

The International Survey of Family Law 2015 Edition

Published on behalf of
the International Society
of Family Law

General Editor: Professor Bill Atkin



Family Law

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The International Survey of Family Law

2015 Edition

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Published by Jordan Publishing Limited
21 St Thomas Street
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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978 1 78473 066 6

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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 in Recife, Brazil, from 6-9 August 2014. and regional conferences in Iowa City in June 2012, Israel in December 2012, Brooklyn in New York in June 2013, Seoul, South Korea in October 2013, Israel in January 2014 and Nassau, The Bahamas, in November 2014. A regional conference will take place in Chongqing China in October 2015. The next world conference will be in Amsterdam in 2017.

B ITS NATURE AND OBJECTIVES

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

- (1) The Society's objectives are the study and discussion of problems of family law. To this end the Society sponsors and promotes:
 - (a) International co-operation in research on family law subjects of 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) Co-operation with other international, regional or national associations having the same or similar objectives.
 - (e) Interdisciplinary contact and research.
 - (f) The advancement of legal education in family law by all practical means including furtherance of exchanges of teachers, students, judges and practising lawyers.
 - (g) Other objectives in furtherance of or connected with the above objectives.

C MEMBERSHIP AND DUES

In 2011 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.
 - Associate Membership, where members pay a reduced subscription fee and have the same benefits as full members except that they do not receive the *International Survey of Family Law*, and only full members are eligible to stand for office in the Society.
 - 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. Associate members pay €12.50 for one year, €30 for 3 years and €45 for 5 years.

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) and those of the world conference held in Lyon in 2011 in Hugues Fulchiron (ed) *Les solidarités entre générations/Solidarity between generations* (Bruylant, Brussels, 2013). These proceedings are commercially marketed but are available to Society members at reduced prices.

F THE SOCIETY'S PUBLICATIONS

The Society regularly publishes a newsletter, *The Family Letter*, which appears twice a year and which is circulated to the members of the Society and reports on its activities and other matters of interest. *The International Survey of Family Law* provides information on current developments in family law throughout the world and is received free of charge by members of the Society. The editor is currently Bill Atkin, Faculty of Law, Victoria University of Wellington, PO Box 600, Wellington, New Zealand 6140. The Survey is circulated to members or may be obtained on application to the Editor.

PREFACE

I am writing this the day after the news broke that the United States Supreme Court had decided in favour of gay marriage. This has brought a mix of jubilation and consternation. Sanford Katz, one of the International Society's great elder statesmen, described it to me as 'an historic day in the USA'. What cannot be denied is that the change to the marriage laws has been one of the most sweeping revolutions in Western family law – ever. It has happened so much more quickly than anyone imagined. The law has matched a change in popular opinion – or is it an instance of the law's playing a role in shaping opinion?

The United States illustrates the vital role of the courts, accompanied by an interplay between the Constitution and the various federal and State legislators. In New Zealand, my own country, which follows the Westminster tradition, it was a 77 to 44 vote in Parliament in 2013 that altered the law. No constitutional challenge was possible, nor was it in Britain following a similar vote. Curiously, New Zealand's neighbour, Australia, voted exactly the opposite way at about the same time. The Irish law, which is referred to in this edition of the Survey, took a different route. A country with a strong Catholic tradition, it voted in a referendum by nearly 2 to 1 in favour of marriage equality.

These developments in the West are not replicated in the rest of the world. Islamic, Asian, Pacific and African traditions (though not southern Africa) remain against a change in the marriage laws. Other family law issues predominate.

Apart from Ireland, same-sex marriage and allied issues are discussed in the chapters on Europe, France, Puerto Rico and Scotland. Other marriage issues arise in the chapters on Canada (forced marriages and polygamy), India (irretrievable breakdown) and Korea. Poland looks at de facto relationships, while South Africa and Fiji with Samoa consider family courts and mediation. Issues to do with reproduction and birth come up in England and Wales (forced caesarean sections), France (surrogacy), Ireland (surrogacy), Switzerland (surrogacy), and the United States (the interplay between the Obama health reforms and religious objections to contraception and abortion). Child law issues are found in Australia (sexual abuse), Japan (child abduction plus paternity), Korea (parental responsibility), Serbia (child abuse and neglect), Slovenia (deprivation of parental care), Scotland (child law reforms) and

Zanzibar (child law reforms and their interface with Islamic practices). Europe discusses gender assignment, Mauritius explores protection orders against domestic violence, New Zealand unpacks two significant appellate decisions on property issues, and South Africa looks at trusts.

Thanks are due to my devoted secretary Angela Funnell, my very fine research assistant Sean Brennan, the anonymous referees, all those who work for Jordans, especially Cheryl Prohett, and those who translated abstracts into French – Dominique Goubau and the team at Lyon.

Bill Atkin
General Editor
Wellington, New Zealand
June 2015

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AUSTRALIA

CHILD SEXUAL ABUSE ALLEGATIONS IN PARENTING DISPUTES IN AUSTRALIA AND THE EXERCISE OF JUDICIAL DISCRETION IN FAMILY LAW DISPUTES

*Lisa Young**

Résumé

Ce chapitre étudie comment la Cour Familiale Australienne traite des allégations de sévices sexuels portées lors de conflits parentaux, et quelle différence, s'il tant est qu'il y en ait une, un important amendement statutaire de 2012 pourrait apporter sur ce point. Ce chapitre débute par un rapide aperçu des lois fondamentales existantes et explique le 'test du risque inacceptable' mis en place avant 2012. On prétend que les nouvelles exigences législatives imposent d'abandonner ce test. La question est en réalité de savoir s'il devrait y avoir un 'test' pour les abus sexuels ou tout autre abus, ce qui soulève une question plus large, celle de la possibilité d'octroyer légalement au juge un pouvoir d'appréciation dans ce type de contentieux et des conséquences que cela impliqueraient en cas d'extension de cette prérogative à d'autres litiges. La seconde partie de ce chapitre envisage les récentes décisions judiciaires relatives à la nature des règles légales, de leurs lignes directrices et de leurs principes. Elle étudie également comment le test du risque inacceptable s'intègre dans cette taxonomie.

I INTRODUCTION

This chapter explores how the Australian family court deals with sexual abuse allegations against a parent in a parenting dispute and what difference, if any, an important 2012 statutory amendment should make to the way cases are decided.¹ The chapter begins with a brief outline of the relevant statutory provisions governing parenting disputes in so far as they are relevant to this issue and then explains the pre-2012 case law setting out what is known as the

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¹ This part of the chapter builds on ideas first formulated in L Young, S Dhillon and L Groves, 'Child Sexual Abuse Allegations and s 60CC(2A): A New Era?' (2014) 28 AJFL 233. For another view on the unacceptable risk test that came to the author's attention after finalisation of this chapter, see P Parkinson, 'Possibilities, probabilities and the standard of proof in determining an unacceptable risk of sexual abuse' (2015) 29 AJFL 1 forthcoming.

‘unacceptable risk test’. Against the backdrop of ongoing critique of this test, both academic and judicial, it is argued that this new provision demands the abandonment of the unacceptable risk test in sexual abuse cases in family court² and requires a child protection focused shift in decision-making. The chapter then touches on how this might affect decision-making.

The question of whether or not there should be a ‘test’ for sexual or other abuse cases raises the broader issue of the judicial formulation of guidelines for the exercise of the broad discretion conferred by the Family Law Act 1975 (Cth) (FLA);³ this is an issue that applies across the board to parenting and property disputes in Australia, where decision-makers have a very wide discretion. The second part of this chapter considers recent judicial statements about the nature of legal rules, guidelines and principles in these highly discretionary areas of Australian family law and explores where the unacceptable risk ‘test’ fits within this taxonomy.

II SEXUAL ABUSE ALLEGATIONS AGAINST PARENTS IN PARENTING DISPUTES: THE STATUTORY CONTEXT, THE CASE LAW AND THE CRITIQUE

Parenting disputes involving allegations of sexual abuse against a parent are some of the most difficult cases for family court judges to resolve. The difficulty arises because of three key factors: (i) actual sexual abuse of any kind is extremely hard to prove and that is especially true where the victim is a child, (ii) the very grave consequences of exposing a child to future sexual abuse by their parent and (iii) the damage that might be done to a child where a relationship with a non-abusing parent is mistakenly curtailed where sexual abuse is alleged but has not in fact occurred. The first of those factors is something of a constant. Processes may be improved to ensure the better collection of evidence and so on, but it will always remain the case that sexual abuse of a child will never be an easy thing to prove: there are invariably no witnesses, physical evidence is most often ambiguous or non-existent, the victim is generally a young child and an offender is unlikely to confess. There will of course be cases in family court where there is an allegation but patently no abuse,⁴ and a very few cases where there is very compelling evidence of abuse, such as a criminal conviction.⁵ The difficult class of case, however, is where the evidence neither allows the possibility of sexual abuse to be ruled out nor permits of any positive finding of abuse. In this situation, the other two factors

² In Australia, family law matters are heard in a range of family courts, depending on the jurisdiction: Family Court of Australia, Family Court of Western Australia and the Federal Circuit Court of Australia.

³ Unless stated otherwise, all references are to the FLA.

⁴ *Northcote v Northcote* [2012] FMCA fam 82; *Fielding v Mason* [2011] FMCAfam 1137; *Gennaro v Giavana* [2011] FamCA 910; *Jets v Maker (No 2)* [2011] FMCAfam 1473; *Biggins v Brown* [2011] FamCA 1027; *Houston v Houston* [2011] FamCAFC 178; *Tripp v Tripp* [2011] FamCA 598.

⁵ See for example *Auburton & McGuinness* [2013] FamCA 492.

mentioned above take centre stage and naturally lead decision-makers in different directions, in that the outcome of the case will depend on which is weighted more heavily: protection of the child from abuse or maintaining ties with the parent against whom the allegation has been made. The dilemma these cases present is inevitable, as the abuse is neither proved nor disproved.

While Australia's parenting laws are now quite complex, in so far as they impact on this discussion, the relevant provisions can be explained quite briefly. The best interests principle applies to all parenting disputes in Australia, namely the best interests of the child is the paramount consideration in the making of any parenting order: s 65C. Guiding the exercise of this broad judicial discretion is a list of mandatory considerations, divided into 'primary' and 'additional' considerations. The two primary considerations are the need to protect children from being exposed to harm (broadly defined) and the benefit to the child of maintaining a meaningful relationship with both parents. Since 2012⁶ the FLA has prescribed that, where these 'primary' considerations come into conflict (as in this situation), the judge *must* 'give greater weight' to the need to protect the child from being exposed to abuse: s 60CC(2A).

Prior to 2006 the provisions relating to parenting disputes were much simpler; while the child's best interests were the paramount consideration under the FLA there was only a single list of mandated considerations. It was always the case that, in assessing the best interests of the child under these former provisions, the court would consider the need to protect the child from future abuse as well as the dangers of curtailing contact between parent and child. However, these two matters were not identified as 'primary' considerations, and no statutory direction was included as to the way these competing considerations should be weighted. It was under this legislative regime that the law in relation to sexual abuse allegations against parents was developed.

The 1988 High Court case of *M v M*⁷ fell squarely into the difficult category, namely, while sexual abuse was not established to the requisite standard, nor could the possibility the abuse had occurred be discounted. In a brief decision, which arguably obscures rather than illuminates the court's reasoning, the High Court developed what is now commonly referred to as the 'unacceptable risk test'. Put simply, a court should not make a parenting order that would expose a child to an unacceptable risk of sexual abuse.⁸ The High Court held that:

- unlike a criminal court, the primary function of the family court was *not* to establish the truth or otherwise of the allegation (though findings on this point would be of great importance) but rather 'to make [the] ... order ... which will ... best promote and protect the interests of the child';⁹

⁶ This provision only applies where the application was filed after 7 June 2012; as these cases often take a long time to reach a final trial, there are still cases being decided where this provision does not apply.

⁷ [1988] HCA 68; (1988) 166 CLR 69; (1988) 82 ALR 577; (1988) 63 ALJR 108.

⁸ *Ibid* at [25].

⁹ *Ibid* at [20].

- the court should only make a positive finding of sexual abuse when satisfied to the high civil standard set out in *Briginshaw* (now reflected in s 140 of the Evidence Act 1995 (Cth)).¹⁰ In fact, the High Court said there are ‘strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so’;¹¹
- the fact sexual abuse is not proved does not determine the wider issue of what orders are in the child’s best interests;¹²
- the court must ultimately ‘determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assessing the magnitude of that risk’;¹³
- in assessing the risk and deciding what order to make the court must ‘achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access’.¹⁴

There have been no later High Court cases which have considered the modern application of this test or the impact on it of subsequent statutory modifications to the relevant sections. The Full Family Court of Australia has, of course, considered the test on many occasions. However, that consideration has really centred on critiques of the way the test has been applied in practice. Post-2012, at first instance it has been held that the recent legislative amendments have not changed the application of the test as laid out in *M v M*,¹⁵ and family courts continue to apply the unacceptable risk test to cases involving a child sexual abuse allegation against a parent.¹⁶

The critique of the unacceptable risk test has essentially been binary. On the one hand some critics argue that the test results in contact being too readily curtailed on the basis of unproven allegations.¹⁷ It has therefore been argued that, if the allegation is not proved, the evidence relating to it should be ignored in the making of the parenting order.¹⁸ While there has been a great deal of judicial comment emphasising the dangers of destroying parent/child relationships on the back of unproven allegations of sexual abuse, at no time has the Full Court endorsed the notion that evidence of abuse should be ignored if the abuse is not proven. Indeed, such an approach would be in direct conflict with the High Court’s position in *M v M*. On the other hand, some critics (including judges) have argued that the test is unhelpful, as the risk of future

¹⁰ *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.

¹¹ [1988] HCA 68 at [23].

¹² *Ibid* at [22].

¹³ *Ibid* at [24].

¹⁴ *Ibid* at [25].

¹⁵ *Tyler & Sullivan* [2014] FamCA 178 at [36].

¹⁶ See for example *Rivas & Stephen* [2014] FCCA 2144, particularly at [111].

¹⁷ For a recent critique to that effect, see D Fryer, ‘False allegations in family law proceedings: Using the Family Court as a sword, not a shield’ (2013) 3 Fam L Rev 137. See also *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 at [47].

¹⁸ See for example J Roebuck, ‘Allegations of Child Sexual Abuse: Should “Unacceptable Risk” be the Only Criterion for Refusal of Contact? An evaluation of *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 All ER 1’ (1996) 3 JCUCL 116.

abuse simply cannot be assessed without knowing whether past abuse has in fact occurred. It has further been argued that some judges have applied the test in such a way as to place greater emphasis on the dangers of a false positive finding of abuse, rather than the dangers of a false negative finding.¹⁹ This approach would result from placing greater weight on the importance of parental contact than on the dangers of sexual abuse to a child. So, some believe the test does not provide sufficient safeguards against false allegations while others think the test has little utility and has been applied at times in a way that does not sufficiently safeguard children from abuse.

I have argued elsewhere that the unacceptable risk test as applied in Australia carries with it the danger – particularly in a shared parenting legislative environment²⁰ such as Australia – that a failure to prove the abuse (which is most likely) leads too readily to a finding that there is no unacceptable risk of abuse. That is, that the question of the proof of abuse will too often become the ultimate determinant of the application. In effect, the test leads some decision-makers to conflate the question of proving past abuse and the assessment of future risk.²¹ While this is not consistent with *M v M*, the High Court failed to elaborate on how one applies a test based on risk without knowing the very thing that is essential to assessing that risk. The conflation of the enquiry into whether the abuse occurred and the determination of future risk is evident in a handy check list of questions routinely applied by Australian family courts.²² While the checklist is said to be aimed at assessing whether there is a future unacceptable risk of abuse, most of the questions relate to matters that go directly to whether or not past abuse occurred (eg the level of detail of any disclosure of abuse by a child). Thus, the assessment of future risk becomes a direct function of the strength of the proof of past abuse.

A recent example of the application of the unacceptable risk test which highlights the problems with its application can be seen in *Susskind & Dean*.²³ Here the trial judge concluded there was clear evidence which supported both the possibility of sexual abuse as well as the possibility of coaching by the mother. In relation to the abuse, the judge concluded that some of the disclosures by the two young girls were not coached and that the disclosures had a consistent theme to them which could be indicative of sexual abuse at some point in time.²⁴ Tree J concluded as follows:

¹⁹ See the discussion of this issue in J Fogarty AM, 'Unacceptable risk – A return to basics' (2006) 20 AJFL 249. See also R Carson, 'Supervised Contact: A Study of Current Trends and Emerging Tensions since the Introduction of the *Family Law Reform Act 1995* (Cth)', unpublished PhD thesis, December 2011.

²⁰ For a discussion of the shared parenting regime in Australia, see L Young, 'Australia: Reflections on the Shared Parenting Experience' in B Atkin (ed), *International Survey of Family 2012 Edition* (Jordan Publishing Ltd, 2012).

²¹ L Young, S Dhillon and L Groves, 'Child Sexual Abuse Allegations and s 60CC(2A): A New Era?' (2014) 28 AJFL 233.

²² *N and S and Separate Representative* (1995) 19 Fam LR 837 at [139].

²³ [2014] FamCA 500. Section 60CC(2A) did not apply to this case as it was initiated prior to 7 June 2012.

²⁴ At [123].

‘... the likelihood that the father has sexually abused either child is low, and certainly the evidence falls far short of persuading me, on the balance of probabilities (bearing in mind the gravity of the allegation) that the father has sexually abused the children. However that is not the end of the matter. Even though I think it unlikely that he has in fact done so, it would have to be conceded on the basis of relatively consistent disclosures over a relatively extended period of time, to a variety of people and in a variety of circumstances, that there is a reasonable basis to think that the father presents some risk of sexual harm to the children. In gauging the magnitude of that risk, I identify that the harmful outcome here is psychological injury to a child consequent upon abuse. In the event that abuse were to occur in the future, I would assess the probability of there being a psychological impact as high. However I do not assess the risk of the father sexually abusing either of the children in the short medium and long term to be substantial. The risks of him doing so can in any event be somewhat managed on a practical level, given that he lives, and intends to continue to live, with his mother, and the children are inevitably growing older and hence better able to protect themselves from harm.’²⁵

... The level of risk of sexual harm which he poses to the children is not such as to require supervision. It follows that there is no basis for requiring the father’s time with the children to be supervised.’²⁶

As this extract shows, it is impossible to ascertain in such a decision how the judge moves from finding that past sexual abuse is not proved to the requisite standard, to the finding that there is no unacceptable risk of abuse to the children in having unsupervised contact. Clearly the judge considered the evidence of abuse was at the lower end of the scale, and so simply concluded that the risk of future abuse was also at the lower end. But these are two different questions; the risk of future abuse may be very high if in fact the abuse did occur. The problem is the judge does not know whether it did or not, they only know that the evidence does not come close to reaching the very high civil standard of proof applied to a finding of sexual abuse. While one appreciates the very real dilemma faced by the judge, even prior to the introduction of s 60CC(2A) (which did not apply in this case due to the date of filing of the original application) one has to question whether sufficient regard was given in this case to the protection of the children. Regular overnight contact was ordered with the only safeguards being the fact the father happened to be living with his mother (though she was not required to supervise contact) and the reference to the children reaching an age where they might be able to protect themselves. One might think these are extremely minimal safeguards, if indeed the father was predisposed to sexually abuse his children; very little attention is given to establishing how these safeguards were sufficient.

