

THE INTERNATIONAL SURVEY OF FAMILY LAW 2011 EDITION

General Editor: Bill Atkin

ENGLISH ABSTRACTS

1 International Family Law

Annual Survey of International Family Law 2009

Elaine O'Callaghan

In 2009, a number of significant developments took place in many different legal fora at international and regional levels. The Hague Conference on Private International Law saw a great number of ratifications and signatures across its wide range of conventions. There was also substantial progress in relation to the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. The United Nations marked the 20th anniversary of the adoption of the Convention on the Rights of the Child (CRC). There were ratifications and signatures of the two Optional Protocols to the CRC. As regards the Council of Europe, this year's review has concentrated on three significant judgments of the European Court of Human Rights which concern fathers' rights to custody of a child born out of wedlock, the deportation of non-nationals and the right to respect for family life, and domestic violence.

2 Argentina

Family, Pluralism and Equality: Marriage and Sexual Orientation in Argentine Law

Cecilia P Grosman and Marisa Herrera

Social reality demonstrates that there is a great diversity of family forms. Argentina took the great step of recognising social diversity when in July 2010 legislation was passed extending the institution of civil marriage to same-sex couples, the first nation in Latin America to do so. However, the reform went only half way. There remains no comprehensive regulation of assisted reproduction, children's surnames still centre around the father and there are laws that give preference to mothers in custody disputes. The complexities of legal parenthood are also discussed in this contribution.

3 Australia

'Reality is the Beginning ...' Australian Family law in 2009

Frank Bates

In various other commentaries in *The International Survey of Family Law*, the author pointed out the dangers of attempting to predict either the possibility of change or the manner in which that change will be effected or, indeed, the nature of such potential change. However, 2009 represents an exception in that jurisdictional changes have been effected to Australia's Family Law Act 1975, along with the possibility of radical change to one of its less than totally successful amendments. At the same time, 2009 saw not insignificant case law in various areas of activity with which the Act has traditionally been concerned and which are of continuing interest. 2009 has also seen a major jurisdictional change in relation to property and maintenance as they affect the majority of heterosexual and same-sex unformalised couples. These matters are, on the breakdown of such relationships, dealt with under the provisions of the Family Law Act 1975. These new provisions are considered in this commentary.

4 Belgium

Levering the Functioning of Families with Family (Self-)Governance?

Frederik Swennen

Family advisers in different fields increasingly take an interest in a new area of practice: family governance. Family governance consists in using private legal instruments, such as contracts, with a view to organising membership of a family, rights and duties of the family members and conflict management within the family. Thus, the family is considered a private organisation subject to good governance. Family governance thus strongly resembles pre-modern house laws (Hausgesetze, lois domestiques) of royal, noble or prominent families. Governance of families in modern times has traditionally been a competence of public authorities, exercised through family law rules considered to belong to public policy. The question then arises whether family self-governance is compatible with public policy, particularly in regard to the possible application of the rule of law. The author illustrates this question by briefly addressing to what extent the governed family members can refer to human rights protection vis-à-vis their governors.

This chapter aims at an exploration of the matter from a Belgian perspective. The author firstly explores the emergence of family governance, with a view of defining the concept. In a second part of this contribution, he explains the different forms of family governance. In part 3 he ascertains that a sufficient theoretical framework is currently lacking. The author illustrates that conclusion in a fourth part, on the horizontal application of human rights within the family as 'organisation'. He then concludes with a call for more scholarly attention to the subject. An elaborated theoretical framework may promote governance as a supportive lever for the functioning of the family as a whole, rather than being a burden for the governed family members.

5 Brazil and Portugal

Homoaffective Parentage in Relation to Medically Assisted Reproduction: a Parallel between Brazil and Portugal

Marianna Chaves

In the field of homosexuality an issue still excessively polemical is the one concerning the possibility of paternity or maternity (biological or adoptive) as a right to be exercised by homosexuals. An even more controversial issue is that of homosexuals' access to assisted reproductive techniques. On an analysis of two countries, Brazil and Portugal face this with opposite approaches in legislation and legal doctrine. In Brazil, the issue is not legislatively regulated. In Portugal, there is regulatory law. The question that arises is: what is better? An extremely reductive and discriminatory law or a true legal vacuum?

