of travel and the increase in international careers has led to an explosion of cross-border relationships. When these relationships break down, the inevitable problem arises of who should live where and with

whom. One parent, almost always a mother, may wish to leave the jurisdiction with the child of the relationship and return to her country of origin. Those parents, usually fathers, who oppose the relocation of their children, do so, for the most part, because they want to have regular contact with their children. They fear that as a consequence of relocation they risk the loss of a relationship with them in both quantitative and qualitative terms. The decisions in the field of international child relocation have always been very much fact dependent. Nevertheless, *Payne v Payne* imposed a judicial gloss, in the form of guidelines. This attracted criticism, with calls for reform by judges, practitioners, academics and parents. Recent decisions on international relocation in the jurisdiction of England and Wales have drawn attention to, supported, or queried the relevance of, these criticisms. The author suggests that reform of relocation law is necessary. A new law should abandon the overarching principle of the paramountcy of the child's welfare, and contain, in default of agreement between the parties, a hierarchical checklist, which relates, inter alia, to the wellbeing of all members of the family.

6. FRANCE

A Chronicle of Family Law in 2011

Centre de droit de la famille (Université Jean Moulin)

The year 2011 was not marked by profound upheavals in French family law. Nevertheless, the legislator and especially domestic case law clarified and rectified various points which may foreshadow further developments. The continued trend of bringing various forms of partnerships and marriage closer together and the ubiquity of disputes related to claims for co-parenting and relationships in homosexual families, together with recent changes in France's political landscape may give rise to real reforms in the coming years...

7. HUNGARY

Partnership in Hungary in the Light of the New Legal Developments:

Status or Contract?

Orsolya Szeibert

Three forms of partnerships have existed in Hungarian law since 2009, namely marriage, registered partnership and cohabitation. While marriage and registered partnership produce status, cohabitation is a contract, in spite of the fact that most of society unquestionably accepts it. This contribution analyses briefly whether the latest Hungarian legal developments modify this legal perception of each partnership. Three such developments are mentioned: judicial practice in property issues affecting the matrimonial property regime, matrimonial property agreements and the property relations of cohabitants; the latest Hungarian regulations as the Fundamental Law of Hungary and the Family Protection Act, which entered into force in 2012; and lastly, the latest Draft of our

Family Law Book as part of a new Civil Code. In some respects, there is convergence, in other respects legal attitudes towards the character of the partnership forms diverge.

8. INDIA

Missing Children in India: Suggestions, Remedies and Solutions

Anil and Ranjit Malhotra

The increase in the number of missing children has become an alarming issue at the present time in India. Proper investigation is needed in such cases of missing children, who due to their age and gender are especially vulnerable to crimes. Several petitions have been filed before different High Courts in the country seeking the formation of separate investigation cells for the search of missing children, involving officers having special knowledge and expertise in the matter. This chapter contains some recent statistics. It then sets out a number of steps within the existing framework of the law to assist in finding missing children. This includes enhancing the roles of the police and media, along with more effective information systems. The chapter also suggests the implementation of provisions in the Commission for Protection of Child Rights Act, 2005.

9. IRELAND

A Softening of the Marital Family Paradigm?

Maebh Harding

The last couple of years have seen several developments in Irish law providing for alternative family structures to the traditional married family. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 came into force on 1 January 2011. This Act created a new institution of civil partnership and provided statutory protection for cohabiting couples. The courts have shown support for alternative family structures and the Irish Law Reform Commission has suggested reform to private child law to make it easier for unmarried fathers, step-parents and civil partners to care for their children. However, Irish law still retains a constitutional preference for the marital family. This chapter discusses the legal provision of alternative family structures and assesses to what extent marriage retains its importance as the paradigm for family relationships in Ireland. It is argued that the effects of the constitutional preference for marriage are still felt throughout the Irish family law system and have the greatest detrimental effect on children. Proposed reforms to protect children's rights remain limited by the constitutional protection of the marital family.

10. JAPAN

Child Custody Issues at the time of divorce – From the Point of View of Japanese Family Law

Tomiyuki Ogawa

Japan has been criticised over international child abductions. The writer argues that such abductions are caused by the differences between Japan and other Western industrialised countries. For example, under the current Japanese legal system, only one of the parents can obtain parental authority and may restrict the other parent from contacting the child. Thus, Japan cannot become a party to the Hague Convention on the Civil Aspects of International Child Abduction. The Japanese Family Court used to refuse applications from overseas parents seeking to take their children back to their original countries. This view is changing and the Family Court is now a lot more willing to allow such applications. The Court now considers international child abductions to be illegal. To prevent further incidents of international child abduction by Japanese parents, the writer suggests that: (1) the current Japanese legal system should be altered so it is more harmonious with other Western industrialised countries; and (2) the Japanese Government should conduct community education to improve Japanese parents' understanding of the illegality of international child abduction.

