THE INTERNATIONAL SURVEY OF FAMILY LAW 2013

GENERAL EDITOR: BILL ATKIN

ENGLISH ABSTRACTS

INTERNATIONAL AND EUROPEAN DEVELOPMENTS IN FAMILY LAW 2013

Louise Crowley

This chapter reviews some recent developments in family law from the perspective of international law and European Community law. The topics covered include child abduction (in particular 'the grave risk of harm' defence, and the use of mediation in Hague Convention cases), the influence of 'Rome III' and 'Brussels II bis' on family law (especially the recognition and enforcement of judgments primarily with reference to divorce, separation and maintenance), a shift in many jurisdictions towards enforceable marital agreements, and international changes in relation to same-sex marriage. Finally, there is a report on some recent developments at the European Court of Human Rights.

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

This chapter discusses the 2012 Angolan Act on the Protection and Holistic Development of the Child. Initially conceived as a law that would address the situation of children aged below 7 years, the Act that was finally adopted covers all children aged below 18. It is thus the vehicle for harmonising Angolan law with international legal instruments such as the United Nations Convention on the Rights of the Child and the African Children's Charter. Many provisions concern the place of the child within the family, and family responsibilities towards children, and it is these provisions which are mainly discussed.

Australia

NEW FRONTIERS FOR FAMILY LAW

Lisa Young

In this chapter, the author considers how Australian family courts are addressing some of the more challenging and contemporary legal problems arising in a modern world. First, however, it provides an overview of the movement towards same-sex marriage in Australia and the particular constitutional issues being raised by state and federal legislative activity in that regard. The chapter then turns to Australia's de facto laws, introduced at a federal level in 2009. These are much broader than preceding state legislation, and cover same-sex and multiple relationships.

The question has arisen as to what parallels can be drawn between the nature of a marriage and a de facto relationship, and how much assistance can be derived from case law dealing with de facto relationships in the different Australian jurisdictions. The final topic discussed is perhaps one peculiar to Australia – whether treatment for gender identity dysphoria is a special medical procedure and therefore requires court authorisation. The limits of the special medical procedure test, developed to deal with sterilisation of intellectually disabled minors, have proved difficult to identify, resulting in parents and hospitals seeking court authorisation in a range of matters. With an appeal pending to the Full Court of the Family Court of Australia, the author considers whether the test as originally framed applies to this difficult category of case.

Denmark

IMPORTANT RECENT DEVELOPMENTS IN DANISH FAMILY LAW

Marianne Holdgaard

There has been an increasing number of amendments to Danish family law in recent years, often based on the principle of individual choice. This chapter discusses four amendments: same-sex marriage, including marriage in church; changes to parental responsibility, including joint custody, the child's right to be heard, contact with persons other than the parents, and access to the court; artificial insemination, widening the options that parties can choose from, for instance in relation to anonymity of donors; and division of property. Society has changed, serial monogamy is more common, and new family forms have emerged, all impacting on the way in which the law has developed.

England and Wales

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

Mary Welstead

Three recent decisions in the jurisdiction of England and Wales have considered the difficult issue of determining the religious upbringing of a child after the relationship of parents of different religious persuasions has broken down. *Re N (A Child:Religion:Jehovah's Witness)* (2011); *Re C (A child)* (2012); and *Re G* (2012) are all interesting illustrations of the difficult, almost intractable task, facing the courts, when two warring parents both want to control the religious future of their children and one of them applies to the court under the provisions of the Children Act 1989. The decisions consider in detail the meaning of the paramountcy principle in determining a child's welfare under the Act, and how to assess what is in the best interests of a child when religious beliefs are at issue. The decisions draw attention to the discretionary nature of this assessment and the inescapable value judgments of the 'judicial reasonable parent'. Two of the three decisions analyse the application of the European Convention on Human Rights (1950) to the determination of a child's religious upbringing and, in particular, to Art 9(1) which gives parents the right to freedom of thought, conscience and religion. It is suggested that Art 9 (1) is of limited value to parents who wish to bring a child up in accordance with their faith

because of the qualifications placed on it by the provisions of Art 9(2). These qualifications, yet again, give the 'judicial reasonable parents' an enormous amount of discretion.