²⁵ At [128].

²⁶ At [185].

III THE IMPACT OF SECTION 60CC(2A)

One might think that the introduction of s 60CC(2A) would clarify the application of this test, as it makes clear that the greatest weight must always be given to the need to protect the child from future harm. For example, this section would seem to counter any argument that evidence of harm can be discounted simply because the harm complained of has not been conclusively proved. A proven disclosure of abuse by a child, while not conclusive of the abuse complained of, remains an important consideration in deciding what orders to make to best protect a child from harm. It would be impossible to give protection from harm the greatest weight if all evidence pointing to the harm had to be ignored if the abuse were not proved. To make this point clearer, imagine a case where the evidence of abuse was compelling, but not quite sufficient to prove the abuse, or perhaps to establish that the perpetrator was the parent. How could a court put greatest weight on protecting such a child if it had to ignore the evidence of abuse? Further, this section also disallows an approach that places more weight on false negatives than false positives – the section is telling us that the greater danger is the abuse, not the loss of parental contact and this is precisely why the former has to be given more weight. Indeed, if one considers this from a rights perspective that must be true. Children have an unqualified right of protection from abuse, but only a qualified right to contact with their parents, dependent on it being in their best interests.

As noted above, this new section did not apply in *Susskind & Dean*. However, it seems unlikely it would have made any difference to the outcome if it had; to date there has been no judicial suggestion that this section has any significant impact on the way the court decides sexual abuse (or indeed other) matters. This is surprising for a number of reasons. First, this section was introduced in response to concerns that the family courts were prioritising parent/child contact over protection of children from exposure to violence. The new section was thus no codification of judicial practice, but rather a legislative direction aimed at impacting on outcomes in favour of greater child protection (though admittedly it was domestic violence more generally that was in the minds of the legislators in introducing this section). Secondly, *M v M* was decided under a different legislative regime which, while predicated on a balancing of the risks of abuse against the benefits of contact, was not subject to a legislative directive to give greater weight to the protection of the child from abuse. In other words, at the time *M v M* was decided the balancing of the competing factors was at large, whereas there is now a clear legislative direction as to the way these two matters must be balanced. Thirdly, the very words of the section demand a different approach. If the court is to give greater weight to the consideration of the need to protect the child from abuse, then it *must* give this primary consideration more weight than *any* other factor to be considered. Pre-2012 case law had held that, in some instances, ‘additional’ considerations could be more important than primary considerations. Take for example the case where a parenting dispute is between a biological parent and a long-standing social parent of the child – in such a case the relationship of the child to the social

parent may be given more weight than the potential benefit to the child of a meaningful relationship with the biological parent. However, that cannot be the case with protection from abuse and this is made abundantly clear by this new section. This section demands, as the explanatory memorandum spelled out,²⁷ that protection of abuse be the number one priority in *every* decision about a child. No other consideration justifies a failure to protect a child from abuse. This subsection is thus very significant and demands a new interpretation of the section overall. So, the court must consider carefully the evidence of abuse, and satisfy itself that the child is, as far as possible, protected from future abuse. In other words, the evidence of the abuse must form the basis on which the court determines how best to protect the child from future abuse. Only then can the court concern itself with the maintenance of parent/child relationships – and that is because, the moment the safety of the child is compromised for the sake of contact, then protection from harm has not been given the most weight.

In *Susskind & Kind* there were some very compelling and apparently unsolicited statements by the children indicative of sexual abuse by the father. However, there was also evidence of coaching by the mother at other times, and the mother presented very badly in many ways with the judge concluding there was the potential she was emotionally harmful to the children. Indeed, both parents had major shortcomings. This exposes another very real conundrum that can arise in these cases. Under the FLA, protection from harm includes both physical and emotional harm.²⁸ Pursuant to s 60CC(2A) more weight (let us say most weight) must be given to protection of the child from harm. But which harm? If the abuse did occur, then the mother is in fact vindicated in her behaviour and it cannot be said that she is emotionally harming the children by seeking to have their contact with the father supervised. If the abuse did not occur, and the mother has coached the children, then the only harm is the emotional harm being caused by the mother. (Of course, there is a third alternative, namely, a mistakenly held, but genuine belief of abuse.)

One might argue that the greatest weight ought to be given to what the decision-maker perceives to be the greater potential harm. But this judgment might be very difficult to make where real uncertainty exists. This might seem an insoluble problem for the decision-maker, as they will invariably never know whether the abuse occurred. However, there is arguably a rational and legally defensible way of approaching this type of case that fits perfectly with the intent of s 60CC(2A). Indeed, it fits with what a parent might do – and after all this jurisdiction is simply giving to the court parental decision-making power where parents cannot agree; the legislation seeks to direct decision-makers to exercise their discretion in the way a reasonable parent would. The court must focus on the evidence of the potential forms of harm and then consider ways in which those harms can be eliminated or at the very least the risk of them reduced significantly. For example, the judge in *Susskind* could have:

²⁷ *Family Law Amendment (Shared Parental Responsibility) Bill 2006 Explanatory Memorandum*, available at www.austlii.edu.au/au/legis/cth/bill_em/flaprb2006510/memo_0.html (last accessed 1 March 2015).

²⁸ FLA, ss 4(1) and 60CC(2A).

- refused to make final orders instead making interim orders, appointing a Family Consultant to supervise compliance with contact orders for a period of time;
- ordered initial daytime contact to the father supervised by the mother-in-law (if she was considered an appropriate person) moving to increased periods of contact giving the supervisory Family Consultant the right to bring the matter back before the court if they considered it necessary;
- ordered the parents to have the children attend protective awareness classes as well as ongoing counselling with an appropriate counsellor chosen by the court; and
- restrained the mother from taking the children to other medical specialists etc in relation to this issue.

The FLA certainly permits such orders to be made.²⁹ However, they would be unusual,³⁰ not least because they would be very resource intensive. But where you have a family in dysfunction, a one-off decision about such an important issue based on uncertainty is unlikely to provide the best solution for children. Of course, we know nothing about what happens to these families after final orders are made and so it would seem timely for there to be some research in this regard, which could help to identify the needs of these families. Even the special pre-trial case management process these cases have applied to them in Australia (known as ‘Magellan’) has only been evaluated against process based criteria. However, successful Magellan might be in diverting cases from final hearings, it is patently evident from looking at the family law cases reported in the major database, AustLII, that many parenting cases involving allegations of parental sexual abuse make it to a final trial. If the issue of sexual abuse cannot be resolved at trial, the normal outcome is final orders. An outcome such as that suggested above would be one way of ameliorating the potential dangers faced by having to make a final decision based on uncertainty.

There is unlikely to be sufficient political will at this point in time to provide the resources necessary to better support these families, but it is important to recognise where a problem can be addressed by reforming the law, and where it cannot. While the unacceptable risk test may be problematic and in need of reform, it is not the sole solution to providing better outcomes for children in these cases.

²⁹ See for example ss 11A (function of Family Consultants), 11F (court can order parties and children to attend appointments with Family Consultants including on its own initiative), s 65D (court’s power to make parenting orders), s 64B (meaning of parenting order) and s 65L (court can order Family Consultant to supervise compliance with orders).

³⁰ For a case where the court refused to make interim orders with a process attached, see *Baglio & Baglio* [2013] FamCA 105.

IV RULES, GUIDELINES AND PRINCIPLES – WHAT IS ‘THE LAW’ IN DISCRETIONARY DECISION-MAKING?

Over the years family law decision-makers have begun to use the unacceptable risk ‘test’ in cases involving other risks of harm to a child by a parent (eg domestic violence). However, despite the Full Court confirming its broader application,³¹ the unacceptable risk test is not applied universally in these other contexts. Indeed, in the Full Court decision of *Simmons and Anor & Kingley*,³² their Honours pointed out that the legislation provides a pathway for resolving parenting disputes which does not mention ‘unacceptable risk’.³³ In the context of the risk of harm to a child arising from the father’s alcohol abuse, their Honours held that the precise words of s 60CC(2)(b) – which refers to the ‘need to protect’ the child from harm – require only that ‘any relevant risk ... be identified and assessed’.³⁴ The trial judge in this case had used the expression ‘unacceptable risk’ on a few occasions and on appeal it was argued her Honour should have referred to the ‘unacceptable risk authorities’. The appeal failed because, according to the Full Court, the trial judge had considered the relevant evidence, identified the alleged risk and assessed whether, on the evidence, there indeed was a risk of harm to the child in the father’s care.

In the case of sexual abuse allegations against parents, however, judges routinely refer to the principle deriving from *M v M* as a ‘test’.³⁵ The Full Court in *Simmons* held that, despite prior judicial statements, the current words of the statute do not *demand* any assessment of the evidence against this ‘test’, but did not consider what this meant in the context of cases involving sexual abuse allegations. The same approach must surely apply in that area, as the words of the statute apply equally to all cases concerning the making of parenting orders. At first blush, therefore, the Full Court appears to be saying in *Simmons* that the unacceptable risk ‘test’ does not amount to a legally enforceable rule of law – that is, where it is claimed a child will suffer harm if certain parenting orders are made, in exercising its discretion as to what orders to make, the court is not legally required to make that decision by deciding whether there is an ‘unacceptable risk’ of harm. The arguably quite different process of identifying the risk, and assessing it, is all that the legislation demands as part of the overall process of determining what orders will best serve the interests of a child.

Where does this leave *M v M*? Rather than establishing a binding legal rule, *M v M* might be seen as providing a ‘guideline’ for the exercise of discretion.

³¹ *Johnson v Page* (2007) FLC 93-344.

³² [2014] FamCAFC 47 at [20].

³³ In fact FLA, s 60CG does refer to this term, but that section, despite its wording, is only relied on when considering harm to third parties: for further discussion of this section, see L Young, S Dhillon and L Groves, ‘Child Sexual Abuse Allegations and s 60CC(2A): A New Era?’ (2014) 28 AJFL 233.

³⁴ [2014] FamCAFC 47 at [20].

³⁵ See for example *Welchman Rubie v Zawada* [2013] FamCA 862 at [135]; *Matthews v Bender* (No 2) [2013] FamCA 74 at [19]-[21]; *Carbirne v Jetton* [2013] 310 at [26]; *Gilmore v Ray* [2013] FamCA 153 at [29]; *Farina v Farina* [2012] 666 FMCAfam at [93]ff.

Leaving aside the problems with this particular guidance (discussed above), what is the legal difference between judicial guidelines and legally enforceable rules of law, both of which may be directed at guiding the exercise of discretion?

The question of how the exercise of judicial discretion in family law is limited by ‘rules’, ‘guidelines’ or ‘principles’ espoused by superior courts has become particularly pertinent in a number of different family law areas in recent years. For example, the Full Family Court has considered this question very recently in some detail in the context of property disputes, in the case of *Hoffman v Hoffman*.³⁶ This case concerned the question of whether there is a binding rule of law, or guideline, in the case of so-called ‘special contributions’. Australian family property law confers family courts with the power to alter the interests of parties in property according to the justice of the case. The court can make whatever order it considers appropriate,³⁷ subject to it being just and equitable to make ‘an’ order, and to make ‘the’ order proposed.³⁸ The court is required to consider a range of matters in exercising this discretion, including very importantly the contributions of the parties to their property and to the welfare of the family.³⁹ To justify attributing greater weight (than in the ‘run of the mill’ case) to the contributions of mega-wealthy breadwinner spouses (the so-called ‘big money’ cases), the Australian family court has recognised what it first called ‘special skill’ and later ‘special contributions’.⁴⁰ Although this principle was said to apply to a range of potential situations (including contributions to the welfare of the family), in practice it has only ever been applied for the benefit of ‘breadwinner’ spouses, in cases where the parties are extremely wealthy and this has arisen, in the court’s eyes, through the enterprise of that breadwinning party (ie not by inheritance for example). The parties in *Hoffman* had net assets of about \$10m, and the husband claimed that his work on various properties they had owned during their 36-year relationship, and his active share trading, should be treated as ‘special contributions’ given their significance in the accumulation of the parties’ wealth. At first instance, Brewster FM (as he then was) refused to recognise any ‘special contribution’ on the part of the husband. In considering the application of the ‘special contributions’ authorities his Honour asserted the following about the impact of the key decisions which developed this principle:⁴¹

- The decision of the High Court in *Mallet v Mallet* [1984] HCA 21; (1984) 156 CLR 605 “need not and should not be followed” (at [57]);
- Such a course is permissible because the decision is “infected by gender bias” and its constituent judges were “... born between 1917 and 1933”, and

³⁶ [2014] FamCAFC 92.

³⁷ FLA, s 79(1).

³⁸ FLA, s 79(2) read in conjunction with *Stanford v Stanford* [201] HCA 52.

³⁹ FLA, s 79(4).

⁴⁰ For a discussion of this area, see L Young, ‘Australia: Gender Identity Dysphoria update and developments in property settlement law’ in B Atkin (ed), *International Survey of Family Law 2014 Edition* (Jordan Publishing Ltd, Bristol, 2014).

⁴¹ *Hoffman v Hoffman* [2014] FamCAFC 92 at [18].

- “[t]he zeitgeist of the era when they grew up, and the zeitgeist in 1984 when Mallet was decided, was vastly different to the zeitgeist today” (at [46]);
- The decision of this Court in *In the Marriage of Ferraro* [1992] FamCA 64; (1993) FLC 92-335 should not be followed ...’

Perhaps rather generously, the Full Court said this of his Honours’ statement:⁴²

‘[a]lthough not expressed in these terms, the thrust of his Honour’s reasons is plainly to the effect that nothing said by the High Court, or this Court, about “special contributions”, or expressions to similar effect, amounts to a legal principle or “binding rule of law” the failure to observe which constitutes an error of law.’

The Full Court agreed with this interpretation of Brewster J’s conclusion, and went on to consider more generally the scope of superior courts to fetter the judicial exercise of discretion by making rules and guidelines. Having reviewed what the High Court has said about this matter to date, their Honours concluded it was permissible for the Full Court to develop guidelines for the exercise of discretion, and in some instances to give those guidelines the force of a binding rule of law, such that an appealable error would arise if the rule were not applied. However, the Full Court acknowledged it would be very rare that a guideline would be given the force of a binding legal rule.⁴³

Having decided that none of the authorities on ‘special contributions’ created a binding rule of law, their Honours went on to say:⁴⁴

‘Indeed, given the nature and breadth of s 79(4); the myriad of contributions particular to individual marriages which the section requires to be considered; and the statements of principle from the High Court just referred to, it is highly unlikely that any such suggestion would or should have been made. This Court has itself counselled care in not elevating particular statements “to a ‘principle’” (see, for example, *Browne & Green* [1999] FamCA 1483; (1999) FLC 92-873, at [49]-[50]).’

However, it is not as simple as saying that binding rules of law must be complied with, but the same is not true of mere guidelines. The Full Court decision in *Browne & Green* provides further clarification of the difference between judicial guidelines and binding rules, and how they operate in practice. In that case the trial judge attributed to the husband sole responsibility for a very large marital debt, as he was the initiator, and had control of, the unsuccessful project which gave rise to the debt. The husband argued on appeal that this was not consistent with the *Kowaliw*⁴⁵ ‘principle’, which limited the attribution of pre-separation marital debts to one party alone, to cases where a party had either ‘embarked upon a course of conduct designed to reduce or

⁴² Ibid at [18] and [20].

⁴³ At [25].

⁴⁴ At [28].

⁴⁵ Deriving from the statements of Baker J in *Kowaliw* (1981) FLC 91-092 (particularly at 76,644).

minimise' the parties' assets or had acted 'recklessly, negligently or wantonly'. The trial Judge had considered *Kowaliw* but concluded:⁴⁶

'... the collection of expressions used there should [not] be seen as attaining the status of something akin to a code on the subject. Circumstances in which people find themselves or arrangements delivered up to them are infinitely variable and the question of where responsibility should lie for losses incurred is largely dependant [sic] upon those presented in the particular case. I do not consider this to be a detraction from the statement of general principle expressed in *Kowaliw*; it is more a recognition that it is just that – a general principle – and there must remain room for the infinite circumstances of individual cases.'

However, the Full Court saw the *Kowaliw* 'principle' as having more force than was accorded by this trial judge. While agreeing the 'principles stated by Baker J in *Kowaliw* certainly do not constitute any form of fixed code', and that they are simply 'guidelines for use in the exercise of the discretionary jurisdiction' under s 79, the Full Court noted that – despite the principle not having been previously analysed in detail by the Full Court – it had over time become a 'well accepted guideline ... the use of which assists in the achievement of the important goal of consistency within the jurisdiction'.⁴⁷ The Full Court went on to say:⁴⁸

'While care should probably be taken (in light of the statements by the High Court in *Norbis* to which we will shortly refer) not to elevate Baker J.'s statement to "a principle", we are nonetheless satisfied that it certainly is a well-accepted guideline within the jurisdiction which has received the endorsement of successive Full Courts.

Such a guideline can of course be departed from if a trial judge considers such a departure is warranted on the facts of a particular case. And such a departure by a trial Judge will be immune from appellate interference unless the trial Judge's order is beyond the range of a just and equitable order – although it would also seem to be incumbent on a trial judge to explain his or her reasons for departing from an established guideline.'

In this context, the Full Court is using the word 'principle' to mean a binding rule of law. In support of their approach, the Full Court cited the following statements of Mason and Deane JJ in the High Court decision of *Norbis*:⁴⁹

'The term "guidelines", though not commonly used in relation to judicial discretions, is familiar enough in the bureaucratic and administrative world, where it denotes rules or standards which are not binding and may be relaxed when it is expedient to do so in order to do justice in the particular case. Guidelines were what Lord Wright had in mind in *Evans v. Bartlam* when he said (at p. 488) (emphasis in original):

⁴⁶ [1999] FamCA 1483 at [43].

⁴⁷ Ibid at [44].

⁴⁸ Ibid at [49]-[50].

⁴⁹ Ibid at [50], emphasis in original.

“It is ... often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion ...”

... A failure to apply a guideline does not of itself amount to error, for it may appear that the case is one in which it is inappropriate to invoke the guideline or that, notwithstanding the failure to apply it, the decision is the product of a sound discretionary judgment. The failure to apply a legitimate guideline to a situation to which it is applicable may, however, throw a question mark over the trial Judge’s decision and ease the appellant’s burden of showing that it is wrong. However, in the ultimate analysis and in the absence of any identifiable error of fact or positive law, the appellate court must be persuaded that the order stands outside the limits of a sound discretionary judgment before it intervenes.’

The Full Court further referred to Brennan J in *Norbis* on the point of the impact of guidelines on discretionary decision-making:⁵⁰

‘There may well be situations in which an appellate court will be justified in setting aside a discretionary order if the primary judge, without sufficient grounds, has failed to apply a guideline in a particular case ... the failure will suggest that the discretion has not been soundly exercised. The distinction between such a guideline and a binding rule of law, though essential, may be thin in practice. But the distinction must be maintained and a failure to apply the guideline cannot be treated as an error of law: a failure to apply the guideline is no more than a factor which warrants a close scrutiny of the particular exercise of the discretion. What cannot be shut out is the discretion of a primary judge not to apply the guideline when the circumstances of the particular case show that its application would produce an unjust or inequitable result or that another approach would produce a more just and equitable result.