Several questions may be raised in this context. The first one is: is there indeed a right to parenthood? What should be said about surrogacy? In these cases, is the commandment of the child's best interest being heeded, the vector for any decision relating to an infant or teenager? Differences of understanding will always exist, especially in such a sensitive field as family law. But one fact must be accepted: any resolution and legislation in this context must be based on the principle of best interests of the – born or unborn – child and other constitutional principles such as equality, freedom, non-discrimination and human dignity, forgetting the prejudice rooted in society and the unfounded conjectures of homophobic judgments.

6 Canada

Polygamy and Unmarried Cohabitation

Martha Bailey

Canada's criminal prohibition against polygamy, defined as living in a conjugal relationship, came under scrutiny in the province of British Columbia. The government of that province asked its courts to rule on the constitutionality of the Criminal Code provision after its legal experts expressed doubt on that issue. British Columbia is home to Canada's most notorious group of fundamentalist Mormons, who practise plural "marriage" in accordance with their professed religious beliefs. Concerns about abuse and exploitation within the fundamentalist group have led to calls for more assertive enforcement of the law. The ruling on the constitutionality of the criminal prohibition against polygamy will either clear the way for prosecutions under that law or lead to formulation of a different strategy to address the problems within the fundamentalist group.

The Supreme Court of Canada made two important decisions in relation to unmarried cohabitation. In the first decision, the Court determined the law relating to resulting and constructive trusts. These trust doctrines are particularly important for unmarried parties, who do not enjoy statutory marital property rights in most provinces. In addition, the Court granted leave to appeal in a case from Quebec dealing with the support for parties who are not either married or a member of a civil union. Quebec is the only province in Canada that does not extend support rights and obligations to unmarried parties.

7 China

Gender Mainstreaming in the Family Law of the People's Republic of China

Wang Wei

Equality between men and women is not only literal or formal equality, but also and more importantly equality in real life, in essence and in result. Family law in the People's Republic of China, based on the principle of equality between men and women, promoting gender mainstreaming and boosting gender equality, is of great value. However, from the point of view of gender, the current law is not perfect. In order to protect women's rights in judicial practice, we should introduce the concept of gender, take women reasonably into account in legislation, and further advance the course of gender mainstreaming.

8 Denmark

Registered and Unmarried Partners in Denmark – Recent Legal Developments

Ingrid Lund-Andersen

In 2010, the rules on adoption and custody in the Danish Registered Partnership Act that made exceptions for same-sex couples were repealed. The way is now prepared for opening up marriage for same-sex couples, but the majority in Parliament is still against it. There has been a debate in Danish ecclesiastical circles about whether couples of the same-sex should have the right to register their partnerships in the National Church, and whether a new authorised liturgy should be introduced for blessing registered partnerships. In September 2010 the latter was recommended by an ecclesiastical committee for civil registered partnerships. A reform of the Inheritance Act in 2007 gave unmarried cohabitants of different sexes or the same sex the right to make a will, called an 'expanded cohabitation will', in which certain groups of cohabitants can decide to inherit from each other in the same way as if they were married and had separate property. However, the new Act did not contain any automatic legal rights for cohabitants, even though a legislative committee had recommended giving some legal rights.

9 England and Wales

This Child is My Child; This Child is Your Child; This Child Was Made for You and Me – Surrogacy in England and Wales

Mary Welstead

A number of legal decisions relating to both domestic and international surrogacy have come before the courts in the jurisdiction England and Wales since the issue was first discussed by the Warnock Committee in 1984 and the Brazier Committee in 1989. The decisions reveal some serious limitations to the regulation of surrogacy. Judicial statements have demanded that the practice and its minimal regulation be

reconsidered. This year's survey of the law in the jurisdiction outlines the law relating to surrogacy, analyses a number of the major decisions and suggests that there should be a reconsideration of the ethical aspects of surrogacy by a regulatory body, such as the Human Fertilisation and Embryology Authority or its replacement, and that new laws are enacted to reflect the ethical conclusions of the regulatory body.