France

A CHRONICLE OF FRENCH FAMILY LAW

Centre de droit de la famille (Université Jean Moulin)

The most notable new development in French family law is above all the opening of marriage and adoption to same-sex couples. It has provoked lively debates, leading to a new examination of the law on bioethics. Perhaps social change has led to law reform, or perhaps not. In fact, while the legislature has amended the rules in the Civil Code relating to person and the family, the Court of cassation seems to refuse to make radical changes, especially when it comes to transsexualism and the reference to sex in the public sector. Although the European Court of Human Rights has not condemned France for its failure to incorporate "kafala" into its adoption laws, there is no reason why French case law should not evolve on this point. Certainly a different conception of society is slowly emerging, evidenced by the proposal to reform the entitlement to family allowances. For all that, this is only a draft, driven primarily by financial considerations and it is not clear that it will be adopted if it causes as much opposition as did same-sex marriage. The legislature perhaps will not dare confront public opinion twice in a row. Of less interest to the media yet constituting an essential step forward for a number of :international" couples, the entry into force of the law creating a franco-german matrimonial regime should also be highlighted.

Germany

ABOLITION OF LEGAL DISCRIMINATION AND IMPLICATIONS OF HIGHEST-COURT CASE LAW

Luise Hauschild

The year 2013 saw several landmark rulings implemented into German legislation. Most prominently, the requirements established in two judicial decisions made by the European Court of Human Rights and the German Federal Constitutional Court respectively have finally resulted in an Act amending provisions on parental responsibility that led to the discrimination of unmarried fathers. Another 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 was reserved to married couples. In February 2013 the Constitutional Court ruled that this was unconstitutional, accordingly resulting in an instruction to the government to amend the law. 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 was resolved by an Act that governs religious circumcision of children. Several issues concerning

other areas of family law 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".

Hungary

PARENTAL RESPONSIBILITIES AND THE CHILD'S BEST INTEREST IN THE NEW HUNGARIAN CIVIL CODE (2013)

Orsolya Szeibert

The codification process of the new Hungarian Civil Code began back in 1998 and reached its conclusion in February 2013 when the new Civil Code was accepted by Parliament. The new Code enters into force on 15th March 2014. When the idea of a new Civil Code emerged, a debate began over whether family law, which is regulated actually in an independent Act on marriage, family and guardianship, should have been included in the Civil Code. The decision taken to include it in the corpus of the Civil Code has been a really decisive one for family law. The new Civil Code consists of seven books among which the fourth is the Family Law Book. The principles of this Book 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.

India

LAW AND SURROGACY ARRANGEMENTS IN INDIA

Anil and Ranjit Malhotra

Surrogacy is prevalent in India and attracts people from overseas who want to have a child. The current position in India is that surrogacy, including commercial surrogacy, is legal under the ordinary law of contract. Those coming from overseas, unless they are Hindus, cannot adopt the child born by surrogacy. However, the court may grant a guardianship order, allowing the child to leave the country. The position was upheld by the Supreme Court of India in a case involving a Japanese couple who separated before the child's birth. The husband's mother lodged the proceedings and, after the Supreme Court decision, was able to take the child to Japan. This decision will also have effect in other situations such as where the genetic father is single or in a homosexual relationship. A new Bill, prepared by an expert committee, proposes to regulate surrogacy, while providing for the enforceability of surrogacy agreements. In the meantime, however, the Indian government has just changed the visa requirements in a way that is likely to cause the international surrogacy business to plummet. People visiting India for the purposes of surrogacy will need a "medical visa", not a mere tourist visa. A medical visa will depend on the receipt of a letter from the foreign country that it recognises surrogacy and will permit the child to enter the country. Thus, the new Medical Visa Regulations have stepped in to do what the Indian Parliament ought to have done to regulate the surrogacy trade.

Ireland

CONSTITUTIONAL RECOGNITION OF CHILDREN'S RIGHTS AND PARAMOUNTCY OF WELFARE

Maebh Harding

In 2012, the Irish people voted to include an express recognition of children's rights in the Irish constitution. The children's rights amendment requires the Irish state to uphold the rights of the child. It also clarifies the legal test for state intervention into the family to safeguard children. The amendment is a major step forward in promoting the interests of children in Ireland and allows marital children to be adopted rather than spending long periods in foster care. However the reform fails to solve some of the problems encountered by the courts when balancing children's interests against the rights of parents and the protection of the marital family unit. To date, constitutional protection of parental rights has caused the courts to rely on presumptions about the best interests of children over expert evidence as to the most preferable solution. The amendment requires the courts to balance the conflicting rights of parents and children while prioritizing the best interests of the child. Whether the amendment will mean greater protection for the interests of children will depend on how the Irish courts resolve this interpretative challenge and to what extent children's rights are presumed to align with parental rights.