The only compromise between idiosyncrasy in the exercise of the discretion and an impermissible limitation of the scope of the discretion is to be found in the development of guidelines from which a judge may depart when it is just and equitable to do so guidelines which are not rules of universal application, but which are generally productive of just and equitable orders.’

The Full Court ultimately held in *Browne & Green* that it was ‘manifestly unjust to the husband in this case to depart from the *Kowaliw* guideline’.⁵¹

So, decision-makers have no discretion about whether or not a ‘principle’ or legal rule that guides the exercise of discretion is applied – it must always be. But there is discretion in applying a guideline (that guides the exercise of a broader discretion); as the Full Court said in *Lovine & Connor & Anor*,⁵² ‘the exercise is one of discretion within a discretion’. And that discretion to apply a guideline may miscarry if the failure to do so causes the overall exercise of discretion to miscarry. Thus the failure to apply the guideline suggests the need for close scrutiny of the ultimate exercise of discretion. So, where a discretionary guideline is not applied, an appellant must show that this

⁵⁰ Ibid at [51], emphasis in original.

⁵¹ Ibid at [53].

⁵² [2012] FamCAFC 168 at [103].

departure from the guideline was not justified by the facts and circumstances of the case, and also show this resulted in the overall discretion miscarrying.

Although a little complicated, this dichotomy can be expressed clearly enough. However, it does not resolve the question of how a decision-maker determines whether a statement by a superior court amounts to a legal rule, a guideline, or neither. Of course, if superior courts are explicit about their application of this taxonomy of legal principles – that is, make explicit whether they are endorsing/creating a guideline, a binding legal rule, or doing neither – then the matter will be much simpler for trial judges. This will leave a category of cases where there is neither a rule nor a guideline, but where it can be said that a review of case law shows that courts tend to exercise their discretion in certain ways, but are in no way bound to do so. In such cases the exercise of discretion can be challenged on appeal, but not on the basis of failing to follow any authority guiding the exercise of discretion, but rather because the exercise of discretion simpliciter is outside the bounds of a reasonable exercise of discretion.

But are the family courts always clear on the status of a ‘principle’? If they are not, then this may leave the law in a state of confusion. Returning to the Full Court’s latest statement in *Hoffman* about ‘special contributions’, the Full Court was clear there was no binding rule of law in that case; but was there a guideline, the departure from which had to be justified? The Full Court in *Hoffman* considered the jurisprudence on guidelines in some depth, concluding:⁵³

‘What emerges, relevant to the instant discussion is, first, that there is a distinction between a “legitimate guideline” and guidance or “statements of principle” that do not fit that description. Secondly, a “legitimate guideline” requires, axiomatically, a principle which can be identified with clarity and, in addition, the identification of a “particular class of case” to which it applies. As has been seen, a legitimate guideline should either apply to *all* cases or, at least, *all* instances within an identifiable category of case.

... there is little doubt that this Court, and indeed judges at first instance, have, from time to time, sought to identify “unifying principles” or “guidelines” designed to address the mischief, and remedy the problems, to which Gibbs CJ and, later, the Justices in *Norbis* refer. Contentions have been made periodically that “legitimate guidelines” exist in respect of a number of purported “categories of case”. Examples might be seen to include global/asset-by-asset approach; initial contributions; gifts and inheritances; waste; and conduct making contributions significantly more arduous.

Consideration of the decisions to which reference has just been made reveals that *some* statements within those cases *may* be described as “legitimate guidelines” in the sense just discussed while many others may not.

⁵³ At [41]-[44], emphasis in original.

The essential inquiry, however, is not one of categorisation or labelling; rather the task is to assess, relevantly, whether the authorities reveal a principle enunciated with clarity and clear indicia as to a class or category of case in which the clear principle can be applied universally so as to guide the exercise of the discretion in the sense earlier outlined.’

The Full Court went on to say there is no legitimate guideline relating to ‘special contributions’ applying to big money cases or indeed any other category of case. This clarification of the (non-) status of the so-called ‘special contribution’ principle is of course legally significant; but the need for this clarification after so many years and so many cases, including Full Court decisions, evidences the difficulty judges have in determining whether prior superior judicial statements of principle are binding rules, legitimate guidelines or neither. Indeed, the Full Court statement in *Hoffman* extracted above acknowledges a number of areas where there has been confusion as to the status of a principle aimed at guiding discretion. Just as in the decision in *Hoffman*, there is not space here to consider those various principles; the key point to be made is that superior courts need to be very clear on this issue. Some such statements can be found. For example, in *Lovine & Connor & Anor*⁵⁴ the Full Court stated that ‘[g]uidelines have been formulated over time in a number of well-known authorities concerning issues surrounding notional add-backs’.⁵⁵ The Court was clear the case law on notional add-backs did not give rise to any binding legal rules, but rather to guidelines that should be adhered to unless the justice of the case required otherwise. In the words of the Full Court in *Hoffman*, this would be a ‘legitimate guideline’.

What does this all mean for *M v M* and what many judges refer to as the ‘unacceptable risk test’? The decision in *Simmons* would seem to establish there is no ‘unacceptable risk’ rule of law, nor guideline – legitimate or otherwise. Rather, the words of the statute must be considered and applied, and thus any risk identified and assessed. However, as noted above, the Full Family Court has on other occasions referred to this as a ‘test’. For example, in *Nikolakis & Nikolakis*⁵⁶ the Full Court discussed the trial Judge’s approach to this ‘test’ without comment as to its characterisation. Why has this approach developed?

The High Court said in *M v M*:⁵⁷

In resolving the wider issue the court must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assessing the magnitude of that risk. After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and

⁵⁴ [2012] FamCAFC 168 at [101]-[102].

⁵⁵ In simple terms, a notional add-back is where an asset that has been disposed of is treated as notionally still being in the asset pool for distribution. For example, where one party has used pre-separation savings to pay their legal fees in the dispute the court will proceed as if that sum still existed in the hands of the party who disposed of the funds. For discussion of this principle, see *NHC v RCH* [2004] FamCA 633.

⁵⁶ *Nikolakis v Nikolakis* [2010] FamCAFC 52 at [24].

⁵⁷ *M v M* [1988] HCA 68 at [24].

evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare. The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of a child, is a fundamental matter to be taken into account in deciding issues of custody and access.'

The confusion, leading to the appeal in *Simmons*, no doubt arises from the later statement of the High Court:⁵⁸

'To achieve a proper balance, the *test* is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.'

Is this a 'test' designed to guide the exercise of discretion? On first blush it appears to be. First, it is expressed as pertaining directly to the process of how to 'balance' the risk of harm to a child against the benefit of parent/child contact. Second, it says that if the risk of harm with contact is 'unacceptable', then there should be no contact. Thus, the 'test' both directs itself at the exercise of discretion and indicates the required outcome of the exercise of discretion.

It might be argued this 'test' is not of the same ilk as those discussed above, but rather is a statement pertaining to the strength of evidence required to justify a no contact order. That is, it simply goes to the evidentiary threshold for the suspension of contact. However, the whole discretionary process of decision-making in family law is about assessing the evidence and deciding how to weigh that evidence (which often points in conflicting directions) in the exercise of discretion – thus principles designed to guide discretion are inextricably linked to the process of attributing weight to the evidence in the case. This is evidenced by the High Court in *M v M* talking of its test in terms of helping to 'achieve a proper balance'. By way of comparison, in *Hoffman* the Full Court referred to a potential guideline relating to 'conduct making contributions significantly more arduous'. This is a reference to *Kennon*⁵⁹ contributions in the area of property settlements, namely contributions made by spouses who are the victims of domestic abuse. Leaving aside the question of the nature of the principle in *Kennon* (that is, whether it is in fact a legitimate guideline), as with the unacceptable risk test, the *Kennon* principle hinges in part on the evidence establishing a certain threshold – that is, that the violent conduct has made the contributions *significantly* more arduous.⁶⁰ Thus the mere fact these principles speak to evidentiary thresholds does not preclude them from falling within the ambit of a legitimate guideline or indeed legal rule.⁶¹

⁵⁸ Ibid at [25], emphasis added.

⁵⁹ *Kennon and Kennon* [1997] FamCA 27; (1997) FLC 92-757.

⁶⁰ The application of *Kennon* is somewhat more complex than this in its totality, and indeed the level of violence will have to meet a certain threshold: see P Esteal, C Warden and L Young 'The *Kennon* "factor": Issues of indeterminacy and floodgates' (2014) 28 AJFL 1.

⁶¹ Another example might be 'the rule in *Rice v Asplund*' (*Rice v Asplund* [1979] FLC 90-725):

While it has not been made explicit by the court, I would argue Australian family courts have, understandably, approached the unacceptable risk test as if it were a binding rule of law in sexual abuse cases to the effect that contact should not be ordered where it exposes a child to an unacceptable risk of abuse. This in turn has meant decision-makers have felt obliged to assess the evidence against the standard of ‘unacceptable risk’. However, the Full Court decision in *Simmons* calls this interpretation of *M v M* into question, as do the matters discussed in the first section of this paper. But there is a further – and perhaps more obvious – reason for abandoning any reference to this test. The more one looks at this ‘test’, the more it becomes obvious that it is no real test at all. It is like saying ‘if the child is likely to be killed in the care of parent A, then parent A should not have care’. It is a self-evident statement of the natural outcome flowing from an assessment of the risk of harm. Merely putting the adjective ‘unacceptable’ (which really means nothing more than ‘not acceptable’ to the decision-maker) before ‘risk’ says nothing of how the court *should* deal with these difficult cases, where it is not possible to be certain about the actual degree of risk. In this context, ‘unacceptable’ has no content. And this is just what the Full Court is saying in *Simmons* – the court’s job is to identify any risks, assess them to the extent it can, and then, in light of the evidence, decide what parenting orders to make. Section 60CC(2A) provides the directive that, in making those orders, the most weight must be given to protection of the child from a risk of harm.

So, does *M v M* ‘reveal a principle enunciated with clarity and clear indicia as to a class or category of case in which the clear principle can be applied universally so as to guide the exercise of the discretion’?⁶² I would argue no.

V CONCLUSION

This chapter has discussed two extremely important – and interrelated – issues in Australian family law. Child sexual abuse allegations in family law parenting disputes generate considerable hysteria on both ‘sides’ – that is, those concerned about protection of children and those concerned about the rights of the wrongly accused. Like many areas in family law, there is a gendered aspect to this debate, with women being those who predominantly bring the allegations to court, and men those typically accused. While issues of gender may very well be relevant to an holistic consideration of how family courts deal with allegations of parental sexual abuse of children, the concerns raised in this chapter about the application of the unacceptable risk test need to be considered first as matters of legal principle. Indeed, it might be argued that closer judicial attention to the law in this area has the potential to reduce the likelihood that decision-making will succumb to, and be unconsciously (or even at times patently) influenced by, the hysteria.

this is a rule requiring a change in circumstances before a parenting dispute can be relitigated. For a discussion of the nature of this rule, see *Marsden v Winch* [2009] FamCAFC 152 at [40]ff.

⁶² *Hoffman v Hoffman* [2014] FamCAFC 92 at [44].

However, one problem in Australian family law that is evident in this area, like others, is knowing just what ‘the law’ is, given the broad discretion afforded to decision-makers. When the family court develops tests/rules/principles/guidelines that impact on the exercise of that discretion, it is not always clear precisely what the status and impact of the so-called test/rule/principle/guideline is. Decisions such as *Hoffman* highlight that there is a deal of uncertainty about a number of well-known legal principles that are routinely considered by the court. It behoves the Full Family Court, when endorsing or creating these legal principles, to be precise as to their intended operation. There is no doubt it is increasingly difficult for lawyers and law teachers (and judicial officers) to be certain about the status of a range of principles, particularly in relation to property disputes. Given the inherent difficulty in predicting the exercise of discretion in an area as complex as family law, where uncertainty can be eliminated, it should be.

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CANADA

SETTING BOUNDARIES

*Martha Bailey**

Résumé

La *Loi sur la tolérance zéro face aux pratiques culturelles barbares* a été adoptée par le Sénat canadien et était, au moment d'écrire ces lignes, en voie d'être adoptée par la Chambre des Communes du Canada. Cette loi apportera des modifications à la *Loi sur le mariage civil* en spécifiant (1) que le mariage requiert 'le consentement libre et éclairé de deux personnes à se prendre mutuellement pour époux'; (2) que nul ne peut contracter mariage avant d'avoir atteint l'âge de seize ans et (3) que nul ne peut contracter un nouveau mariage avant que tout mariage antérieur ait été dissous par le décès ou le divorce ou frappé de nullité par ordonnance d'un tribunal. Au chapitre de l'immigration, il sera désormais prévu qu'empportent 'interdiction de territoire pour pratique de la polygamie la pratique actuelle ou future de celle-ci avec une personne effectivement présente ou qui sera effectivement présente au Canada au même moment que le résident permanent ou l'étranger'. La loi modifie également plusieurs dispositions du Code criminel et elle crée de nouvelles infractions criminelles. Nous soutenons qu'en réalité cette loi ne changera rien aux règles actuelles qui s'intéressent déjà à la question des mariages forcés et à la polygamie.

Emperor Hadrian 'was the first to build a wall, eighty miles long, to separate the Romans from the Barbarians'.¹

I INTRODUCTION

In 2014, the governing Conservative Party initiated an effort to demarcate civilised marriage from barbaric forms of marriage. The Zero Tolerance for Barbaric Cultural Practices Act ('Zero Tolerance Act') was passed by Canada's Senate and, at the time of writing, was in the final stages of passage in Canada's House of Commons.² The ethos of Parliament in relation to this law reform

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¹ *Vita Hadriani*, 11, 2, in Ernestus Hohl (ed) *Scriptores Historiae Augustae*, (Leipzig: Teubner, 1971) 13.

² Senate Government Bill S-7, 41st Parliament, 2nd Session, last stage completed: second reading and referral to Committee in House of Commons, 23 March 2015, online at www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=6761928.

measure can be contrasted with that of 30 years ago, when legislators enacted a statute that significantly reduced the restrictions on marrying one's relatives.³ During the Senate debates at that time it was said that 'socially undesirable marriages ... take place for many, many reasons and we cannot and do not attempt to legislate to prevent those marriages'.⁴ The current Parliament has abandoned the relativistic notion that the shape of marriage should be left to individual choice to the greatest extent possible. Parliament, or at least the Conservative Government, is now reasserting a strong state interest in defining marriage and in prohibiting 'socially undesirable' or 'barbaric' forms of marriage.

If it becomes law, the Zero Tolerance Act will amend Canada's marriage, immigration and criminal laws. Canada's Civil Marriage Act will be amended to provide: (1) that marriage requires 'the free and enlightened consent of two persons to be the spouse of each other'; (2) that no person under the age of 16 may marry; and (3) that no married person may contract a new marriage until the previous marriage is dissolved by death or divorce and declared null.⁵ In regard to immigration, permanent residents and foreign nationals will be deemed inadmissible to Canada 'if they are or will be practising polygamy with a person who is or will be physically present in Canada at the same time as the permanent resident or foreign national'.⁶ The Zero Tolerance Act will also amend various provisions of the Criminal Code and create new criminal offences.⁷

The Zero Tolerance Act has been widely pilloried by opposition party members and in the media for its foolish name and unsubtle, politically motivated appeal to fear and xenophobia. As well critics point to its failure to add any significant positive measures to existing laws and introduction of measures that may actually hurt the women and children that it purports to protect.⁸ This chapter will assess the new Act on its merits, identifying problems and discussing the extent to which it will fill gaps or address problems in existing laws.

³ Marriage (Prohibited Degrees) Act, SC 1990, c 46.

⁴ 2 Parl Deb, Sen 1749 (18 December 1985) (Can).

⁵ Civil Marriage Act, SC 2005, c 33; Zero Tolerance Act, s 4.

⁶ Zero Tolerance Act, s 2.

⁷ Criminal Code, RSC, 1985, c C-46; Zero Tolerance Act, ss 6–12.

⁸ See, eg, Canada, House of Commons, Hansard, 41st Parliament, 2nd Session, 23 March 2015 (Robert Aubin, Laurin Liu, Matthew Dubé, Marjolain Boutin-Sweet, Pierre Dionne Labelle, Raymond Côté, Isabelle Morin); Laura Payton, "Barbaric cultural practices" bill all about politics, Elizabeth May says' CBC News (13 March 2015), online at: www.cbc.ca/news/politics/barbaric-cultural-practices-bill-all-about-politics-elizabeth-may-says-1.2994274; Michael Spratt, 'The Honour Killing Bill: Who's the Barbarian Now?' iPolitics (18 November 2014), online at www.ipolitics.ca/2014/11/18/the-honour-killing-bill-whos-the-barbarian-now; Stephanie Levitz, 'Senators challenge name, need for Conservative marriage bill' *Globe & Mail* (4 December 2014); Reva Seth, 'Laws meant to protect women can have the opposite effect' *Ottawa Citizen* (5 December 2014), online at <http://ottawacitizen.com/news/national/reva-seth-laws-meant-to-protect-women-can-have-the-opposite-effect>; Hannah James and Megan Rowney, 'To Honour and Obey: Women and girls forced to wed against their will' *Global News* (15 April 2015), online at <http://globalnews.ca/news/1940127/to-honour-and-obey-women-and-girls-forced-to-wed-against-their-will>.

II CIVIL MARRIAGE ACT AMENDMENTS

(a) Consent to marriage

From the time of Roman law and later Christian canon law, the consent of both parties has been required for a valid marriage.⁹ Human rights conventions to which Canada is a party enshrine this imperative. For example, the International Covenant on Civil and Political Rights provides that: ‘No marriage shall be entered into without the free and full consent of the intending spouses.’¹⁰ This requirement of free consent of both parties to a marriage is embedded in Canadian law. In Canada’s one civil law jurisdiction, Quebec, the requirement is included in the Federal Law-Civil Law Harmonization Act, No 1.¹¹ In the rest of Canada the common law rule applies. Under the common law of Canada, duress will render a marriage voidable at the instance of the coerced party.¹²

The government claims that the Zero Tolerance Act will address the problem of forced marriage,¹³ in part by adding to the Civil Marriage Act a provision that ‘the free and enlightened consent of two persons to be the spouse of each other’ is a requirement of a valid marriage. But the consent of both parties is *already* required in order to create a valid marriage. Therefore the proposed addition to the Civil Marriage Act simply replicates current law. And the Zero Tolerance Act does not address the challenge of distinguishing between forced marriages and those resulting from permissible pressure.

The common law relating to the requirement of consent and the doctrine of duress was extensively reviewed in the 1988 case of *S(A)*,¹⁴ where a 16-year-old girl sought an annulment. The girl’s mother and stepfather had pressured her into marriage with a man who wanted to immigrate to Canada. The parents did so in exchange for a payment of \$2,000. The girl objected but finally went through with the marriage ceremony because of the pressure exerted on her – pressure to which she was particularly sensitive because she had been sexual abused by her stepfather. The girl did not live with the ‘husband’ after the ceremony; there was no sexual intercourse; and the ‘husband’ later left Canada.