11. MACEDONIA

The Legal Regulation of Nonmarital Cohabitation in Macedonian Family Law

Dejan Mickovik and Angel Ristov

Rapid changes in the family and in family relations have contributed to the increase in non-marital relationships in nearly all modern societies. Although a little behind other jurisdictions, Macedonian family law provides for cohabitation based on the concept of 'unregistered marriage'. According to Macedonian family law, cohabitation is defined as the union of a man and a woman lasting for at least one year. Cohabitation is similar to marriage only in respect of property acquired in common during the time of living together and in respect of maintenance law. The parties do not have inheritance rights nor other rights that flow from health insurance, pensions and social security. However, cohabitants, according to the laws of Macedonia, can use assisted human reproduction and posthumous reproduction. The conclusion from an analysis of the current national law is that the legislature has left many gaps in the regulation of non-marital relationships, creating problems in judicial practice, which ought to be corrected in future family law reforms. They will be an integral part of the Civil Code being prepared in the Republic of Macedonia. In this respect, it is necessary to provide for marriage impediments as conditions for the validity of cohabitation and more detailed regulation of the link between the property of spouses and non-marital partners. The next reform should provide, under certain conditions, for non-marital partners to have succession rights, for a voluntary registration system for cohabitation, and for children born posthumously to be heirs.

12. MALAWI

Child Care, Protection and Justice Act: Merging Customary Family Law?

Lea Mwambene

Customary rules and practices have long been perceived as barriers to the full realization of the enjoyment of children's rights. This is so because some customs and beliefs are felt to be inconsistent with human rights. The Child Care, Protection and Justice Act of 2010 (Children's Act) that gives effect to section 23 of the Malawi Constitution, the Convention of the Rights of the Child and the African Children's Charter on the Rights and Welfare of the Child provisions has directly or indirectly incorporated African customary rules and practices in the protection and promotion of children's rights in Malawi. In light of the Children's Act focus on children's rights principles as well as respect for some customary rules and practices, this chapter examines the manner in which it addresses this interaction. The aim is to assess the extent to which the Children's Act allows for considerations of cultural context in the protection and promotion of children's rights. The Chapter shows that while the Children's Act support customary practices, the exclusion of some customary rules and practices that would enforce children's rights violations is a regrettable oversight, as most children in Malawi are governed by customary rules. This exclusion may render this well-intended piece of legislation mere paper law.

13. MALAYSIA

Rights of Children: Future Challenges in Malaysia

Datin Noor Aziah Mohd Awal

The rights of children have been a topical issue since Malaysia signed and ratified the United Nation Convention on the Rights of the Child in 1995. This means that children in Malaysia have rights in accordance with the Convention and the government must comply with its terms. As a multi-racial and multi-religious nation, one of the greatest challenges for Malaysia in fulfilling its obligations is to strike a balance between the rights of Muslim and non-Muslim children. Parents still play a big role in the upbringing, education and religion of their children and this role could come into conflict with the right of children to determine their own lives. When such a conflict happens, the Court or mediation should play the role of solving and settling such issues so as to ensure that the best interests of children are safeguarded.

14. THE NETHERLANDS

Something Old, Something New, Something International and Something Askew

Ian Curry-Sumner and Machteld Vonk

In Dutch family law in 2011, there were new developments, but nothing on a large scale. New legislative proposals were introduced in the Dutch Parliament, including a Bill to vest both female spouses parents *ex lege* with parentage rights over any child conceived with the sperm of an unknown donor born during their marriage, and old legislative proposals were finally adopted, including a Bill relating to the rights and responsibility of spouses regarding their marital property. At the international level the international recovery of maintenance has undergone enormous changes, with three new instruments having been drafted in the past few years. Two of these new instruments, the European Maintenance Regulation and the Hague Maintenance Protocol entered into force in the Netherlands on 18 June 2011. The major changes for Dutch law are reviewed. Furthermore, the European Court of Human Rights held that the Dutch Supreme Court had not been efficient when hearing a case brought by a minor who had been placed in a confined institution on a custodial placement. This led to an immediate change in the Supreme Court's approach.