Israel

THE DEVELOPING RIGHT TO PARENTHOOD IN ISRAELI LAW

Rhona Schuz

This chapter examines the expanding recognition of the right to parenthood in Israeli jurisprudence, since the author first addressed this subject in the 1996 Survey. In addition to a consideration of the relevant case law in relation to the rights of prisoners to found a family, the right of access to the different methods of assisted reproductive technologies and the right to adopt, the chapter sets out and discusses the main recommendations of a Public Committee on the legal regulation of reproduction in Israel, whose report was published in 2012. After discussing the various developments, the chapter analyses the arguments of those who claim that the right to parenthood has been too widely interpreted in Israel and, on the other hand, those who argue that it is still not drawn broadly enough.

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

Japanese family law was amended in significant ways in 2011. Amendments to the Japanese Civil Code and related Acts, which came into force in April 2012, are designed to incorporate

measures such as a new ‘stop’ system for suspending parental authority, and enabling a juridical person or two or more persons to become guardians of a child. In addition, the amendments set out new rules stipulating how questions of contact and the sharing of child support are to be dealt with. It is expected that the changes will better protect the interests of children.

Kazakhstan

THE REFORM OF THE FAMILY LEGISLATION OF KAZAKHSTAN: EXPECTATIONS AND OUTCOMES

Maria Baideldinova Dalpane and Federico Dalpane

In early 2012 the family legislation of Kazakhstan underwent significant transformation. A new Code on Marriage and Family replaced the previous Law on Marriage and Family. 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 harmonize these with the norms of the Hague Adoption Convention, the signing of which had been the subject of intensive consideration in 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 analyzes the main issues with the latest reform of the family legislation of Kazakhstan and considers them in their historical and political context.

Macedonia

THE EXERCISE OF PARENTAL RIGHTS AFTER DIVORCE IN MACEDONIAN FAMILY LAW

Dejan Mickovik and Angel Ristov

In this chapter, the authors analyse the regulation of the exercise of parental rights after divorce under Macedonian legislation. They conclude that Macedonian family law contains no precise provision for parents to continue to exercise parental authority in common after divorce. This causes serious problems in practice because the parent with care of the child post-divorce in most cases makes the more important decisions for the child, while the other parent, usually the father, is left only with a right of contact with the child and the duty to pay maintenance. The authors argue that family law must provide expressly for the joint exercise of parental authority post-divorce as a fundamental principle, unless, in the child’s interests, a court decides that only one parent should have parental rights. This is consistent with the child’s best interests, as well as the United Nations Convention on the Rights of the Child and modern-day legislation.

Mexico

FAMILY LAW REFORM IN MEXICO CITY: THE CONTEMPORARY LEGAL AND POLITICAL INTERSECTIONS

Graciela Jasa Silveira

Mexico City (the Federal District of Mexico) has enacted watershed reforms of family law, especially in relation to equality and women's rights. The changes include increased rights for couples in a concubinage relationship; the introduction of civil unions and same-sex marriage; adoption rights for same-sex couples; unilateral divorce; and the decriminalization of abortion. As far as the letter of the law is concerned, the law reforms represent an important stride in the incorporation of equality principles in family law. However, the reforms have also been entangled in a complex legal and political context. Thus, to understand the complex context surrounding Mexico City's recent reforms, it is important to place Mexico City's reforms in their proper context.

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

The year 2013 is a time of momentous change in New Zealand family law. This chapter focuses 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.

Norway

FUTURE POWERS OF ATTORNEY

Peter Hambro

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.

Poland

DIVORCE LAW IN POLAND: A NEW REGIME NEEDED?

Dr Anna Stępień-Sporek, Paweł Stoppa, Margaret Ryznar

A trend in Poland, as in other countries, is the growth in the number of divorces. Nonetheless, marriage remains a popular institution and family is one of the most important values in Polish life. These contradictory observations have provided the inspiration for this chapter. It is obvious and perhaps even 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. The first part reviews the present Polish divorce law. The second part analyzes the disadvantages of the present law, while the third part describes its advantages. The final part offers answers to the questions formed at the beginning of this chapter.