The judge who granted the annulment noted the caution with which earlier courts approached petitions for annulment on the grounds of duress, quoting an English case from 1886:¹⁵

⁹ AM Prichard, *Leage’s Roman Private Law* (3rd edn, St Martin’s: New York, 1967) at 104–105; Shulamith Shahar, *Childhood in the Middle Ages* (Routledge: London, 1990) at 224; Christopher Brooke, *The Medieval Idea of Marriage* (OUP: Oxford, 1991), at 140.

¹⁰ International Covenant on Civil and Political Rights, Canada, 19 December 1966, Can TS 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976), art 23(3). (SC 2001, c 4), s 5.

¹¹ *S(A) v S(A)* (1988), 65 OR (2d) 720; 15 RFL (3d) 443 (UFC) [*‘S(A)’*].

¹³ Government of Canada, Press Release: ‘Protecting Canadians from Barbaric Cultural Practices’ (5 November 2014), online at <http://news.gc.ca/web/article-en.do?nid=900399>.

¹⁴ Above n 12.

¹⁵ *Scott v Sebright* (1886), 12 PD 21 at paras 23–24.

‘The Courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. True it is that in contracts of marriage there is an interest involved above and beyond that of the immediate parties. Public policy requires that marriages should not be lightly set aside, and there is in some cases the strongest temptation to the parties more immediately interested to act in collusion in obtaining a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal, but they in no wise alter the principle or the grounds on which this, like any other contract, may be avoided.’

Although the judge agreed that courts must exercise care and circumspection to ensure that the alleged duress has been established, he pointed out that now there is no need for parties to seek annulment because divorce is readily available. Therefore concerns in regard to collusion (an agreement or conspiracy to fabricate or suppress evidence in order to get a divorce¹⁶) have now largely disappeared. The courts may therefore approach a proceeding for nullity in a manner no different from that of any other matrimonial cause and without the extra scrutiny that was exercised in the past.

The judge affirmed that a valid marriage is grounded in the consent of the parties, and that oppression may vitiate consent. The question is whether the applicant’s mind at the time of the marriage ceremony was so overcome by oppression that there was an absence of free choice, no real voluntary consent to the marriage. The test is not whether a person of reasonable fortitude would have been so affected, but whether the applicant was. The oppression may be generated by fear or by pressure or by persuasion. It is not necessary to show physical force. The court will look at the facts of each case and consider all relevant circumstances, including the age and maturity of the applicant, the applicant’s emotional state and vulnerability, the lapse of time between the conduct alleged as duress and the marriage ceremony, whether the marriage was consummated, whether the parties lived together as husband and wife, and the time between the marriage and the application for annulment. These principles have been applied in more recent cases. Judges focus on whether the coercion reached a degree that it vitiated consent to the marriage.¹⁷

The issue of duress has arisen in the context of arranged marriage cases. Arranged marriages are distinguished from forced marriages on the basis that ‘while the families may play a dominant role in arranging the marriage, in arranged marriages, the final decision depends on the consent of the party to the marriage’.¹⁸ However, family pressure to agree to an arranged marriage may make it difficult to maintain this distinction. ‘Intense psychological pressure and manipulation and threats of abandonment or excommunication from the family unit can sometimes be used to induce the parties to acquiesce in

¹⁶ Divorce Act, RSC, 1985, c 3 (2nd Supp), s 11(4).

¹⁷ *RH v RT*, 2011 BCSC 678.

¹⁸ Neha Jain, ‘Forced Marriage as a Crime Against Humanity’ (2008) 6 *Journal of International Criminal Justice* 1013 at 1028.

the marriage arrangement.’ The question then is whether this sort of extreme family pressure meets the legal test of duress that vitiates consent.

Although the legal test of duress in the context of arranged marriage has been somewhat softened in other jurisdictions,¹⁹ the more lenient approach has not yet been adopted in Canada. In the 1980 *Parihar v Bhatti* case, the court refused to grant an annulment to a woman, age 24, who was pressured by her family to marry a man she barely knew.²⁰ The court noted that: ‘The plaintiff was clearly caught in such a dilemma. Had she wanted to alienate herself completely from her family, probably necessitating leaving home, she could have refused to go through with the marriage.’²¹ But this was insufficient to satisfy the test of duress. The court said: ‘There are many situations where families, or others, bring great persuasion upon a person to enter into marriage. However, the cases indicate that the duress sufficient to set aside the marriage must be of such a nature that her powers of volition were so affected that it really was no consent.’²²

The Zero Tolerance Act does not address the challenge of distinguishing arranged marriages in which legitimate family pressure played a role from forced marriages. Common law principles will continue to guide the courts, although there may be an increased willingness to apply a less stringent approach to arranged marriage cases in light of developments in other jurisdictions. In any case, those who are not able to have their marriages annulled can always obtain a divorce on the basis of separation for one year, adultery or cruelty.²³ This alternative remedy is available for those who summon the courage to face the disapprobation of their families and seek dissolution of an arranged marriage.

While adding nothing to current marriage law in regard to duress, the Zero Tolerance Act may expand the scope for impugning marriages for lack of consent in the case of fraudulent misrepresentation. The new law will require ‘the free and *enlightened* consent of two persons to be the spouse of each other’.²⁴ Those who are misled by fraudulent claims as to the characteristics of their spouse may argue that their consent to the marriage was not ‘enlightened’ and that they would not have consented to the marriage had they known the truth.

The current law is enunciated in the 1971 *Iantsis* case, where the Ontario Court of Appeal ruled that a fraudulent or innocent misrepresentation will not affect the validity of a marriage unless the misrepresentation induces an operative

¹⁹ See, eg, David Bradley, ‘Duress and Arranged Marriages’ (1983) 46 *The Modern Law Review* 499; David Bradley, ‘Duress, Family Law and the Coherent Legal System’ (1994) 57 *Modern Law Review* 963.

²⁰ (1980), 17 RFL (2d) 289 (BCSC) [*Parihar*].

²¹ *Parihar* at paras 7–8.

²² *Parihar* at para 11.

²³ Divorce Act, RSC, 1985, c 3 (2nd Supp), s 8.

²⁴ Above n 5. Emphasis added.

mistake, such as a mistake as to the nature of the ceremony or as to the identity of one of the parties to the marriage.²⁵ Misrepresentations as to a person's character or personality traits do not vitiate consent to marriage.²⁶ For example, in *Iantsis* the court denied an annulment to a plaintiff who sought relief on the grounds that her husband had purported to marry her for love but then revealed that he did not love her and had married just to get into Canada. It remains to be seen whether the new requirement of 'enlightened' consent will modify the application of the doctrine of misrepresentation in marriage cases.

(b) Age of Marriage

Legislative competence in relation to marriage is divided between the federal Parliament and the provincial legislatures. Canada's constitution gives the federal Parliament legislative jurisdiction over 'marriage and divorce'.²⁷ This means that the federal government has exclusive jurisdiction over the *essential* validity of marriage, including issues of capacity to marry.²⁸ But the provinces have legislative jurisdiction over 'solemnization of marriage in the province'.²⁹ This means that the provinces have exclusive jurisdiction over the formal validity of marriage.³⁰ Every province and territory has legislation regarding the formal requirements of a marriage conducted within its territory.

Parliament has not enacted any legislation regarding the age of marriage except in relation to the province of Quebec, where the minimum age of marriage is set at 16.³¹ Under the common law applicable in the rest of Canada, the marriageable age for boys is 14 and for girls 12.³² Presumably because child marriage is not a problem in Canada, Parliament previously has not felt any pressure to address this gap and has instead left it to the provinces to prevent child marriages by means of laws relating to the formalities of marriage. The provinces do restrict minors from obtaining a marriage licence, but their rules vary.

In the provinces of Ontario and Newfoundland, marriage licences may be issued to minors who are at least 16 years old provided consent is given by the parents or guardian or a court – licences cannot be issued to those under the age of 16 under any circumstances.³³ Ontario raised the minimum age of marriage to 16 back in 1977 at the same time that the province abolished all distinctions between children born within and outside of wedlock. Attorney

²⁵ *Iantsis (falsely called Papatheodorou) v Papatheodorou* [1971] 1 OR 245; 15 DLR (3d) 53 (OCA) [*Iantsis*].

²⁶ *Sahibalzubaidi v Bahjat*, 2011 ONSC 4075.

²⁷ Constitution Act, 1867, 30 & 31 Victoria, c 3 (UK), s 91(26).

²⁸ *Hill v Hill* [1929] 2 DLR 735 (Alta CA).

²⁹ Constitution Act, 1867, 30 & 31 Victoria, c 3 (UK), s 92(12).

³⁰ *Kerr v Kerr* [1934] SCR 72, 1933 [*Kerr*].

³¹ Federal Law-Civil Law Harmonization Act, No 1, (SC 2001, c 4), s 56.

³² *S(A) v S(A)* (1988), 65 OR (2d) 720; 15 RFL (3d) 443 (UFC).

³³ Marriage Act, SNL 2009, c M-1.02, s 18(a); Marriage Act, RSO 1990, c M.3, s 5.

General Roy McMurtry drew the link between age of marriage and the rules relating to ‘illegitimate’ children during the legislative debates:³⁴

‘With respect to the age of marriage, I think the original proposal was to leave the age at 14 ... [P]art of the history was related to the stigma of illegitimacy that often attached upon children who were born of parents under the age of 16 years. So it was thought, wisely or not, that rather than have the stigma of illegitimacy attached to a child, the parents therefore should be married to avoid that, even though they might be 14 or 15 years old. In view of the fact that we are now in the process of very wisely and sensibly removing the stigma of illegitimacy, in my respectful view it certainly removes much of the reason for recognizing marriages of people as young as 14 or 15.’

While Ontario was early to move on this issue, across Canada now all legal distinctions between children born within and those outside of wedlock have been removed. This positive reform is consistent with Convention on the Rights of the Child, which provides that ‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind ...’³⁵

Despite the abandonment of concerns in regard to minors giving birth to ‘illegitimate’ children, it is still the case that (outside of Quebec, Ontario and Newfoundland) marriage licences may be granted to minors under the age of 16, and some provinces explicitly provide for doing so in cases of pregnancy. The provinces of Alberta and Prince Edward Island provide for minors under the age of 16 to obtain marriage licences if the female is proven to be pregnant or the mother of a child.³⁶ The Northwest Territories and Nunavut allow marriage licences to be granted to minors under the age of 15 if the female is proven to be pregnant or the written permission of the Minister is given.³⁷ The remaining provinces and territory permit licences to be granted to those under the age of 16, but do not permit the grant of a licence on the pregnancy of the female. British Columbia, Manitoba, New Brunswick and Nova Scotia and Saskatchewan empower courts to authorise the issuance of a marriage licence to minors under the age of 16.³⁸ The Yukon Territory is distinctive in authorising licences to be issued to minors with the consent of parents or

³⁴ Ontario, Legislative Assembly, Official Report of Debates (Hansard), 31st Parl, 1st Sess, No 23 (19 October 1977) at 882.

³⁵ Convention on the Rights of the Child, 28 May 1990, Can TS 1992 No 3, UN General Assembly Doc A/RES/44/25, art 2(1). When drafting the CRC, some parties proposed including a specific provision to ensure that children born outside of wedlock would enjoy the same legal rights as those enjoyed by children born within wedlock. However, states were unable to reach agreement on such a provision: Sharon Detrick, *A Commentary on the United Nations Convention of the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1999) at 75–76.

³⁶ Marriage Act, RSA 2000, c M-5, s 20(2); Marriage Act, RSPEI 1988, c M-3, s 17.

³⁷ Marriage Act, RSNWT 1988, c M-4, s 21; Marriage Act, RSNWT (Nu) 1988, c M-4, s 21.

³⁸ Marriage Act, RSBC 1996, c 282, s 29; Marriage Act, CCSM c M50, s 18(1)(d); Marriage Act, RSNB 2011, c 188, s 21; Solemnization of Marriage Act, RSNS 1989, c 436, s 21; The Marriage Act, 1995, SS 1995, c M-4.1, s 19.

guardians or a court order without setting any minimum age or providing special rules for those under the age of 15 or 16.³⁹

Although under the laws of all provinces and territories except for Ontario, Quebec and Newfoundland, marriage licences may be granted to minors under the age of 16, Statistics Canada reports that there are virtually no marriages in Canada involving parties that young.⁴⁰ And I was unable to find any reported cases in which courts authorised parties under the age of 16 to marry. It seems, then, that Canada does not have a problem relating to marriages of those under the age of 16. Nevertheless, it is advisable for the federal government to exercise its exclusive legislative power over capacity to marry by setting a minimum age.

The government argues that the Zero Tolerance Act will prevent ‘underage’ marriages and proposes 16 as the appropriate age of marriage.⁴¹ However, marriage below the age of 18 is considered ‘underage’ marriage and prohibited in some countries, including Russia and China.⁴² And UNICEF takes the position that marriage below the age of 18 is ‘a fundamental violation of human rights’.⁴³ The government has not explained why it chose the age of 16 as the appropriate age of marriage. Nor has it referred to the calls of international bodies such as UNICEF to raise the minimum age of marriage to 18. After refraining for so long from exercising its power to set the age of marriage, it would seem advisable to consider the matter more carefully and to take into account shifting international norms.

(c) Polygamous marriage

It is not possible to enter into a polygamous marriage in Canada. The Civil Marriage Act currently defines marriage as ‘the lawful union of two persons to the exclusion of all others’.⁴⁴ A married person cannot marry again unless the existing marriage is dissolved by death, divorce or annulment. Any purported ‘marriage’ by someone in a prior subsisting marriage is void.⁴⁵ The Zero Tolerance Act will amend the Civil Marriage Act by adding the provision that: ‘No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null by a court order.’⁴⁶ The new provision will add nothing to existing law.

³⁹ Marriage Act, RSY 2002, c 146, ss 40–42.

⁴⁰ Anne Milan, ‘Marital Status: Overview 2011’ Component of Statistics Canada Catalogue no 91-209-X (July 2013) at 2.

⁴¹ Canada, House of Commons, Hansard, 41st Parliament, 2nd Session, 23 March 2015 (Chris Alexander).

⁴² Olga Khazan, ‘A Strange Map of the World’s Child Marriage Laws’ *The Atlantic* (9 March 2015), online at www.theatlantic.com/international/archive/2015/03/child-marriage-map/387214.

⁴³ UNICEF, ‘Child Marriage is a Violation of Human Rights but all too Common’ (December 2014), online at <http://data.unicef.org/child-protection/child-marriage>.

⁴⁴ Civil Marriage Act, 2005, c. 33, C-31.5, s 2.

⁴⁵ *Bate v Bate* (1978), 1 RFL (2d) 298 (Ont HC).

⁴⁶ Zero Tolerance Act, s 4.

III IMMIGRATION AND REFUGEE PROTECTION ACT AMENDMENTS

Canada's immigration laws protect Canada's monogamous character by excluding multiple spouses from the family reunification programme and from the list of family members who can immigrate with a successful applicant.⁴⁷ In addition, applicants who qualify independently may be deemed 'inadmissible' for 'criminality'. This means that applications will be turned down if there are reasonable grounds for an immigration officer to believe that an applicant will commit the criminal offence of polygamy.⁴⁸

The Zero Tolerance Act will more directly carry out the policy of not permitting immigration of polygamists by providing that:⁴⁹

'A permanent resident or foreign national is inadmissible on grounds of practising polygamy with a person who is or will be physically present in Canada at the same time as the permanent resident or foreign national.'

It will no longer be necessary to use 'criminality' as the basis for ruling that the applicant is inadmissible. This direct approach is similar to that used in other countries, for example, the US.⁵⁰

As well, the Zero Tolerance Act will for the first time prevent even temporary visits to Canada by polygamous families. The Minister of Citizenship and Immigration made clear that: 'To ensure polygamy is not practised on Canadian soil, this bill proposes to ban foreign nationals who practise polygamy from

⁴⁷ The *Immigration and Refugee Protection Regulations* (SOR/2002-227), s 117(9)c, provide: '(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if . . . (b) the foreign national is the sponsor's spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended; (c) the foreign national is the sponsor's spouse and (i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or (ii) the sponsor has lived separate and apart from the foreign national for at least one year and (A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or (B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor . . .'

⁴⁸ See, eg, *Ali v Canada (Minister of Citizenship and Immigration)* [1998] FCJ No 1640 (TD); *Atwaa v Canada (Minister of Citizenship and Immigration)* [1999] FCJ No 103; [1999] ACF no 103; 162 FTR 209; 85 ACWS (3d) 892. The Immigration and Refugee Protection Act, SC 2001, c. 27, I-2.5, s 36(2)(d) provides: 'A foreign national is inadmissible on grounds of criminality for committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.' This must be read in light of s 33, which provides: 'The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.' The Criminal Code, RSC, 1985, c C-46, s 293 creates the criminal offence of polygamy.

⁴⁹ Zero Tolerance Act, s 2.

⁵⁰ See, eg, Immigration and Nationality Act, 8 USC.1182, s 212 (a)(10)(A): 'Any immigrant who is coming to the United States to practice polygamy is inadmissible.'

entering Canada with any of their spouses, even on a temporary basis.⁵¹ This policy is consistent with Canada's criminal offence of polygamy, which by its terms applies even to those legally married in their home country and simply passing through or temporarily visiting Canada.⁵² In contrast, the US Uniform Model Penal Code provision on polygamy specifically exempts from its application 'parties to a polygamous marriage, lawful in the country of which they are residents or nationals, while they are in transit through or temporarily visiting this State'.⁵³ The wisdom of not only criminalising but now also ejecting from Canada those temporary visitors who have legally entered into polygamous marriages in their home countries is open to question. Canada's monogamous character is probably hardy enough to survive the temporary presence of polygamists.

IV CRIMINAL CODE AMENDMENTS

The Zero Tolerance Act contains several amendments and additions to the Criminal Code. In regard to sexual offences involving complainants aged 14 or 15, it will no longer be a defence that the accused is less than 5 years older and is married to the complainant.⁵⁴ The change reflects the fact that marriages of those under the age of 16 will no longer be possible.

The Zero Tolerance Act will also alter Canada's criminal law on provocation. Currently the Criminal Code provides that: 'Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.'⁵⁵ The Criminal Code further provides that: 'A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.' The Zero Tolerance Act will add the additional requirement that the conduct of the victim constitute an offence punishable by at least 5 years' imprisonment.⁵⁶ This amendment is, according to the government, aimed at 'honour' killings, that is, murders of relatives, particularly females, who are perceived to have brought dishonour on a family.⁵⁷ As has been pointed out by critics of the Zero Tolerance Act, the provocation doctrine has never been applied to honour killings in Canada.⁵⁸ The Ontario Court of Appeal commented that: 'Provocation does not shield an accused who ... acted out of a sense of revenge

⁵¹ Canada, House of Commons, Hansard, 41st Parliament, 2nd Session, 23 March 2015 (Chris Alexander).

⁵² Criminal Code, RSC, 1985, c C-46, s 293.