10 France

Review of Family Law in 2010

Family Law Centre (Jean Moulin University, Lyon)

In this review of family law for the year 2010, the authors cover several subjects. During the last decade, the question of opening marriage up to same-sex couples has been the subject of great debate. French law does not recognise marriage between persons of the same sex. It is probable that European law will oblige states to legislate on the matter. On the other hand, while the recognition of homosexual marriages in France might be celebrated elsewhere, French membership of the European Union could well have serious consequences. This chapter also examines the converging of different kinds of conjugal status, homosexual parenting, adoption by homosexual couples, the development of family procedural justice, the simplification of divorce procedures, the social problems relating to the consequences of divorce as well as surrogacy. Some have tried to circumvent the French prohibition on surrogacy by resorting to a country that allows surrogate mothers in order to establish parenthood with the child in that country, in the hope of gaining recognition of that status in France.

11 Germany

Courts Strengthening Equality and New Ways in Cross-Border Matrimonial Property Questions

Nina Dethloff and Alexandra Maschwitz

2010 has been a year of landmark rulings favouring equality between the sexes with regard to parentage as well as equality between registered partners and spouses. Ongoing family law reforms mainly serve to implement the changes that the European Court of Human Rights and the German Federal Constitutional Court required. On the one hand, the position of fathers has been at the centre of attention of the courts for quite some time now. Even though the rights of unmarried fathers and biological fathers, whose parentage has not been legally recognized, were continually strengthened through several noteworthy rulings and law reforms, marked differences between the rights of mothers and fathers respectively still exist. Hence, recent judgments of the European Court of Human Rights and the German Federal Constitutional Court dealt with parental responsibility for unmarried parents and access rights for biological fathers. Equality was further at the heart of several rulings with regard to the treatment of registered partners as compared to spouses. The

milestone judgments of the German Federal Constitutional Court show a clear trend to narrow the gap between registered partnerships and marriage. Furthermore, legal cooperation between France and Germany created a new option for cross-border couples with regard to matrimonial property: a common matrimonial property regime was set up to allow spouses to choose a marital property regime on a contractual basis.

12 Hungary

How Cohabitants and Registered Partners Can or Cannot be a Child's Legal Parents in Hungary with a Special View to the 'Pater Est' Principle for Cohabitants

Orsolya Szeibert

In the last decade some essential modifications have affected Hungarian family law, primarily the law of non-marital partnerships. Although spouses can be common parents of a child in several ways, the same legal solutions are not or not so easily available to unmarried cohabitants and not available for registered partners (who will be same-sex partners). The issue this chapter deals with is how two cohabitants or registered partners can or cannot acquire paternal and maternal status with respect to a common child. This question has emerged again and again as cohabiting couples have a human desire to have their common child legally recognized. This contribution analyses how cohabitants and registered partners can be parents of a common child, if at all, and the theoretical background is shown. Also attempts at law reform are introduced.

13 India

Custom as an Important Source of Hindu Law: Its Usage in International Family Migration

Anil Malhotra and Ranjit Malhotra

Custom is an important source of Hindu law, having statutory recognition by virtue of the Hindu Marriage Act, 1955. There is a considerable body of case law on the subject. The Supreme Court of India and various High Courts in different parts of the country, including judgments from 2007 to 2011, have consistently reiterated the earlier settled position recognising customary law with regard to marriage and divorce. The underlying aim of this chapter is to ensure that parties to such genuine marriages and divorces avail themselves of the proper approach to custom, especially in the area of international family migration. Sometimes, overseas embassy authorities refuse to accept customary marriages and divorces. Specialist domestic family law expertise is pivotal in such situations.

14 Kazakhstan

Matrimonial Property and its Contractual Regulation in Kazakhstan

Mariya Baideldinova Dalpane

The family legislation of Kazakhstan keeps showing strong analogies with the family legislation of the other former soviet countries, that can be explained mainly by the common soviet heritage. Community of property is the legal regime of the property of the spouses which functions by default in the absence of a marriage contract. The marriage contract can replace the legal property regime with any other and apply it to all the property of the spouses or for just a certain part of it. This contract can regulate any other property relations of the spouses. It cannot regulate any personal non-property relations. The alimony agreement serves to determine the modality of payment of the alimony. It is made between the person who has the obligation by law to pay the alimony and the person who has right to receive it. Although good instruments to regulate property relations between spouses, neither marriage contracts nor alimony agreements are widespread in Kazakhstan. There appears, however, to be a growing interest in these contracts that is related to an increasing legal consciousness of the people in the sphere of family law and to the rising wellbeing and prosperity of the country.