Scotland

CAN FAMILY LAW BE RENDERED MORE ACCESSIBLE?

Elaine E Sutherland

Scots child and family law has developed rapidly over recent decades, prioritising equality, inclusion and protection. The 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. The second of these challenges has been the subject of numerous government and other reviews with the latest of them not due to report until the summer of 2013. This chapter addresses the first challenge: the accessibility of the law itself. It highlights the difficulty caused when the law is spread over multiple documents that must be read together in order to ascertain the current legal provision. This is a source of frustration to lawyers and makes the task of lay advisers all but impossible. As those with limited means are forced to place greater reliance on lay advisers, the need to make the vast array of legal provisions more user-friendly becomes all the more pressing. It would be naïve to suggest that child and family law could be expressed so simply and succinctly that all members of the public would be able to understand it and all its attendant implications without assistance. However, codification would do much to make the law more accessible to lawyers and lay advisers.

South Africa

YOU REAP WHAT YOU SOW: REGULATING MARRIAGES AND INTIMATE PARTNERSHIPS IN A DIVERSE, POST-APARTHEID SOCIETY

Helen Kruuse

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. The author posits that the apartheid system in South Africa was replicated in family law, with the Western 'white' monogamous marriage receiving the state's stamp of approval – leaving other relationships (customary, Muslim, homosexual, cohabiting etc) largely out in the cold. The chapter considers the subsequent recognition of different forms of marriage in an attempt to provide equal protection to these relationships in post-apartheid South Africa, but questions whether such proliferation has avoided the central issue of how to protect vulnerable people in intimate relationships (usually women). The chapter focuses on customary marriages (and specifically the recent case of *Ngwenyama v Mayelane*), but deals in turn with civil unions and Muslim marriages.

South Korea

THE REFORM OF ADOPTION LAW IN KOREA

Jinsu Yune

In 2011 and 2012, there were two major changes to Korean adoption law. Firstly, the Special Act on Adoption was enacted on 4 August 2011. Secondly, the part of the Civil Code regulating adoption was thoroughly revised on 10 February 2012 and came 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. To advance this aim, the new laws require the permission of the family court for adoption of minor children. Further, the new Civil Code abolished consensual dissolution in cases of adoption of minor children. This chapter explores the important features of the reform.

Switzerland

A NEW LAW FOR THE PROTECTION OF ADULTS

Ingeborg Schwenzer and Tomie Keller

On 1 January 2013 a revised law for the protection of adults, found in the Civil Code, entered into force in Switzerland. In the interests of self-determination, it provides for durable powers of attorney and advanced health care directives. Where a person has no durable power or advanced directive, the principle of family solidarity comes into play: if the person lacks capacity, consent may in many situations be given by the spouse or registered partner, or if there is no one fitting this description, then an unregistered partner, children or siblings may be able to represent the person. Where the person is in a nursing home, the law requires the institution to provide a written contract detailing assistance and services. In other situations where the person is not properly protected, the Child and Adult Protection Authority has to tailor a support package for the person, customized to the individual's own needs. A welfare advocate may be appointed: there are various kinds of advocates with different degrees of power. The new Authority, established by each canton, must be professional, specialized and interdisciplinary. The revision that has taken place is considerable and has been a big step forward. It has yet to be shown whether the aims of the new law will be realized.

United States

THE PAST, PRESENT, AND FUTURE OF THE MARITAL PRESUMPTION

June Carbone and Naomi Cahn

The marital presumption is deeply rooted in Anglo-American law: a husband and wife are assumed to be the father and mother of any child born during their marriage. However, 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. This article explores how states struggle to reconcile the strong public policies supporting marriage with new knowledge about biological facts.

Vanuatu

FINDING THE LAW ON ADOPTION IN VANUATU

Jennifer Corrin

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. Other written laws are provided by Acts of the Vanuatu Parliament, and decisions of the Vanuatu courts. Also some British and French laws apply. In addition to these written laws, customary laws, known locally as 'Kastom' laws, remain in force. The extent of the application of British and French laws and of Kastom laws is a matter of some debate, but such laws do not apply if an Act of the Vanuatu Parliament covers the field. 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 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.