⁵³ American Law Institute, Model Penal Code, art 230.1(2).

⁵⁴ Zero Tolerance Act, s 6(1).

⁵⁵ Criminal Code, RSC 1985, c C-46, s 232(1).

⁵⁶ Zero Tolerance Act, s 7(1).

⁵⁷ Government of Canada, Press Release: 'Protecting Canadians from Barbaric Cultural Practices' (5 November 2014), online at <http://news.gc.ca/web/article-en.do?nid=900399>.

⁵⁸ Michael Spratt, 'The Honour Killing Bill: Who's the Barbarian Now?' iPolitics (18 November 2014), online at www.ipolitics.ca/2014/11/18/the-honour-killing-bill-whos-the-barbarian-now.

or a culturally driven sense of the appropriate response to someone else's misconduct.⁵⁹ The amendment, then, is not needed in regard to 'honour' killings, and it may make the partial defence of provocation too narrow, so that it will not be available in appropriate cases.⁶⁰ Further consultation with criminal law experts on the provocation amendment would be advisable.

The Zero Tolerance Act will also add new criminal offences. Removing minors from Canada for the purpose of carrying out an early or forced marriage will now be a crime.⁶¹ Celebrating, aiding or participating in a forced marriage or a marriage involving a person under the age of 16 will be a crime.⁶² Solemnising a marriage that contravenes federal or provincial laws will be a crime.⁶³

As well, the Criminal Code provisions relating to peace bonds will be amended. Where there are reasonable grounds to fear that a person will commit the crime of removing a minor from Canada for the purpose of an early or forced marriage or the crime of celebrating, aiding or participating in a forced marriage or a marriage involving a person under the age of 16, a judge may order that the defendant enter into a recognisance to keep the peace. The judge may also impose specific terms on the defendant, including terms to prevent the defendant from making arrangements for the forced or early marriage in or outside of Canada.⁶⁴ A person who is subject to a peace bond may be prosecuted for breaching the order.

The amendments relating to peace bonds are the only preventive aspect of the Zero Tolerance Act, which has been widely criticised for its emphasis on criminal law and failure to address the need for preventive measures, social supports and education.⁶⁵ The new law would be strengthened by further consultation with communities where forced and underage marriage may be a risk and by giving more attention to prevention. Consideration of measures taken in other countries to address these problems, for example the United Kingdom's Forced Marriage (Civil Protection) Act 2007, would be advisable.⁶⁶

V CONCLUSION

The Zero Tolerance Act introduces few changes to Canada's marriage law. The Act adds nothing to current laws that already address the issues of forced marriage and polygamy. The one change the Act will make is to set the minimum age of marriage at 16. Because there is no demand for marriage by

⁵⁹ *R v Hamaid* (1986), 81 OR (3d) 456; 208 CCC (3d) 43 (CA) at para 85.

⁶⁰ Michael Spratt, 'The Honour Killing Bill: Who's the Barbarian Now?' iPolitics (18 November 2014), online at www.ipolitics.ca/2014/11/18/the-honour-killing-bill-whos-the-barbarian-now.

⁶¹ Zero Tolerance Act, s 8.

⁶² Zero Tolerance Act, s 9.

⁶³ Zero Tolerance Act, s 10.

⁶⁴ Zero Tolerance Act, s 11.

⁶⁵ See, eg, Canada, House of Commons, Hansard, 41st Parliament, 2nd Session, 23 March 2015 (Linda Duncan).

⁶⁶ 2007 c 20, online at www.legislation.gov.uk/ukpga/2007/20/section/1.

those under the age of 16, this will have little or no practical effect. The desirability of setting the minimum age of marriage at 18, as is advocated by UNICEF, should be considered. The Act's amendment to immigration law, making those practising polygamy inadmissible, will, again, have little practical effect because current laws address that issue. The amendment providing for removal of visitors to Canada who legally entered into polygamous marriages in their home countries expresses an excessive degree of intolerance for a form of marriage that is legal in many civilised countries. The amendment to the Criminal Code provision on provocation is unnecessary in regard to 'honour killings' and may remove the possibility of successfully claiming provocation in appropriate cases. The Act does not give sufficient attention to prevention, and its reliance on new criminal offences to address problems of underage or forced marriage is misplaced.

The Act may indeed build a metaphorical wall around Canada, creating the illusion that our civilised country is being protected from barbaric outsiders. But as far as effectively addressing the problems of underage and forced marriage, the Act falls short. Most importantly, additional resources should be given to preventive measures, including education and social and legal support in communities where underage or forced marriage is a risk. Further consultation with affected communities and with family, criminal and immigration law experts is advisable.

ENGLAND AND WALES

‘WAS FROM HIS MOTHER’S WOMB UNTIMELY RIPP’D’ (*MACBETH* ACT 5, SCENE 8): COURT-ORDERED CAESAREAN BIRTHS

*Mary Welstead**

Résumé

En droit anglais, la femme enceinte, à la condition d’être saine d’esprit, peut refuser une césarienne même si cela met en péril sa propre vie ou celle de l’enfant qu’elle porte. Dans un seul cas il est arrivé que le jugement constatant que la femme était saine d’esprit, n’est intervenu qu’après la césarienne forcée. Nous allons analyser ici quatre cas de césariennes imposées par un tribunal qui obligent à se demander si le droit d’une femme saine d’esprit de refuser une intervention chirurgicale n’est pas plutôt théorique. En pratique, la question se pose de savoir si un juge accepterait vraiment de déclarer qu’une personne est mentalement apte à refuser l’intervention lorsque les conséquences d’un tel refus, dont les médecins deviendraient les témoins impuissants, sont potentiellement dévastatrices. Nous sommes d’avis qu’une réforme du droit est devenue nécessaire afin de mieux répondre à cet hiatus entre, d’une part, de telles décisions pragmatiques rendues avant la naissance et, d’autre part, la possibilité de rendre, après coup, un jugement devenu théorique.

I INTRODUCTION

‘A competent woman, who has the capacity to decide, may, for religious reasons, other reasons, for rational or irrational reasons or for no reason at all, choose not to have medical intervention, even though the consequence may be the death or serious handicap of the child she bears, or her own death.’

The above observation of Butler-Sloss LJ in *Re MB (Medical Treatment)*,¹ albeit obiter, gives the strongest possible message to pregnant women, and to those responsible for their medical care, that such women have the right to refuse to give birth by caesarean section provided that they do not lack the mental

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¹ *Re MB (Medical Treatment)* [1997] 2 FLR 426 at 437.

capacity to make that decision. In spite of Butler-Sloss LJ's robust words, there is only one decision in the jurisdiction of England and Wales in which a pregnant woman has been held to have had the necessary mental capacity. Even then, the judgment was given only after the birth had actually taken place by means of a forced caesarean section ordered by the High Court. In *St George's Healthcare NHS Trust v S; R v Collins and Others, ex parte S*,² the Court of Appeal ruled that the surgery performed on a pregnant woman, S, had been unlawful. It amounted to trespass because she had refused her consent and there had been insufficient evidence for the High Court to find that she lacked the mental capacity to do so. The woman had wanted to give birth to her baby in a barn in Wales and right up to the time of birth had resolutely objected to the surgical intervention.

In this year's *Annual Survey*, I propose to discuss four recent decisions relating to court-ordered caesarean sections and question whether the view of Butler-Sloss LJ in *Re MB* is merely theoretical, given its *ex post facto* nature. Would any court be prepared to find that a woman had the mental capacity to refuse to give birth by caesarean section and, thereby, allow the potentially devastating consequences to her and her unborn child to unfold whilst the doctors stand helplessly by?

II MEDICAL INTERVENTION AND CONSENT

In *Airedale NHS Trust v Bland*,³ Lord Browne-Wilkinson explained:

'Any treatment given by a doctor to a patient which is invasive (i.e., involves any interference with the physical integrity of the patient) is unlawful unless done with the consent of the patient: it constitutes the crime of battery and the tort of trespass to the person (see also e.g. *Re F (Mental Patient: Sterilisation)*; *Re T (Adult: Refusal of Treatment)* [1992] 2 FCR 861; *Re C (Adult: Refusal of Treatment)* [1994] 2 FCR 151).'

Where a doctor suspects that a person lacks the necessary capacity to consent, a court order must be sought before the medical treatment may be carried out. The only exception to this is in cases of emergency where the patient is unconscious or in such a physical state that her mental capacity is unknown. Then, a doctor may act in the best interests of the patient if there is no time to contact the court (see *F v West Berkshire Health Authority (Mental Health Act Commission Intervening)*).⁴

Whether a pregnant woman has the capacity to consent to a caesarean section treatment is a question to be decided under the Mental Consent Act 2005 (MCA 2005) or under the inherent jurisdiction of the High Court. In its

² *St George's Healthcare NHS Trust v S; R v Collins and Others, ex parte S* [1998] 2 FLR 728.

³ *Airedale NHS Trust v Bland* [1993] AC 789 at 882; [1994] 1 FCR 485 at 558.

⁴ *F v West Berkshire Health Authority (Mental Health Act Commission Intervening)* [1990] 2 AC 1.

application to a pregnant woman, the Act provides that she is assumed to have capacity to make a decision unless the contrary is proven. A lack of capacity is defined as an inability to make a decision because of a temporary or permanent impairment or disturbance of the mind or brain. This inability may be demonstrated by:

- her failure to understand the relevant information after receiving an explanation of the procedure and its consequences;
- her failure to be able to retain that information;
- her failure to be able to use or weigh that information in making her decision and communicate it to the relevant authorities.

Where the woman is found to lack capacity, the MCA 2005 provides that any decision taken must be in her best interests. When considering what might be in her best interests the court must take into account, inter alia, whether it is likely that she will have the capacity to make a decision about the proposed medical intervention in the near future. It must, in so far as is reasonably practicable, permit and encourage her to participate in the decision. It must attempt to discover the woman's past and present wishes, feelings, beliefs and values which might have influenced the decision facing her had she had the mental capacity to make it. The court must consult anyone named by the woman or who has responsibility for her care or interested in her welfare to help discover what decision she might have wanted to make. Finally, the court must ensure that any decision is as minimally restrictive of her rights and freedom of action as possible.

III THE DECISIONS

(a) *Re AA*⁵

In June 2012, AA, a 35-year-old Italian woman, who had come to England to undergo a training course for work with an airline, suffered a severe panic attack. At the time, she was in the third trimester of her third pregnancy and was not taking her regular medication for a serious pre-existing psychiatric problem. She was compulsorily detained under s 2 of the Mental Health Act 1983 (MHA 1983).

In August 2012, Mostyn J received an urgent application from the NHS Trust responsible for the hospital where AA was to give birth, seeking a declaration and order for her to undergo a caesarean section. She had given birth to two other children in Italy by way of caesarean section. AA was 39 weeks pregnant

⁵ *Re AA* [2014] 2 FLR 237 (Mostyn J's decision was not reported when he gave it in 2012 but he was later persuaded to have it transcribed in a response to the comments of Sir James Munby, President of the Family Division, in *Re P (a child)* [2013] EWHC 4048 (Fam) that transparency was essential in these decisions. Mostyn J was also aware that the lack of a reported judgment had perhaps led to the considerable and unjustified negative press coverage and public comments following the decision).

and her due date for delivery of the baby was imminent (40 weeks is considered to be the normal duration of pregnancy). The Official Solicitor represented AA.

The psychiatrist, who was treating the woman stated that she was suffering from a significant mental disorder which was psychotic in nature. The condition brought about delusional beliefs. Mostyn J, without going into any further detail, held that the woman lacked capacity under s 2 of the MCA 2005 to make any decision about her ante-natal care, a birth plan, or her post-natal care. The court, therefore, had to make a decision for her, which was in her best interests, and, in so doing, have regard to the principle that her autonomy should be restricted in as minimal way as possible.

The obstetrician in charge of her care advised that there was no alternative for AA but to give birth by a planned caesarean section. Her two previous births meant that there was a danger that her womb might rupture with all the attendant physical and psychiatric risks for her, and physical risks for her unborn child, if a vaginal birth was attempted. The court was told that the surgery was required to be carried out within the next 24 hours; there was no time for lengthy discussion to take place.

Mostyn J maintained that he was bound by the judgment of Butler-Sloss LJ in *Re MB*, in which she expressly excluded any balancing of the interests of the unborn child in determining what medical treatment was in the mother's best interests. However, he hoped it would not be at variance with the decision in *Re MB*, to find that it would be in AA's best interests, in terms of her mental health, that her child should be born alive and healthy. He ordered that the obstetrician's advice be followed and that reasonable force could be used to restrain AA to allow the administration of sedation or a general anaesthetic in order that the caesarean section could be carried out safely. AA was not to be told of the court's decision until the birth of her child had taken place.

Given that AA had been compulsorily detained in hospital since June, it would be interesting to know why the NHS Trust delayed in applying for the court order until the day before the surgery became necessary. Last minute urgent applications make it difficult for a court to take into account all the relevant factors in resolving such a difficult and important issue. One must question whether the delay was related to a further complication about which the Official Solicitor, who was acting for AA, had expressed his concern to the court. The local authority, which was not a party to the action, had let it be known that it intended to invite the police, under s 46 of the Children Act 1989, to remove the baby into police protection soon after the birth. The local authority thought that it had reasonable cause to do so because it believed that the baby would be likely to suffer significant harm were it to be left with AA. She had been unable to care for her two other children and they had been handed over to their maternal grandmother by the Italian authorities. The local authority's social workers had liaised extensively with the extended family but were unable to find anyone who could care for this third child.

Mostyn J expressed the view that it would be heavy-handed and might cause a significant deterioration in AA's mental health for the local authority to intervene in this way. The Official Solicitor suggested that the baby would suffer no significant harm if kept in a secure mother and baby unit. Mostyn J incorporated a further order into his main order which authorised the caesarean section. It stated that the local authority should not take the action which it had proposed. He thought that it would be better that a separate application be made immediately after the mother had given birth. The Official Solicitor would be able to represent the mother and arguments could be heard as to whether the child's welfare demanded her removal and, if so, when and on what terms.

The day after P, a baby girl, was born, an interim care order was made under s 38 of the Children Act 1989. The story did not end there. AA gave her version of events to the press and certain newspapers published her story under extremely sensational headlines such as:

'Explain why you snatched baby'; 'Operate on this mother so that we can take her baby'; 'Woman's baby taken from womb by social services' and 'Social workers took baby into care after forcing her mother to have a Caesarean.'

In 2013, the local authority made a second application for a reporting restrictions order to prevent this form of reporting (*Re P (a child) (reporting restriction order)*).⁶ The application was heard by Sir James Munby P who expressed the view that:⁷

'It is not the role of the judge to seek to exercise any kind of editorial control over the manner in which the media reports information which it is entitled to publish.'

He also repeated what he had said in an earlier speech to editors:⁸

'... dare I suggest that the media should remember the great C P Scott's famous aphorism that "Comment is free, but facts are sacred".'

The President held that the court had to conduct a balancing exercise between competing interests. The child's interests were of primary, even if not of paramount, consideration. In his opinion:⁹

'... it is hard to imagine a case which more obviously and compellingly required that public debate be free and unrestricted. The mother had an equally obvious and compelling claim to be allowed to tell her story to the world since there was importance in a free society of parents who felt aggrieved at their experiences of the family justice system being able to express their views publicly about what they conceived to be failings on the part of individual judges or failings in the judicial system, and likewise being able to criticise local authorities and others ... To deny

⁶ *Re P (a child) (reporting restriction order)* [2013] EWHC 4048 (Fam).

⁷ At [26].

⁸ At [27].

⁹ At [35]–[37] and [40]–[41].

the mother in the circumstances of the instant case the right to speak out would have been an affront, not merely to the law, but also to any remotely acceptable concept of human dignity and humanity itself ... Further, P [the baby] also had an equally compelling claim to privacy and anonymity ... P's welfare demanded imperatively that neither she nor her carers should be identified ... There are ... the most obvious and compelling reasons why, in this case, there should be no stifling of the widest possible public discussion of what has happened ...'

The President made an order protecting the anonymity of the baby and her new prospective adoptive parents and, within that constraint, anyone else who wished to talk about the case could do so.

In 2014, Sir James Munby P made a final adoption order for P after neither of her biological parents had raised any objections.¹⁰

(b) *Royal Free NHS Foundation Trust v AB*¹¹

AB was a 32-year-old pregnant Sri Lankan woman who had lived in the United Kingdom for almost 6 years. She suffered from a long-term serious psychotic mental illness which her psychiatrist thought to be paranoid schizophrenia. She also had diabetes, which had become increasingly difficult to control during the pregnancy because her mental illness led her to eat and drink inappropriately and irregularly. This led to the destabilisation of her blood glucose and electrolyte levels which endangered her and her unborn baby.

The pregnancy was AB's first and she and her husband, who also had mental health difficulties, were delighted that they were to become parents. During the third trimester of the pregnancy, AB raised, for the first time, questions about the delivery of her baby. She had been unable to do so any earlier in the pregnancy because of her mental state. At first, she had expressed a wish to have a caesarean section because she was afraid of the pain of childbirth. However, she subsequently backtracked on this decision when talking with her psychiatrist.

AB had made two attempts to commit suicide, one by means of an overdose of insulin. When she was 32 weeks pregnant, she had a protracted psychotic episode. This led to the NHS Trust's decision to apply to the court for three declarations that AB lacked capacity:

- to consent to medical treatment, including the birth of her child by caesarean section;
- to monitor and regulate her diet;
- to take her diabetic medication on a regular basis.

¹⁰ *Re P (A Child)* [2014] EWHC 1146 (Fam).

¹¹ *Royal Free NHS Foundation Trust v AB* [2014] EWCOP 50.

The court had little time to consider the evidence before making the declarations requested by the NHS Trust. The application had begun at 4.15pm, and the *ex tempore* judgment was given by Hayden J at 9.30pm on the same day. The court recognised that this was not an ideal situation because it meant that there was no time to do justice to the detailed medical evidence.

The obstetrician stressed that the reason for the NHS Trust's application was to prevent AB from dying. She explained that the pregnancy was jeopardising the best possible care for AB in terms of her serious psychotic illness, which was proving increasingly dangerous to her survival. AB had become distressed that morning when her husband had to leave the ward to go to work, and had threatened to commit suicide once again. AB could only be treated effectively once she was no longer pregnant. The psychiatrists would then be able to assess the scope of her psychotic illness and optimise her medication. She could be nursed on a psychiatric ward where her condition could be properly managed. The obstetrician wanted to deliver the baby within the next 24 hours and although the pregnancy would be of only 32 weeks duration, she did not feel that it would in any way significantly compromise the foetus. She believed that AB lacked the capacity to give consent for these proposals to go ahead.

The Trust had sought the opinion of a consultant psychiatrist who had only been able to assess AB's capacity with respect to her diabetes medication and not to her capacity to consent to a caesarean section. AB's own consultant psychiatrist was not available because he was out of the jurisdiction. The court accepted the evidence of the Trust's psychiatrist that, at an intellectual level, AB was capable of understanding the effects of starvation. However, she had not eaten or drunk anything for 24 hours and her brain was showing the consequences of a lack of nutrients. Her consciousness was disturbed and she was irrational. She could not weigh up the effects of her behaviour or what was involved in making a decision with respect to her medication or the means by which her child might be born. It was only a matter of hours before AB's brain would become insufficiently nourished, and she could die. AB had explained to him that she had stopped eating and drinking because she believed that it would help to control her diabetes. However, the psychiatrist speculated that her behaviour might be a further suicide attempt.