15. NEW ZEALAND

The Changing Politics of Family Law in New Zealand

Mark Henaghan

This chapter explores the connection between politics and family law in light of four recently proposed family law reforms in New Zealand. The proposed reforms are: a substantial Governmental review of the New Zealand Family Court which seeks to address increasing expenditure on Family Court services; a Governmental Green Paper containing possible solutions to improve outcomes for vulnerable children in New Zealand without spending more money; a detailed overhaul of the New Zealand child support regime (including the introduction of the Child Support Amendment Bill) to provide a fairer and more up-to-date scheme to ensure parents meet their child support obligations; and a New Zealand Law Commission review of the law of trusts based upon a concern that trusts are defeating claims under the Property (Relationships) Act 1976. The chapter concludes that family law reforms should not be based purely on political fiscal concerns, but rather on how best to assist families in crisis in the most effective and efficient manner.

16. POLAND

The Rules on the Administration of Community Property in Poland

Anna Stępień-Sporek, Pawel Stoppa and Margaret Ryznar

The Polish rules on the administration of marital common property underwent significant changes in 2005. Previous regulations, having their roots in the pre-1989 communist regime of Poland, appeared insufficient for the current capitalist economy and today's dynamically developing society. The previous management of common property, based on the unclear dichotomy between ordinary and extraordinary actions, created practical judicial problems and undermined the stability of legal relationships established without the consent of the other spouse. The new law, based on the general principle of self-management except for particularly important actions, seems preferable, although it is not completely free of shortcomings and still requires periodic review. This chapter describes the most notable differences between the old and new rules on the administration of common marital property, and introduces readers to the field of the administration of common property pursuant to the relevant new regulations.

17. SAMOA

Reform of Maintenance and Divorce Law in Samoa: Appropriate for the 'Aiga'?

Lalotoa Mulitalo and Jennifer Corrin

The formal, written laws in Samoa include a number of statutes relating to family law, including the Divorce and Matrimonial Causes Ordinance 1961 and the Maintenance and Affiliation Act 1967. In 2010, both these Acts were amended. The amendments to the divorce legislation made Samoa one of the only two small Pacific island nations to have introduced a purely no-fault system of divorce, the other being Fiji. They also empowered the courts to alter property rights. The changes to the law on maintenance and affiliation gave new powers to the District Court to make custody orders and set out guidelines on the amount and payment of maintenance. This chapter commences with a summary of the law prior to the reforms. It then looks at the recent changes to divorce and maintenance legislation and discusses their efficacy in the light of the cultural and social background of Samoa.

18. SERBIA

Challenges of the Modern Family – Draft Civil Code of Serbia Relating to Family Law Relations

Olga Cvejić Jančić

This chapter deals with innovations introduced by the Draft Civil Code of Serbia concerning the law of family relations. The author points out that the Draft changes the conditions for the recognition of heterosexual cohabitation in so far as marriage and close blood kinship henceforth prevent this type of cohabitation from having any legal effects. As regards cohabitation by homosexuals, the Draft provides that this question will be regulated by a special statute. Another new provision refers to surrogate motherhood, which will be allowed if there is no other way to become a parent, such as: (a) if there are medical barriers for pregnancy by natural means or by other methods of biomedical assisted

reproduction; or (b) if pregnancy is not desirable due to the existence of genetically transmissible diseases. The Draft then provides that corporal punishment of children is forbidden. The Commission for the Drafting of a Civil Code considers that standards of family behaviour without violence should be promoted, because parents may use other measures for disciplining their children. It is also provided that a child who has reached the age of 15 may give medical consent but may not refuse it independently. For the refusal of medical consent the consent of a guardian authority will be needed. Among the other more significant innovations is one providing for the establishment of an Alimony Fund for the payment of child maintenance if the parent debtor does not comply with the obligation to support the child. Yet other innovations include the introduction of a simple, breakable adoption, amendments to the matrimonial property regime, and more detailed regulation of the marital contract.

19. SLOVENIA

Critical View on the Performance of Foster Care in Slovenia

Suzana Kraljić and Iva Gajšek

Foster care is a secondary form of protection for children whose parents cannot, are not allowed to or do not want to take care of them. The State, through its agencies, has the duty to guarantee proper forms of protection for the interests of a child placed in a foster family. In Slovenia, foster care has a long-standing tradition, but an Act regulating foster care was adopted only in 2002. After ten years of its adoption, certain areas of the law need to be added to or changed. In this contribution, the authors critically analyze the present regulation of foster care and think of future changes in the field.