15 The Netherlands

National and International Surrogacy: an Odyssey

Ian Curry-Sumner and Machteld Vonk

In recent years both the Central Authority for International Adoption and the Dutch Children Protection Board have been made aware of a number of cases concerning commercial surrogacy and the unlawful placement of foreign children in The Netherlands. Many of these cases have also received broad media attention. A number of Belgian cases have attracted particular attention in The Netherlands. The Dutch government operates a very restrictive policy with respect to commercial surrogacy. Incidents in recent years have led to numerous parliamentary questions being raised in the Second Chamber of the Dutch Parliament. The Minister of Justice has responded to the Dutch Parliament by commissioning research to be conducted into the nature and scope of the problems related to commercial surrogacy and the unlawful placement of children. The aim hereby is to ensure that more clarity can be gleaned as to what actually occurs in the countries where the possibilities are greater than in The Netherlands, as well as providing information with regards to the Dutch response upon the return of the commissioning parents to The Netherlands.

This contribution follows the path that a Dutch commissioning couple may follow in their search to conceive a child via surrogacy. The story starts with the possibilities for surrogacy in The Netherlands (Part 2). Subsequently, the couple travels to California to investigate the surrogacy possibilities there (and subsequently conceive a child) (Part 3). After the birth of the child, the couple returns to The Netherlands at which point Dutch private international law rules will apply (Part 4). The contribution ends with a brief evaluation of the current situation both with regards to the substantive rules, as well as the rules of private international law.

16 New Zealand

Discretion, Status and Money: the Essence of Family Law in New Zealand

Mark Henaghan

The big three of family law, discretion, status and money were prominent in New Zealand family law in 2010. Decisions about children inevitably obscure choices of value beneath the surface, bringing an element of randomness to decision-making. Status is about who has authority and power and who does not. Historically family law has given authority and power to those who are approved by the state and withheld it from others. This discrimination is at the heart of family law and needs constantly to be challenged and scrutinised. Money is the bottom line in family law disputes. Those who have money can afford to pay lawyers to draw out and win their cases, while those without it often have to settle for less than the law would otherwise entitle them to. Recent judgments on relocation, adoption and maintenance illustrate these three concepts.

17 Norway

Equal Parenthood: Recent Reforms in Child Custody Cases

Tone Sverdrup

As in many other countries, child law in Norway has become a key policy area with frequent legislative amendments. Over the past three years, significant changes to the Children Act reflect revised social conceptions and new psychological knowledge, as well as biotechnological achievements. In 2008, female spouses and cohabitants were given the status of co-mothers in the Children Act and were given the same access to medically assisted reproduction as different-sex couples. In 2010, the Children Act was amended again, under the keyword 'equal parenthood'. The new enactments concerned alternating residence, relocation inside the country, right to access and the use of violence in the upbringing of children. These changes are discussed in part 2 of this chapter. The legal procedure in custody cases was reformed in 2003, and the implementation of these changes has since been assessed: see part 3 of this chapter.

Equality has a strong footing in Norwegian legal heritage, and the objective of 'equal parenthood' has a favourable wind behind it. Child law has become an important arena for gender policy, and the final word has not yet been spoken in this respect. However, there is also significant awareness of the dangers of 'juridification' of private life, and the fact that children are harmed by being subjected to conflicts between the parents. Efforts to develop both procedural and substantive provisions that could prevent and ease conflict will therefore be given high priority in Norway in the years to come.

18 Samoa

Adoption and 'Vae Tama' in Samoa

Jennifer Corrin and Lalotoa Mulitalo

The tension between customary law and State law is often particularly acute in the area of family law, where the influence of custom and culture is strong. This chapter looks at the consequences of legal pluralism for Pacific family law in the context of adoption in Samoa. Commencing with a brief outline of Samoa's cultural and legal background, it looks at customary adoption. It then analyses the statutory provisions for adoption both before and after the recent amendments to the law and considers the relevant case law. The issues arising from the current regime are discussed and some suggestions for reform are put forward.