The court accepted that any decision to compel an incapacitated mentally and physically ill woman to undergo a caesarean section was an extremely draconian act but the NHS Trust's application had not been embarked upon lightly. Although the court found that the evidence of the obstetrician and the psychiatrist acting for the Trust was of significant importance, it demanded further evidence of AB's specific lack of capacity to consent to a caesarean section. This was provided by a further psychiatric report from a different psychiatrist who had concluded that AB could understand the core information about the proposed surgery, and retain it. However, in the current circumstances she was neither able to weigh up the evidence about the surgery nor even really to think about it at all. AB maintained that she would be fine to have the baby in 5 weeks' time and was able to communicate that decision but

was unable to balance out the advantages or disadvantages of a caesarean section or evaluate the importance to take her diabetic medication and eat and drink.

The court was finally convinced that AB did lack capacity to consent both to the birth of her child by caesarean section and the monitoring and regulation of her diet and medication. It considered AB's best interests under the MCA 2005. The court explained that the best interests of the person requiring to be protected were very rarely or never grounded exclusively in the medical context. Therefore, it had to consider the wider picture as well as the complex medical evidence. The assessment of best interests involved to some degree trying to understand the individual, in so far as it were possible to do so. When her psychotic condition was under control, AB was lively, personable and intelligent. In Sri Lanka, her mental illness had been effectively medicated, and she had attended university and obtained an arts degree. When mentally stable she had an insightful and intelligent understanding of her own diabetic condition.

The court decided that it was in AB's best interests to accede to all three of the NHS Trust's requests. It ordered that she should undergo a caesarean section and be given diabetic medication and be intravenously fed. The Trust had also asked that permission be given to sedate AB which the court granted, albeit, rather surprisingly, with a certain reluctance, given the nature of a caesarean section. The request by the Trust to use reasonable force was withdrawn when the obstetrician, the psychiatrist and AB's husband all maintained that AB's agitation was relatively easily calmed and that force would not be necessary. The court indicated that, should force be required, an urgent application could be made to it within the next 24 hours.

In a postscript to his written judgment, the judge added the following happy note:¹²

'I have been informed that AB has had a caesarean section and gave birth to a healthy baby boy. There was no need to consider restraint. When Miss Tuck [the obstetrician] went to see her, AB hugged her.'

(c) *Great Western Hospitals NHS Foundation Trust v AA*¹³

In January 2014, at 9.30pm the Great Western Hospitals NHS Foundation Trust made an application to allow a 26-year-old mentally ill woman, AA, who was 38 weeks pregnant to be deprived of her liberty and have her unborn child delivered by caesarean section; a plan to which AA was opposed. She was not represented in court because the Official Solicitor, who had been contacted, was unavailable to assist at such short notice.

¹² *Royal Free NHS Foundation Trust v AB* [2014] EWCOP 50 at [29].

¹³ *Great Western Hospitals NHS Foundation Trust v AA* [2014] EWHC 1666 (Fam); *Great Western Hospitals NHS Foundation Trust v AA* [2014] EWHC 132 (Fam).

The day before the hearing, AA had arrived at hospital, after her membranes had ruptured. She was found to be in a very agitated state and had been for several days. A consultant psychiatrist assessed her condition and found her to be hypomanic and moving towards puerperal psychosis which was an extremely serious condition. A decision was made to compulsorily detain her under s 5(2) of the MHA 1983 for assessment. This section applies when a person has been admitted to hospital on a voluntary basis; it permits the hospital to treat the patient but only for a mental illness and not for obstetric or any other medical reasons. The psychiatrist was satisfied that AA lacked the mental capacity to litigate or to make decisions about the means of birth of her child.

The consultant obstetrician who saw AA was concerned about her medical condition which he believed required immediate delivery of her baby by means of an induced birth or preferably by caesarean section. He maintained that AA would need to be deprived of her liberty in order that either of these procedures could be carried out. Normally, an application to deprive a patient of her liberty in these circumstances would be made under the MCA 2005. However, the Act does not apply once a person has been detained under s 5(2) of the MHA 1983.¹⁴ Moor J decided that, in these difficult circumstances, it was appropriate to invoke the inherent jurisdiction of the High Court and overcome the statutory dilemma. The inherent jurisdiction can always be used to ensure the best interests of a patient who lacks mental capacity to consent to medical procedures.

Given the likelihood of a serious risk to AA if she did not give birth soon, and by caesarean section, Moor J thought that the risks of the proposed surgery were significantly outweighed by the advantages to AA and her unborn baby. He was not, however, prepared to make a final order with respect to such a serious matter, late at night, brought without notice, and without representation for AA. He decided to adjourn the matter to be heard by Hayden J in the High Court in London on the following morning. He made an interim order which authorised a caesarean section, if AA required it for any reason whatsoever before the High Court hearing.

On the following day, Hayden J heard the case in the High Court and in doing so showed considerable empathy towards AA who was represented by the Official Solicitor. Further evidence was given by the psychiatrist of AA's mental condition on her admission to hospital. Not only was she extremely agitated but she was also confused, vague and disorientated. It was thought that she had had a seizure. She had been prescribed a significant number of medications prior to being hospitalised which she was apt to discontinue when she perceived herself to be well. Further medication could not be given because of the effects it would have on AA's pregnancy. The psychiatrist explained to the court that he was satisfied that AA lacked capacity to make any decisions about her

¹⁴ See para 17 of Sch A1 of the MCA 2005 which stipulates that Sch 1A of the MCA 2005 applies for the purpose of determining eligibility for deprivation of liberty; see also *A NHS Trust v Dr A* [2013] EWHC 2442 (COP).

medical treatment. She had a history of substance and alcohol abuse, probably undertaken as an effort to self-medicate in the early stages of her illness. She had been an in-patient in a mental hospital in 2011 and appeared to have only a very limited insight into her illness and its consequences.

AA's parents were with her in hospital; her father, who had supported AA throughout her mental illness, described her current state as the worst he had ever seen. She was very distressed, violent and exhausted because of a lack of sleep and had been largely uncooperative with the efforts to take care of her in the final stages of her pregnancy. During the night, AA had run to the window and tried to get out. She told her father that she wanted to go to heaven.

It was clear that the forthcoming baby was a wanted one for both AA and her partner but AA was fixated on her baby being born on her birthday in a few days' time and was not prepared to cooperate with any of the alternative proposals to deliver her baby before that date.

The consultant obstetrician explained in further detail the alternative procedures for the birth of AA's baby. Were he to induce birth, AA would need to be restrained whilst an epidural was administered to cope with the pain. This would necessitate intravenous administration of drugs and continuous monitoring of AA and the foetus. She had already removed intravenous lines on more than one occasion during her stay in hospital and would be unlikely to comply with leaving them in her during what would likely be a prolonged labour. The obstetrician considered that AA's distress and agitation would increase and it would not be safe to proceed in this way. Furthermore, between one-third and a quarter of patients who required medical inducement of labour, particularly, in the case of a first child, ultimately required an emergency caesarean section.

The whole of the clinical obstetric team responsible for AA believed that it would be in her best interest to be given a general anaesthetic and undergo a caesarean section. This would involve a significant deprivation of AA's liberty. Further restraint following the surgery might also be necessary. Whatever procedure was decided upon, action was urgent. The longer AA remained untreated, the greater the risk of her developing sepsis with the risk of uterine infection and a severe life threatening haemorrhage.

Hayden J stressed that, in determining what was in the best interests of AA, he was only addressing the disadvantages to her of the proposed medical intervention; he was not concerned with the welfare of the foetus. However, he did say that the alternative to a planned caesarean section did carry significant risks and the real possibility of distress to the foetus or to the baby once born. A best interests decision, according to the judge, required a broad approach to all the available material put before him. He believed that AA had

a supportive family unit and her parents supported the proposal of surgery. At first, her partner had had reservations but had eventually accepted that the surgery was essential. Hayden J said:¹⁵

‘I have listened carefully to what the family has said, particularly what AA’s partner, BB, has said. He was not always consistent or indeed logical. If I may say so, at such a stage in his life in these difficult circumstances I would hardly expect him to be so. He communicates to me that AA is extremely anxious, extremely distressed, but he also says she is tired and he believes in some way she now wants to get on with the delivery. I believe that he was telling me that if AA were not florid, if she were not suffering this profound psychotic episode, and if she were in a position to reason her situation objectively, she would follow the recommendation of the doctors.’

The Official Solicitor, who represented AA, had had the opportunity to consider all the medical evidence, both psychiatric and obstetric. He was in complete agreement with the NHS Trust’s plans.

Hayden J held that it was self-evident that AA lacked the capacity to litigate or to make a medical decision for herself in relation to the serious medical treatment she required. He authorised the NHS Trust’s medical team to carry out such treatment as it believed to be necessary in her best interests. This could include depriving AA of her liberty in order to manage her pregnancy and the delivery of her foetus and give her the necessary post-birth care. Such physical restraint or force, which might be essential for her treatment, including anaesthesia, sedation and to prevent AA from leaving the hospital ward, was to be the minimum necessary. The judge insisted that all reasonable steps were to be taken to minimise any distress to AA and to maintain her dignity.

(d) *The Mental Health Trust & Another v DD & Another*¹⁶

In the fourth of the decisions, Cobb J gave a lengthy judgment, and justifiably so, in which he showed considerable empathy and respect towards DD, a 30-year-old pregnant woman. It was an exemplary judgment on the law relating to mental capacity and was significantly more detailed than the judgments in the three previous cases. Perhaps this is not so surprising given Sir James Munby P’s insistence, in *Re P (a child) (reporting restriction order)*,¹⁷ on the need for total transparency in Court of Protection decisions. Cobb J may also have wished to avoid the adverse and inaccurate press reports following *Re AA* and *Great Western Hospitals NHS Foundation Trust v AA*. It must also be acknowledged that he had the benefit of a little more time than his judicial colleagues had had in the earlier cases because the applicants had not waited until the last minute to request the court’s help.

¹⁵ *Great Western Hospitals NHS Foundation Trust v AA* [2014] EWHC 132 (Fam) at [16].

¹⁶ *The Mental Health Trust & Another v DD & Another* [2014] EWCOP 11.

¹⁷ [2013] EWHC 4048 (Fam).

DD's background was tragic in the extreme. She had a learning disability and had received special education, was autistic, and had been involved with social services from infancy after being ill-treated by her own parents. She had spent time in foster care. After leaving home at the age of 24 to live with TJ, a man with learning difficulties, DD became pregnant by him. The baby was born by caesarean section because of foetal distress during labour. DD and TJ had tried to care for the baby for 4 months, supported by social services, but could not cope. The baby was removed and placed permanently with his paternal grandparents and DD had not had contact with the child for a long time.

At the age of 30, DD left TJ and moved in with BC who also had learning disabilities. Over the next 5 years she gave birth to four more children, all fathered by BC. Two of the babies were born by caesarean section and two births took place at home without any medical care. One of these latter babies had reportedly been delivered using barbecue tongs and fed on cup-a-soup. DD's home was overrun by cats and dogs and there was evidence of animal faeces and urine. All four children were removed from the parents soon after birth and were adopted. Many efforts had been made by the applicants to persuade DD to use contraceptives but all had failed.

In January 2014 the Adult Social Care Team was advised that DD was once again pregnant. A multi-agency plan was put in place with the aim of monitoring the pregnancy. The plan did not work. Between late February and early April, 25 social work visits were made to DD and BC's home but DD avoided contact with them. On one occasion, BC shouted through the locked door of the home that DD was not pregnant.

Social services eventually obtained a warrant under s 135 of the MHA 1983 to go with the police to DD's home and remove her, by force if necessary, to a place of safety. After initial distress at this intrusion, DD eventually calmed down and was taken away for an assessment with which she cooperated. During the assessment, DD was found to have some delusional beliefs. She maintained that a well-known actor was her father and a well-known opera singer, who was actually younger than her, was her mother. DD said that she had been born in New Zealand and raised in England by the adults who had kidnapped her. She also said that she did not fit in to society because she had a foreign accent, and, that she was planning to live in Australia with her cats. Her 'twin' brother and 'mother' would come to England and take her there, before the baby's birth. DD showed a complete lack of understanding about her pregnancy and the risks involved. She returned home and 15 further attempts were made by social services to visit DD but without success. DD did not attend any of the ante-natal appointments, which had been arranged for her, and letters sent to her were returned marked 'moved away'.

The applicants who were responsible for various aspects of DD's care finally decided to apply to the court for declarations that:

- DD lacked the mental capacity to make a decision about giving birth by caesarean section which was believed to be in her best interests;
- the necessary and proportionate steps be authorised to allow AA to be taken to hospital for the surgical intervention including forced entry to her home, restraint and sedation.

They had considered asking for DD to be admitted to a residential unit well in advance of the birth but decided that the obstetric risks were not sufficiently severe to interfere with her liberty in that way. They had also applied for a declaration for DD's to undergo an assessment on her capacity to make decisions about contraception. This application is outside of the remit of this chapter. In any event, the application was rejected and resubmitted for hearing at a later date.¹⁸

Within the main application, immediate orders were sought to enable the applicants to arrange an ante-natal assessment and ultrasound scan for DD. These were granted by Paulley J prior to the hearing of the main application.¹⁹ On the following day, a team of professionals went to DD's home; once again they were accompanied by the police. DD was removed to hospital where she cooperated and spoke with the Consultant Obstetrician. She repeated the delusional claim that her baby would be born in Australia and explained further that a friend had acquired a passport for her using a photograph of her when she was a child and in foster care.

In the hearing of the main application before Cobb J, neither DD nor her partner, BC, took part. DD was represented by the Official Solicitor. Cobb J was concerned about BC's absence because the applicants' request, if granted, would interfere with his Art 6 right to a fair trial, and his Art 8 rights to a private and family life, under the European Convention on Human Rights 1950 (ECHR). However, the judge was not prepared to delay the hearing any further because of the very serious potential consequences for DD and her unborn baby.

Cobb J acknowledged that the applicants had done their utmost to engage DD in the discussions and plans for her care during pregnancy, but had been totally frustrated by DD's behaviour. Nevertheless, he was acutely aware of the unusually onerous responsibility facing him. The applicants' request was a challenge to:²⁰

‘... the most precious and valued human rights and freedoms. Authorisation for the deprivation of DD's liberty and for the use of restraint (even for a short time) is sought, as is permission to intrude, by force if necessary, into the privacy and

¹⁸ See *The Mental Health Trust & Others v DD & Another* [2014] EWCOP 13.

¹⁹ See *The Mental Health Trust, The Acute Trust & The Council v DD (by her litigation friend the Official Solicitor), BC: In the matter of DD* [2014] EWCOP 8.

²⁰ *The Mental Health Trust & Another v DD & Another* [2014] EWCOP 11 at [5].

sanctity of her home. Steps to promote her physical health and well-being, it is argued, require a physically invasive medical procedure, to be conducted under general anaesthetic.²¹

(i) Mental capacity

Cobb J divided the issue of DD's mental capacity into two parts. First, he considered her capacity to litigate and second, her capacity to decide the means by which she should give birth and, if by surgical intervention, the time of birth. He stressed that it was only if he found that DD was not competent with respect to these matters that he would have to consider her best interests and decide whether to grant the applicants' request. Cobb J was anxious to avoid being influenced by:²¹

‘what may be natural anxieties about the general or specific well-being of DD or the unborn baby, particularly in light of DD's obstetric and social history ...’

If DD's decision-making was merely unwise, he could not intervene in her life.

The two-stage test in s 2 of the MCA 2005

In determining lack of capacity, Cobb J referred to the two-stage test in s 2 of the MCA 2005: DD must be shown to be unable to make a decision for herself because of an impairment of, or a disturbance in, the functioning of her mind or brain. If there was evidence of a higher level of functioning at other points in her life, he had to consider, on the balance of probabilities, what that evidence revealed about her current state (s 2(4)).

The four-stage test in s 3 of the MCA 2005

Cobb J applied the four-stage test of s 3 of the Act to DD which focused on her ability:

- to understand the information relevant to the decision;
- to retain that information;
- to use or weigh that information as part of the process of making the decision; and
- to communicate her decision.

The threshold with respect to understanding was not to be set unduly high in order to avoid discrimination against a person suffering from a mental disability.²² It is only the important aspects which need to be understood.²³

²¹ *The Mental Health Trust & Another v DD & Another* [2014] EWCOP 11 at [56].

²² See *PH and A Local Authority v Z Limited & R* [2011] EWHC 1704 (Fam).

²³ See *LBJ v RYJ* [2010] EWHC 2664 (Fam).

Mental competence to litigate

With respect to DD's mental competence to litigate, Cobb J applied the test in *Masterman-Lister v Brutton & Co (No 1)*.²⁴ This requires the court to consider whether the person involved in the litigation is capable of understanding, with the assistance of such proper explanation from legal advisers and other appropriate experts, the issues on which her consent or decision is likely to be necessary during the legal proceedings. A person should not be regarded as unable to make a rational decision merely because she makes a decision which would not be made by a person who might be regarded as having normal common sense.

In *Sheffield Crown Court v E & S*,²⁵ Munby J (as he then was) explained that the capacity to litigate cannot be determined in the abstract but only with reference to a specific issue. A person may have the capacity to litigate in one case where the issue is simple but lack it in a case where the issue is more complex.

DD had been involved in many legal proceedings relating to her children without any representation but no findings had ever been made about her capacity to litigate. She had also made decisions about her own medical treatment and the assumption had been made that she had the mental capacity to do so.

The psychiatrist believed that DD did lack litigation capacity and the Official Solicitor had agreed with him. Cobb J demanded to know what was the difference between the current litigation and the past when DD did apparently have capacity. The psychiatrist suggested that there might have been deterioration in the already impaired functioning of DD's mind or brain. Alternatively, the issues in the current application might be materially different from those in earlier proceedings, or there might be some other unknown factor. He thought that the stroke she had suffered in 2011 might have had an effect but he also thought that her fixed beliefs which were a characteristic of her autism had gained in strength. In any event, Cobb J accepted that he must only consider the evidence on DD's ability to litigate on the current issues before him and concluded that DD did lack that ability.

Mental competence to make decisions about the means and time of giving birth

With respect to DD's mental capacity to make decisions about when and how her baby should be born, an abundance of evidence was given by all those involved in DD's care during the 2-day hearing. The three psychiatrists were all in agreement that DD was mentally incompetent although there was some difference of opinion about the level of that incompetence. What was agreed

²⁴ *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511.

²⁵ *Sheffield Crown Court v E & S* [2005] Fam 236.

was that DD could not understand the risks of her current pregnancy and was rigid in her thinking about it. She was unable to process the information given to her and use or balance it. Cobb J accepted that DD lacked capacity with respect to the means and time of giving birth.

(ii) Best interests

Cobb J considered what would be in DD's best interests taking into account the wide-ranging provisions in s 4 of the MCA 2005. In *Aintree University Hospitals NHS Foundation Trust v James*,²⁶ Baroness Hale explained that:

'The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are ... But in so far as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.'