20. SOUTH AFRICA

Kinship Care and Cash Grants: In Search of Sustainable Solutions for Children Living with Members of their Extended Families in South Africa

Ann Skelton

Many children live with extended family members in South Africa. The new Children's Act does not specifically recognise kinship care, but focuses on court-ordered foster care, with social work oversight, as the central model of alternative care. This article charts the original intentions behind the Children's Act, and examines the changes made to it by the Executive and Parliament. Alternative care in South Africa is considered in the context of the social assistance arrangements which cause families caring for children to favour the foster care model, with its more lucrative cash grant, over the informal model of primary caregivers receiving the child support grant. The over-reliance on the foster care model has led to systemic crisis, which is described in the article, and solutions are proposed.

21. SRI LANKA

The Sri Lankan General Law of Marriage: Dutch, Victorian, or Indigenous

Sharya Scharenguivel

The Sri Lankan General Law of marriage has been considerably influenced by the Roman Dutch law and the English law. To a large extent the law remains unreformed and is in many ways not compatible with modern notions relating to marriage and the termination of marriage. In this chapter, aspects of the Sri Lankan law of marriage are examined with a view to ascertaining whether the General Law of marriage is Dutch, Victorian or indigenous. Also considered is whether the lack of agitation for reform can be attributed to the fact that the law accords with the country's current sense of values and is therefore indigenous. Marriage is looked at from the point of view of contracting a marriage, the incidents arising out of marriage and terminating a marriage. Divorce in terms of the General Law is fault-based and the procedural laws are adversarial, with the process being essentially acrimonious. The question that has to be posed is whether the customary systems which de-emphasize fault and stress conciliatory or mediatory measures are better options.

22. SWEDEN

Parental Influence – More and Less

Anna Singer

Family law in Sweden is continuously adjusted to a changing view of family and the relationship between the family members. Limited, but not unimportant, changes are made in the law, particularly in regulations concerning the relationship between parents and children. These changes reflect a slow but steady development towards the recognition of the child as an independent, even autonomous, individual, and the parents' right to decide in personal matters for the child is at the same time diminishing. Against this background it is interesting to notice a landmark change in the Tort Liability Act that reflects a different view in principle of the relationship between children and their parents, calling for more vigilant custodians when it comes to protecting the interests of others.

23. SWITZERLAND

New Swiss Code of Civil Procedure: Special Proceedings in Matrimonial and Family Law Matters

Ingeborg Schwenzer and Tolmie Keller

On 1 January 2011 the Swiss Code of Civil Procedure entered into force. The new Code unified civil procedure throughout Switzerland, the last country in Europe to do so. It replaced the 26 different cantonal statutes on civil procedure. In regard to procedural family law, the substantive family law in the Swiss Civil Code already contained several procedural provisions, guaranteeing a minimum of uniformity amongst the different cantons. These

procedural provisions have now been deleted from the Swiss Civil Code and been integrated – to some extent with certain modifications – in the Swiss Code of Civil Procedure. After a short overview of some general provisions of the Swiss Code of Civil Procedure, this chapter outlines the different family law procedures regulated in the new Code and closes with a look at mediation and the (missing) specialized family courts in Switzerland. The changes are minor and not particularly innovative. Unfortunately, Switzerland missed out on the opportunity of being more progressive.

24. UGANDA

Widow Inheritance in Uganda

Jamil Ddamulira Mujuzi

The Constitution of Uganda and international and regional human rights instruments that Uganda has ratified or acceded to such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African, the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Civil and Political Rights specifically provide that women should marry only after having freely consented to such marriages. Nevertheless, widow inheritance is still practised in some communities in Uganda. Several attempts have been made to eliminate widow inheritance in Uganda. This paper highlights those attempts from the 1988 Constitutional Commission to the 2009 Marriage and Divorce Bill.

25. UNITED STATES

Premarital Agreements in the United States

Tom Oldham

During the past forty years U.S. courts have accepted that parties can, via a premarital agreement, change the rules governing the economic rights of the parties if they divorce. There is as yet no consensus regarding the extent to which contract rules normally applied to agreements between unrelated third parties should govern, or whether additional safeguards are needed. In this chapter, the author suggests two major changes. The first is that parties should be required to negotiate and sign the agreement before the wedding, thus giving the parties more time to intelligently consider whether to sign the agreement. Such a change would be a substantial improvement over current law; in many states, a premarital agreement will be enforced even if it is first presented a day or two before the wedding. The second would bar parties from negating the right to spousal support if the parties raised a common child during marriage. Such a limit would ensure that, if one party's earning capacity is significantly reduced due to child care responsibilities during marriage, spousal support would potentially be available regardless of the terms of a premarital agreement.