19 Scotland

'The Easing of Certain Legal Difficulties': Limited Legal Recognition of Cohabitation under Scots Law

Elaine E Sutherland

Non-marital cohabitants received scant attention from Scots law until the Family Law (Scotland) Act 2006 introduced provisions regulating their property during the cohabitation, on relationship breakdown and in the event of the death of one of the parties. These reforms did not seek to place cohabitants on a par with spouses and civil partners but, rather, sought 'the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair.' The legislation has been operating for some five years and this chapter provides a brief contextual background, examines the provisions themselves and, using the judicial decisions to date, assesses whether they are realising the modest goals set for them. It concludes that there is a need, not only to amend the statutory provisions, but to undertake a fresh evaluation of the goals the legal system should be seeking to achieve in regulating cohabitation.

20 Serbia

Inheritance Rights of a Surviving Spouse under Serbian Law

Olga Cvejić Jančić

The author analyzes the legal inheritance status of the spouse as an heir of the first and second order of succession, according to the regular statutory rules, as well as the other provisions which are different from the regular rules. These differences refer to the situations in which the surviving spouse loses the right to inherit from the decedent or in which his or her succession share will be reduced or augmented. The variations from the regular rules refer also to the situation where the surviving spouse may keep some items which are the part of succession, but where sometimes the surviving spouse should pay their value to other heirs. In addition, the chapter deals with the issue of the inheritance status of a spouse as a protected (necessary) and a testamentary heir.

21 South Korea

The Adoption System of Korea and Its Problems

Youmee Kim

The adoption system of Korea consists of common adoption under the 'Korean Civil Code', full adoption under the 'Korean Civil Code' and adoption under the 'Act on Special Cases Concerning the Promotion and Procedure of Adoption', ASPPA). Common adoption is established by the agreement of an adoptee and an adopter. It is not regarded as being in the best interests of the child because its effect is incomplete and it allows for adult adoption. The adoptee of common adoption cannot have the adopter's family name and the registration of the adoption is open. In response to demands, the government created the full adoption system in 2005, which took effect on 1 January 2008. ASPPA is a special law in the Korean Civil Code. Adoption under ASPPA is used as an easy form of adoption because the court's approval is not necessary. The common problems with these three ways of adoption are lack of protection of the child's right to express views and lack of intervention by the court. Common adoption should occur only with the Family Court's approval as in the case of full adoption. Likewise, under the adoption system in ASPPA, anonymous adoption should be only with the Family Court's approval. Where a full adoption is to be dissolved, the Family Court should intervene to prevent the automatic return to the natural parents. The protection of the child's right to express an opinion and the intervention of the Family Court in the process of adoption should be required, for these are basic factors in the protection of the interests of a child.

22 Switzerland

Ten Years Divorce Reform in Switzerland

Ingeborg Schwenzer

Since the 1970s Swiss family law has been amended step by step. The first step was the rules on adoption of children in 1973, followed by the general rules on the law of children in 1978 and the rules on the law in marriages in 1988. On 1 January 2000 the new rules on divorce law entered into force after preparations that had taken more than 20 years. Since then, further amendments to the family law provisions of the Swiss Civil Code as well as to other statutes relating to family law have been undertaken and still more are pending and expected to come into force in the far or near future. After giving some factual background on Swiss divorce and family statistics, this chapter gives a short overview of the development of the law on divorce during the last ten years since the coming into force of the reform.

23 United States

Constitutional Rights of Parents and Children in Child Protective and Juvenile Delinquency Investigations

Barbara Bennett Woodhouse

This report addresses the balance between the authority of the child protective system to investigate allegations of child abuse and the constitutional rights of parents and children to family privacy and autonomy. It also discusses rights of parents and children in the juvenile delinquency context, where the child is a suspected perpetrator of a crime rather than a victim. In the principal case discussed, *Camreta v Greene*, the Supreme Court was asked to decide whether, absent exigent circumstances, the 4th Amendment prohibition of unreasonable searches and seizures is violated when a child protective services investigator accompanied by a police officer interviews a suspected child victim at school, without first obtaining a judicial warrant or parental permission. While it remains to be seen whether the Court will reach the merits of the case, the oral arguments and outpouring of friend of the court briefs illustrate the difficulty of balancing values of child protection, public safety and family autonomy.

(In a decision delivered on 26 March 2011, the Supreme Court determined that the case had become moot, thus leaving open the controversial question of the 4th Amendment.)