The test is not an easy one. How does one take into account the wishes of a patient who has been declared to be mentally incapable when those very wishes, which were deemed to be unrealistic and, indeed delusional, were accepted as evidence of that incapacity?

Cobb J decided that DD's best interests would be served by the safe delivery of her baby and considered all the means of achieving that. He found that she was incapable of engaging with any of the professionals who would be responsible for her obstetric care if she were permitted to have her baby by a 'normal' vaginal delivery. The risks would be huge, possibly even catastrophic, for her; she might die. Cobb J balanced out alongside those risks associated with a caesarean section such as abdominal injury, scarring, infection, pain, and the potential for further damage to DD's mental health as a consequence of being forced to undergo a procedure to which she was opposed. He recognised that although it would be distressing for DD, the applicants should take her to hospital a few weeks before her delivery date in order that a planned caesarean section and the necessary ancillary care could be carried out. Cobb J wished to ensure that DD's rights under s 1(6) of the MCA 2005, the minimal restriction of rights and freedom of action, Art 5, the right to liberty and security, and Art 8, the right to respect for private and family life, of the ECHR were protected. He ordered that the applicants were to take such necessary, reasonable and proportionate measures in carrying out a forced entry into her home, in restraining and sedating her and only after less restrictive techniques had been attempted. Professionals who were experienced in these matters should be responsible for carrying out the court's order and to do their best to minimise any distress to DD and maintain her dignity using the skilled de-escalation techniques which had worked for her in the past.

²⁶ *Aintree University Hospitals NHS Foundation Trust v James* [2013] 3 WLR 1299.

Cobb J decided that DD and her partner should not to be told of the date on which DD would be taken to hospital. He believed that, if they were only given partial information, it would lessen their levels of anxiety. Furthermore, because of her autism, DD might have difficulty relating detailed information to herself until it became a reality. The judge acknowledged that not giving full information to DD and BC about the plans for the delivery of their baby might breach their Art 8 and Art 6 (the right to a fair trial) rights under the ECHR but it was justified in these circumstances.

The Official Solicitor had felt unable to make any recommendation on DD's behalf about her best interests in relation to this surgical intervention.

One of the applicants had plans to issue proceedings to remove DD's baby soon after the birth, under the Children Act 1989. Cobb J urged that DD should be involved in such proceedings and that she should be represented by the Official Solicitor. The applicant was also encouraged to formulate and present the plans for the baby to DD in a way which would engage her. It is questionable whether this was a request in vain on Cobb J's part given all that had gone before but it demonstrates his determination to show respect for DD in spite of his ruling on her mental incompetence.

IV THE PRAGMATIC SEARCH FOR MENTAL INCAPACITY

The court's task in determining mental capacity is a demanding one; the consequences of its decision may be catastrophic. If the woman is found to be competent, she may refuse to undergo a caesarean section and thereby risk her own death and that of her child. If the birth takes place in hospital, her doctors would have the difficult task of standing by and watch the catastrophe unfold. If the birth takes place outside of a hospital, bearing in mind that one pregnant woman wanted to give birth in a barn in Wales,²⁷ the woman, and whoever is with her, will have to cope alone – not an attractive thought. Is there a temptation for courts to do everything within their power to find that a pregnant woman lacks capacity to avoid the unthinkable?

The courts in the four cases above had little difficulty in finding that the women lacked capacity. Their task was somewhat easier because the women were all suffering from a mental illness which had begun prior to the pregnancy. Whilst mental illness is not in itself evidence of mental incapacity, the courts in the first three cases were able to make the link between the two and, thereby, protect the mother and her unborn child. They did not undertake any serious analysis of the meaning of mental incapacity either under the MCA 2005 or under the inherent jurisdiction. Mostyn J's judgment in *Re AA* was lacking in any detail whatsoever about AA's mental incapacity. He simply accepted the view of the psychiatrist that AA suffered from a serious mental illness and was incapable of

²⁷ *St George's Healthcare NHS Trust v S; R v Collins and Others, ex parte S* [1998] 2 FLR 728.

making a decision about the birth of her child. It was only in the last of the four cases that Cobb J, undertook a detailed analysis of the MCA 2005 and made the link between DD's mental disability and her mental incapacity with respect to her pregnancy.

V CIRCUMSTANCES IN WHICH A WOMAN MIGHT BE FOUND TO HAVE MENTAL CAPACITY

Where a pregnant woman has shown no signs of mental illness prior to the pregnancy, it may be more difficult for the courts to find that she lacks capacity unless an urgent last minute application is made to the court when the woman is about to give birth, is in distress and her life, and that of the baby, is at risk. In such circumstances, there will be little time for any detailed examination of the evidence relating to the woman's mental capacity and it is likely that the court will order that a caesarean section be carried out. The courts might justify such a decision on the basis that the woman had been mentally competent until just before the birth and has suddenly become mentally impaired because of panic and fear. In *Re MB*, the woman had a needle phobia which led her to decline to have the necessary anaesthetic. The Court of Appeal accepted the view of Lord Donaldson MR in *Re T*:²⁸

‘Others who would normally have capacity may be deprived of it or have it reduced by reason of temporary factors, such as unconsciousness or confusion or other effects of shock, severe fatigue, pain or drugs being used in their treatment.’

The Court of Appeal upheld the decision of Hollis J in the High Court and the surgical intervention went ahead; the woman decided to consent to the surgical intervention after she heard the verdict of the Court. How this was possible, given the Court's decision that she lacked capacity, remains unexplained.

The cases which will present the courts with the greatest difficulty will be those where the woman has been able to express with clarity, throughout her pregnancy, why she does not wish to undergo a caesarean section. A committed Jehovah's Witness, for example, who does not wish to undergo a caesarean section because she is not prepared to take the risk that she may require a blood transfusion as a consequence of the birth, might come into this category. Even then, a court might intervene at the last minute if the woman showed signs of wavering when she was forced to face the fact that her life and that of her baby were obviously in danger. Even if a woman has made a legally binding advanced directive refusing a caesarean section, the doctors might argue that she showed a desire to revoke it at the last moment.

²⁸ *Re T* [1993] Fam 95 at [27].

VI A PREGNANT WOMAN'S BEST INTERESTS

The MCA 2005 was drafted to take care of all types of decisions relating to mental capacity for a wide variety of people. The provisions of s 4 often seem inappropriate for pregnant women. The court is required to take into account the beliefs and values and other factors which would be likely to influence the woman's decision if she did have capacity. This will generally mean that the court will simply take into account the medical evidence before it and substitute its view for the illusory views which have been accorded to the incompetent woman. The court will almost certainly order that the caesarean section should go ahead. The court is also mandated to consider the view of anyone engaged in caring for the pregnant woman or interested in her welfare. There may be a clash of opinion between a woman's partner, her parents, and the medical team caring for her. Once again, it is likely that the court will order the necessary surgical intervention.

(a) The unborn child

Butler-Sloss LJ in *Re MB* (above) was faced with the argument by the Health Authority that even where a pregnant woman is competent, the court should take into account the interests of her unborn child and balance them against those of the woman. In an obiter observation, her Ladyship rejected this argument. In her view, whether a woman is found to be mentally competent or not, the court has no authority whatsoever to consider the best interests of the child. The court has no jurisdiction over a mentally competent woman; therefore, there can be no possible discussion of the best interests of her unborn child. Where the woman lacks mental capacity, it is her best interests which determine her medical treatment and not those of her unborn child. Butler-Sloss LJ stated firmly that a court is a court of law and not one of morals. She quoted from Balcombe LJ's judgment in *Re F (in utero)*:²⁹

'If Parliament were to think it appropriate that a pregnant woman should be subject to controls for the benefit of her unborn child, then doubtless it will stipulate the circumstances in which such controls may be applied and the safeguards appropriate for the mother's protection. In such a sensitive field, affecting as it does the liberty of the individual, it is not for the judiciary to extend the law.'

Her Ladyship's views on the interests of the unborn child cast doubt on the correctness of Lord Donaldson MR's statement in *Re T (An Adult)(Consent to Medical Treatment)*³⁰ and that of Sir Stephen Brown P in *Re S (Adult: Surgical Treatment)*³¹ to the effect that, if the future of a viable foetus was at risk, that should be a factor to be taken into account by the court. Butler-Sloss LJ commented on the anomaly that the court may not take into account the

²⁹ *Re F (in utero)* [1988] Fam 122 at 144.

³⁰ *Re T (An Adult)(Consent to Medical Treatment)* [1993] Fam 95.

³¹ *Re S (Adult: Surgical Treatment)* [1993] 1 FLR 26.

interest of the unborn child, yet the Offences against the Persons Act 1861, s 58, and the Infant Life Preservation Act 1929, s 1, protect the life of an unborn child, and that the Abortion Act 1967 places limitations on the circumstances in which a pregnancy might be terminated. The ECHR does not appear to accord the foetus rights under Art 2, the right to life, or under Art 8, the right to respect for private and family life.

In the four cases under consideration, all four judges, whilst accepting Lady Butler-Sloss's obiter observations in *Re MB*, managed to circumvent them. They chose to do so by aligning the best interests of the mother with the safe birth of her child. Mostyn J in *Re AA* thought that it would be in the mother's mental health best interests that:³²

‘... her child should be born alive and healthy and that such result should be, if possible achieved, and such risks attendant should be avoided. I think, looked at from her point of view, there is also a significant mental health advantage in her unborn child not being exposed to risk during his or her birth.’

Hayden J, in *Royal Free NHS Foundation Trust v AB* went perhaps a little further and, in a rather inexplicit way, came somewhat closer to balancing out AB's interests with that of her unborn child. He referred to the evidence given by the obstetrician that the grant of an order for an immediate caesarean section at 32 weeks (a normal pregnancy is regarded as being of 40 weeks duration) would not in any way significantly compromise the foetus. It would also satisfy the view of the psychiatrist that it would allow AB to be treated as rapidly as possible for her mental illness.

In *Great Western Hospitals NHS Foundation Trust v AA*, Hayden J stressed that he was not permitted to be concerned with the welfare of the foetus. Nevertheless, he made the order for the birth to go ahead by caesarean section having taken the view that:³³

‘... the alternative to the elective caesarean plainly carries significant risks to the foetus or to the baby and the real clinical prospect of foetal distress.’

Finally, in *Mental Health Trust and others v DD*, Cobb J explained that:³⁴

‘... the best interests [of the mother] are not limited to best *medical* interests, but the wider best interests of DD [the mother]. It must be in the best interests of any woman carrying a full-term child whom she wants to be born alive and healthy that such a result should if possible be achieved.’

³² *Re AA* [2014] 2 FLR 237 at 239.

³³ *Great Western Hospitals NHS Foundation Trust v AA* [2014] EWHC 132 (Fam) at [15].

³⁴ *The Mental Health Trust & Another v DD & Another* [2014] EWCOP 11 at [97] (emphasis in original).

He also stated that the provision of limited information to DD about the plans for her forced caesarean section was a justified interference with her Art 8 rights, not just in the interests of her own health but for the health of her unborn child.

VII CONCLUSION

There appears to be a serious and understandable reluctance on the part of the courts to allow a woman to refuse a caesarean section and risk her own life, or that of her unborn child in spite of Butler-Sloss LJ's observation in *Re MB*, and Judge LJ's clear statement in *St George's Healthcare NHS Trust v S; R v Collins and Others, ex parte S*, that pregnant women who are of sound mind are entitled to refuse medical treatment even at the expense of their own death and that of their unborn child. Women are likely to be diagnosed as mentally incompetent and be ordered to undergo caesarean sections to ensure that the unthinkable does not happen – a dead baby and a dead mother. The courts' approach is not unreasonable; who would want to ignore the potential life of a foetus within days, or even hours, of the birth? However, it is an approach which may, in certain situations, be less than honest and also demeaning to those pregnant women who would not be described as lacking in mental capacity in any other situation which affects their lives.

Butler Sloss LJ and Judge LJ's views are based on precedents relating to an individual's mental capacity in circumstances not related to pregnancy. A pregnant woman at the moment of birth cannot be seen as the only person involved in the decision to refuse a caesarean section. Her unborn child at the moment of birth is on the cusp of becoming an individual human being. Is it time for Parliament to consider this issue and recognise that an unborn child, immediately prior to birth, should not be regarded as a mere foetus with no rights but should be placed in a special category and protected. He or she should be regarded as having a right to be born safely and, if necessary, by caesarean section as long as the mother's life is not put at risk by such an intervention. It would be a more honest solution for both mothers and doctors than the current pragmatic approach of the courts and would be in keeping with existing statutes which protect the unborn child. It would avoid the last minute race to court when a woman is on the point of giving birth and the uncertainty, panic and danger which that entails for all those involved.

Unless, and until, such legislation is enacted, the English judiciary is likely to continue to find women mentally incompetent and that their best interests will be served by a mandatory caesarean section. I would suggest that Butler-Sloss LJ's statement at the beginning of this chapter will rarely be honoured.

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EUROPEAN LAW

DEFINING THE FAMILY AND THE SCOPE OF PROTECTION AVAILABLE – TENSIONS BETWEEN NATIONAL GOVERNANCE AND INTERNATIONAL EXPECTATIONS

*Louise Crowley**

Résumé

La Cour européenne des droits de l'homme est un forum actif en matière d'examen des plaintes individuelles contre les gouvernements dans le domaine des droits individuels et familiaux. Il reste qu'en dépit des progrès indéniables réalisés tant sur le plan du droit domestique que du droit européen, la déférence à la marge d'appréciation des États signataires a été prépondérante dans ce secteur particulièrement sensible du droit. Cela provoque des tensions continues entre les positions de juridictions locales et les inclinations souvent (mais pas toujours) plus libérales de la Cour européenne des Droits de l'Homme. Le présent texte analyse ces questions à travers les exemples du changement de sexe et des relations homosexuelles.

I INTRODUCTION

Family law is an especially organic and evolving area of law; reacting as it must to social change but nonetheless operating within the confines of the social and cultural norms of each jurisdiction. It is arguable that in the context of regulating the family, law is used less as a social tool utilised to direct individual choices and rather more typically as a regulatory framework to identify and protect the rights of a social unit or units, as individual and social choices evolve, making it reactive rather than proactive in approach. In terms of scope, the concept of the family and the protections afforded to the family by any state is typically limited by the parameters placed by individual states on its definition and composition. Traditionally many states deliberately limited the scope of the concept of family, mandating a particular structure and composition in order for it to come within the remit of the protections offered. Historically, differences have always existed between individual states as to the accepted norms in this sphere, but progressive shifts in respect of the changing

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shape and definition of families and the associated development of individual and family unit-based rights have been addressed to different degrees in most states. Against this backdrop the European Court of Human Rights has served as an active forum for the identification and consideration of individual grievances against governing regimes, in respect of the vindication of individual and/or family-based rights. However, despite the unquestionable progress that has been made at domestic and convention level, the over-riding deference to the margin of appreciation of signatory states in this especially sensitive area of governance can still result in remaining tensions between the jurisdiction-based regulatory approaches and the typically (but not always) more liberal inclinations of the European Court of Human Rights.

II DEFINING THE SCOPE OF ART 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Court of Human Rights has demonstrated a growing acceptance of the multiple formulations of family to which the Art 8 Convention rights may apply, continuing the shift away from the more traditional construct of the family, historically expected to be premised upon a marital union, and typically with children. This broadening of the application of the Art 8 right to respect for one's private and family life has been evident in a number of recent cases, some related directly to the scope and definition of the familial relationship, and others more broadly linked to the notion of private life. However, as a collective it is reasonable to surmise that these decisions of the Court reflect a further and developing willingness to continue to extend the reach of Art 8 protection.

In *Fernandez Martinez v Spain*,¹ the complainant priest, an employee of the state, had been working as a religious education teacher for 7 years on the basis of renewable annual contracts. Privately, he lived as a married priest, with five children. The case arose from the decision of the Ministry of Education, under the direction of the diocese where he worked, to refuse to renew his contract; he claimed that this was in light of his personal circumstances becoming widely known through media exposure. Fernandez Martinez sought to rely upon the protections afforded by Art 8, claiming that the non-renewal of his employment contract had occurred as a direct result of the personal choices he had made in his private and family life. The European Court of Human Rights found in his favour, regarding 'private life ... [as] ... a broad term not susceptible to exhaustive definition',² and deeming Art 8 to be applicable to the case. It regarded the refusal to renew the contract as constituting interference with the exercise by the complainant of his right to respect for his private life.

¹ Application no 56030/07 Judgment of the Grand Chamber 12 June 2014.

² Paragraph 109; relying upon *Schuth v Germany* no 1620/03 ECHR 2010, stating that it would be 'too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle'.

‘Restrictions on an individual’s professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. In addition, professional life is often intricably linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession.’

The Grand Chamber took the view that ‘as a consequence of the non-renewal of the applicant’s contract, his chances of carrying on his specific professional activity were seriously affected on account of events mainly related to personal choices he had made in the context of his private and family life’ and thus it followed that Art 8 was applicable. However, in adjudicating on the issue of arbitrary interference, the Court noted that ‘regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual’, noting the fact of the state’s margin of appreciation in both instances.³ In applying these accepted principles to the facts of the case, the complainant’s awareness of his heightened duty to the church as an employee of the state within the religious context was deemed to limit the scope of his right to respect for his own private choices. The court was of the view that:⁴

‘by signing his successive employment contracts, the applicant knowingly and voluntarily accepted a heightened duty of loyalty towards the Catholic Church, which limited the scope of his right to respect for his private and family life to a certain degree.’

Thus, given that the applicant had knowingly placed himself in a situation that was incompatible with the teachings of the Church, the Court concluded that no violation had occurred in the circumstances.

Although unrelated to the definition or scope of the family per se, the decision of the Court in *Konovalova v Russia*⁵ demonstrates a consideration of a previously untested aspect of the concept of private life – notably the extent of a patient’s rights in the context of medical procedures, and in again stating that ‘the concept of “private life” is a broad term not susceptible to exhaustive definition’,⁶ it serves to highlight the obligation on signatory states to protect individual rights of privacy; and in the instant case, the right of free and informed consent in the patient–hospital relationship. The applicant challenged the uninvited presence of medical students at the birth of her child, notwithstanding that she was attending a public hospital and was informed in advance, via information booklet, of the possibility of their presence. After the birth she claimed that their attendance without her express consent in advance had constituted a breach of her rights under Art 8. The Court found in her favour, declaring:⁷

³ Paragraph 114.

⁴ Paragraph 135.

⁵ Application no 37873/04; judgment delivered 9 October 2014; rectified 21 November 2014.

⁶ Paragraph 39. The court noted that Art 8 covers, amongst other things, information relating to one’s personal identity, such as a person’s name, photograph, or physical and moral integrity.

⁷ Paragraph 41.

‘that given the sensitive nature of the medical procedures ... the fact that the medical students witnessed it and thus had access to her confidential medical information ... there is no doubt that such an arrangement amounted to “an interference” with the applicant’s private life within the meaning of Article 8 of the Convention ...’

and thus there had been ‘an interference’ with her right to respect for her private life. The fact of an established legal basis for the interference, Art 54 of the Russian Health Care Act, did not legitimise the interference, as the Court regarded the statutory provision as having failed to ‘contain any safeguards capable of providing protection to patients’ private lives’ as necessary.⁸

The interesting related judgment of the Court in *Dubska and Krejova v Czech Republic*⁹ considered the scope of the contracting states’ margin of appreciation in respect of the compliance of domestic legislation with Art 8 obligations. Acknowledging the sensitivities associated with the process of giving birth, as per the case of *Konovalova v Russia*, the Court noted in particular the important related issues of physical and psychological integrity, medical intervention, reproductive health and the protection of health-related information. Consequently, as a matter of definition, the Court was satisfied that decisions relating to the circumstances of giving birth do fall within the scope of the mother’s private life for the purposes of Art 8. However, the issue before the court in *Dubska and Krejova v Czech Republic*, ie the prohibition under Czech law preventing health professionals from assisting with home births, was deemed to be a matter within the scope of the wide margin of appreciation afforded to signatory states and could not be regarded as placing an unlawful disproportionate or excessive burden upon the applicants. Certainly in allowing for this margin of appreciation, the Court relied upon what it considered to be the lack of European consensus on the issue of facilitating home births as a matter of policy.

More directly relevant to the concept and definition of family is the recent decision of the Grand Chamber in *Hamalainen v Finland*¹⁰ where the issue of gender identity in the sphere of family life was considered. The applicant had undergone male-to-female gender reassignment surgery and issued the complaint because she was unable to record her new gender without either securing a divorce against her wife or alternatively transforming the marriage into a same-sex registered partnership. Neither was possible in the circumstances: the former because it would go against their religious conviction and the latter because her spouse would not consent to the transformation of their relationship status. The applicant claimed that, by forcing her to take one of these actions in order to record her new identity, her right to private and family life, as guaranteed under Art 8, was violated. The decision of the Grand Chamber not to find in her favour was not surprising in light of previous

⁸ Paragraphs 43–44.

⁹ Applications nos 28859/11 and 28473/12.

¹⁰ [2014] ECHR 787. Application no 37359/09. Judgment of the Grand Chamber delivered 16 July 2014.

decisions in similar cases, bowing to the need for a margin of appreciation to be afforded to signatory states, given that the case ‘raises sensitive moral or ethical issues’,¹¹ as well as the absence of a European consensus on permitting same-sex marriages and the related lack of governing regulations of marriages where one party has undergone gender reassignment. From a comparative perspective and in an attempt to identify any level of consensus amongst the member states of the Council of Europe, the Court noted as follows:¹²

‘From the information available to the Court, it would appear that ... twenty-four member States (Albania, Andorra, Azerbaijan, Bulgaria, Bosnia and Herzegovina, Croatia, Cyprus, Estonia, Georgia, Greece, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Moldova, Monaco, Montenegro, Poland, Romania, Russia, Serbia, Slovenia and Slovakia) have no clear legal framework for legal gender recognition or no legal provisions which specifically deal with the status of married persons who have undergone gender reassignment. The absence of legal regulations in these member States leaves a number of questions unanswered, among which is the fate of a marriage concluded before gender reassignment surgery. In six member States (Hungary, Italy, Ireland, Malta, Turkey and Ukraine) relevant legislation on gender recognition exists. In these States the legislation specifically requires that a person be single or divorced, or there are general provisions in the civil codes or family-law provisions stating that after a change of sex any existing marriage is declared null and void or dissolved. Exceptions allowing a married person to gain legal recognition of his or her acquired gender without having to end a pre-existing marriage exist in only three member States (Austria, Germany and Switzerland).

... It would thus appear that, where same-sex marriage is not permitted, only three member States permit an exception which would allow a married person to gain legal recognition of his or her acquired gender without having to end his or her existing marriage. In twenty-four member States the position is rather unclear, given the lack of specific legal regulations in place.’

As regards the extent of the signatory states’ duty to give effect to their positive obligations under Art 8, given the sensitivities surrounding the issue for consideration, and the need to strike a balance between competing private and public interest of Convention Rights, the Court accepted the need for a wide margin of appreciation in the particular circumstances.¹³

‘In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one ... This margin must in principle extend both to the State’s decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.’¹⁴

¹¹ Paragraph 67.

¹² Paragraphs 32–33.

¹³ Paragraph 67, citing *Fretté v France* and others Application no 36515/97.

¹⁴ Paragraph 75. The court in this paragraph relied upon the previous ruling in *X, Y and Z v United Kingdom* Application no 21830/93 (1997).

An additional factor hindering the strength of the applicant's claim that her rights under Art 8 had been breached related to the fact of her remaining options, in particular the capacity for her to convert her marriage into a registered partnership, a status that already operated to protect same-sex couples in a manner very similar to marriage. On this point, the differences between marriage and registered partnership were not deemed sufficient to amount to a failure on the part of the Finnish legal system to act:¹⁵

'In the Court's view, it is not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership as that is a genuine option which provides legal protection for same-sex couples that is almost identical to that of marriage (see *Parry v The United Kingdom* (dec)). The minor differences between these two legal concepts are not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation.'

Another recent decision of the European Court of Human Rights in respect of Art 8 arises from the related cases of *Mennesson v France*¹⁶ and *Labassée v France*¹⁷ which concerned a claim of interference first in relation to respect for the collective family life of surrogate parents and their twin daughters; and secondly relating to the twins' right to respect for their private lives. The cases centred on the refusal by the French authorities to recognise the parentage of the applicant twin girls, born as the result of a surrogacy arrangement entered into in California. The applicants sought to register their familial parent-child status in France, having already secured US birth certificates identifying the French couple as the parents of the two girls, following a judgment of the Californian Supreme Court. The parents were unable to register the birth of the girls in the French Civil Register because surrogacy is prohibited under French law. The Court of Cassation in France rejected the applicants' case on the basis that surrogacy is unlawful and is contrary to French law and public policy.

The European Court of Human Rights commenced its judgment by declaring it to be satisfied that the complainants Mr and Mrs Mennesson had cared for the children since birth and they had lived together as a family in France for 10 years, being 'brought up there by genetic and intended parents in a de facto family unit in which [they were receiving] affection, care, education and the material welfare necessary to their development'.¹⁸

On the first issue, by way of preliminary point, the Court noted that it was not in dispute between the parties that the refusal by the French authorities to legally recognise the family tie between the four applicants amounted to an interference in their right to respect for their family life, and thus it was simply

¹⁵ Paragraph 87. Thus the court concluded that no violation could be declared. Of note of course is the subsequent change in governing Finnish regulation, with same-sex marriage to become lawful in Finland in 2017.

¹⁶ Application no 65192/11.

¹⁷ Application no 65941/11.

¹⁸ Paragraph 26, quoting from the observations of the Advocate-General, although his opinion was not followed by the Court of Cassation (First Civil Division) 6 April 2011.

for the Court to determine the lawfulness of that interference. Such interference would be regarded as a breach of the rights guaranteed by Art 8 of the Convention ‘unless it is justified under paragraph 2 of that Article as “being in accordance with the law”, pursuing one or more of the legitimate aims listed therein, and being “necessary in a democratic society” in order to achieve the aim or aims concerned’.¹⁹

On the first issue requiring that the interference must be ‘in accordance with the law’ the Court explained that not only does this mandate that the measure in question must have a basis in law, but also that it must be accessible to the person affected and be foreseeable as to its effects in order to permit the person to regulate his or her behaviour as necessary.²⁰ The court was satisfied that the interference was in fact in accordance with law, on the basis of the evidence adduced and the applicants’ associated failure to support their assertion that a more liberal practice had previously existed in France regarding the recognition of a surrogacy arrangement. As regards the legitimacy of the refusal to recognise the existence of a valid legal familial relationship, the Court noted the lack of a consensus in Europe on the lawfulness of surrogacy arrangements and on the legal recognition of the relationship between the intended parents and the child or children conceived abroad:²¹

‘A comparative-law survey conducted by the Court shows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others. In thirteen of these thirty-five States it is possible to obtain legal recognition of the parent-child relationship between the intended parents and the children conceived through a surrogacy agreement legally performed abroad. This also appears to be possible in eleven other States (including one in which the possibility may only be available in respect of the father-child relationship where the intended father is the biological father), but excluded in the eleven remaining States (except perhaps the possibility in one of them of obtaining recognition of the father-child relationship where the intended father is the biological father) ...’

The lack of a consensus was not a surprise to the court, given the ‘sensitive ethical questions’ raised in this context and thus led the court to recognise the need for a wide margin of appreciation in principle, both in relation to authorising surrogacy arrangements and also recognising such arrangements carried out in other jurisdictions. However, given the impact of the French Government’s refusal upon what the court regarded as ‘an essential aspect of

¹⁹ Paragraph 50. The Court further noted that ‘[t]he notion of “necessity” implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued ...’ citing reliance upon *Wegner and JMWL v Luxembourg* Application no 76240/01 and *Negrepontis-Giannis v Greece* Application no 56759/08.

²⁰ Paragraph 57; citing relevant case law from the Court in support: *Rotaru v Romania* Application no 28341/95 ECHR 2000-V and *Sabanchiyeva and others v Russia* Application no 38450/05 ECHR 2013.

²¹ Paragraph 78.

the identity of individuals',²² it determined that in the present case the margin of appreciation must be reduced. In respect of the claim by the four applicants that the French laws failed to vindicate their right to respect for their family life, the Court concluded that the applicants had not claimed that it had been impossible for them to overcome the practical difficulties arising from the lack of recognition of the legal parent–child relationship and were thus deemed to have failed to demonstrate that they had been prevented from enjoying in France their right to respect for their family life.²³ Thus the court agreed with the findings of the Court of Cassation on this point, concluding that the situation arising from the lack of French legal recognition of the parent–child relationship 'strikes a fair balance between the interests of the applicants and those of the State in so far as their right to respect for family life is concerned'.²⁴ The separate claim of a failure to respect the private lives of the third and fourth applicants was however successful. The Court commenced this part of its ruling by noting that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship ...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned'.²⁵ The legal uncertainty for the third and fourth applicants arising by virtue of the failure by France to recognise their legal relationship with their parents was regarded as serving to undermine their identity in French society, with the capacity to have 'negative repercussions on the definition of their personal identity' as well as consequences for their inheritance rights.²⁶ In the circumstances the Court unanimously ruled that²⁷

'having regard to the consequences of this serious restriction on the identity and right to respect for private life of the third and fourth applicants, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation ... having regard also to the importance to be given to the child's interests when weighing up the competing interests at stake, the Court concludes that the right of the third and fourth applicants to respect for their private life was infringed.'

The gradual expansion of the scope of the rights and the circumstances to which they will apply arising under Art 8 and the associated willingness of the European Court of Human Rights to narrow the margin of appreciation afforded to signatory states was perhaps better evident in the 2014 judgment in *Jeunesse v the Netherlands*.²⁸ This case concerned a complaint by Jeunesse, a Surinamese national who was illegally present in the Netherlands, having been refused a residence permit although she lived there with her Dutch husband and their three children and provided welcome clarification in respect of the scope

²² Paragraph 80.

²³ Paragraph 92.

²⁴ Paragraph 94.

²⁵ Paragraph 96.

²⁶ Paragraphs 96–97.

²⁷ Paragraphs 101–102.

²⁸ Application no 12738/10; judgment delivered on 3 October 2014.

of a signatory state's positive obligations to ensure respect for family and private life under Art 8, arising in the context of immigration. Crucially the court addressed the state's margin of appreciation given the fact of family life being established, albeit during an illegal overstay, and the associated obligations on the state vis-à-vis the children and the protection of their best interests.

The applicant had overstayed a tourist visa and subsequently married a Dutch national with whom she had three children. Despite numerous attempts the applicant failed to secure a residence permit, primarily given her lack of a provisional residence permit upon which to ground a successful application. Before the Grand Chamber she sought to rely upon, inter alia, her rights arising by virtue of Art 8; that the refusal by the Dutch authorities to issue her a residence permit amounted to an infringement of her right to respect for her family life. As a matter of process, the domestic practice, as evidenced in this case, of requiring requests to be made from outside the receiving state, was regarded by the Grand Chamber as entirely reasonable. In cases such as the one at issue, where the applicant is part of an established family living with nationals of that state, the Court stated that only in the most exceptional circumstances would the removal of such an applicant be deemed incompatible with Art 8. However such exceptional circumstances were deemed to exist in the case presented by the applicant, the Court was satisfied that, upon examining her circumstances cumulatively, the Dutch authorities had failed to strike a fair balance between the competing interests of the complainant, her husband and their children and their need to maintain their family life together in the Netherlands and the competing interest of the state's public-order efforts to control immigration. Ultimately the Court found in favour of the applicant, concluding that:²⁹

‘national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interest of the children directly affected by it.’

Thus whilst there remains significant domestic capacity to refuse applications for residence notwithstanding evidence of family life, and Art 8 cannot serve as a means to override domestic policies that greatly restrict the success of such applications, where exceptional circumstances are presented, the European Court of Human Rights can invoke Art 8 to protect the right to private and family life.

Reliance upon Art 8 protections has more recently been accepted in respect of the *potential* for family life developing at a future stage. The applicants in *D and Others v Belgium*³⁰ challenged the time taken by the Belgian authorities to provide them with the necessary travel documentation to allow a child born in the Ukraine as the result of a surrogacy arrangement to return to Belgium with

²⁹ Paragraph 120.

³⁰ Application no 29176/13. Judgment delivered 8 July 2014.

the applicants following his birth. The capacity to rely upon Art 8 was not negatively affected by the fact that the parents and child had very limited contact at the time of the hearing, and struggled to prove the fact of ‘family life’. The Court was satisfied that, in light of the extensive efforts of the parents from the moment of birth to establish strong familial ties, an effective family life had in fact existed and they were deemed entitled to invoke the protections available under Art 8. In the circumstances however, the court was not satisfied that the applicants had proven unreasonable delay and the complaint was rejected as manifestly ill-founded.³¹

Finally, as regards the scope and impact of Art 8, the European Court of Human Rights also recently considered the scope of protection that can be afforded to protect the relationship between grandparents and grandchildren. In *Kruskic v Croatia*³² the first and second named applicants, the grandparents, sought to challenge the decision of the domestic court to award custody of their grandchildren to the children’s father. Whilst the court accepted that Art 8 might be invoked successfully by grandparents, it stated that the relationship between grandparents and grandchildren attracts a lesser degree of protection and is different in nature from a parental/child relationship. Additionally, although Art 8 can be successfully relied upon by grandparents in certain circumstances, it cannot in its own right be regarded as conferring custodial rights on grandparents. The complaint before the court in this case was rejected as manifestly ill-founded, especially as the father had not renounced nor been divested of his rights and responsibilities of parental care; and indeed the domestic proceedings were ongoing. However, the capacity for Art 8 to apply to protect the grandparent–grandchild relationship reflects an expanding view of the scope of Art 8 protections and its capacity to protect parties in a non-traditional family formation.

III EXPANDING THE BOUNDARIES OF MARRIAGE – MOVING TOWARDS THE ACCEPTANCE OF SAME-SEX-MARRIAGE AS A RIGHT?

The capacity for parties to a same-sex partnership to secure protection under the European Convention on Human Rights Art 8 guarantee of respect for private and family life has been considered in a number of recent cases by both the First Section Chamber and the Grand Chamber of the European Court of Human Rights. In these cases, the Court has also 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 in same-sex relationships where they seek to vindicate their rights to equal treatment. Specifically the cases before the courts have arisen in the context of the consideration of the

³¹ The child was born on 26 June 2013 and was not authorised to arrive in Belgium accompanied by the applicants until 6 August 2013, following approval by the Brussels Court of Appeal for the issuing of a travel document in the child’s name.

³² Application no 10140/13. Judgment delivered on 25 November 2014.

right to marry and the right to adopt and the recent rulings have demonstrated that the international momentum is moving increasingly towards the recognition of the equal rights of all couples, as regards both status and substantive rights.

Whilst the European Court of Human Rights has not as yet recognised the right to same-sex marriage nor has it identified any positive obligation on members of the Council of Europe to afford and facilitate this right, recent case law centring on the application and scope of the right to respect for private and family life in this and related contexts continues with a progressive, less rigid view of the notion of family, suggesting a gradual movement in that direction. Recent applications to the court have relied as a starting point upon the important decision of *Schalk and Kopf v Austria*³³ where it was accepted by the Court 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, these applications have sought to further extend that 2010 decision, and to limit or indeed eliminate the generous margin of appreciation afforded to the Austrian Government in that case.³⁴ The applicants in *Schalk and Kopf v Austria* sought a progressive, contemporary interpretation of the Art 12 right to marry, challenging the (then) Austrian statutory provisions which they claimed to be in breach of their right to marry and additionally in breach of the Art 14 right to non-discriminatory treatment in circumstances where the discrimination could no longer be regarded as objectively justifiable in the circumstances. In calling for a more liberal interpretation of the Art 12 right to marry, they sought to rely upon what they identified as the existing international acceptance of the right of same-sex couples to have their relationships recognised by law. However, the Court pointed to the lack of a consensus amongst signatory states, noting that at that time, no more than six of the 47 Convention states permitted same-sex marriage.³⁵ Showing absolute deference to the individual signatory states’ right to govern in this sensitive area, the Court relied expressly upon Art 9 of the Charter of Fundamental Rights of the European Union and the right to determination of the scope of the right by individual national states which provides that ‘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’.³⁶ This formed the basis for the Court’s refusal to impose its own judgment upon national authorities, who retain the right to regulate in such matters in light of domestic norms and policies.

However, of note since this 2010 judgment are both the changing regulatory frameworks in numerous signatory states as well as the related decision (both

³³ *Schalk and Kopf v Austria* [2010] ECHR 995.

³⁴ However, the potential scope and impact of this judgment was greatly lessened by the court’s ultimate reluctance to identify the fact of such a right, in light of the Court’s acceptance of a significant ‘margin of appreciation’ for individual signatory states in respect of the equal right to marry, thereby limiting the impact of the extension of the application of Art 8.

³⁵ Paragraph 57.

³⁶ See www.europarl.europa.eu/charter/pdf/text_en.pdf.

delivered and pending) of the European Court of Human Rights. It is interesting to track the slow but definite escalation in the number of states now permitting same-sex marriage – not quite attaining consensus status yet, but certainly moving in that direction. In addition to the ongoing attempts by citizens, individually and collectively, to convince their domestic courts and ultimately in some instances, the Grand Chamber of the European Court of Human Rights, to progress the rights of same sex couples, the legislatures of various jurisdictions, and in the case of Ireland, the citizens,³⁷ are in fact making the most significant progress on this issue. Currently, 13 European countries recognise same-sex marriage as lawful, namely Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom (except Northern Ireland).³⁸ Finland and Ireland are the most recent additions to this list; Finland will give effect to same-sex marriage in 2017.³⁹ Ireland has uniquely progressed its laws by way of popular vote; with 60 per cent of those voting in a referendum on 22 May 2015 voting in favour of the re-definition of the right to marry to exclude any distinction based on the gender of those entering the civil union. Upon the passing of the Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015 the Irish Constitution will be amended to state as follows: ‘Marriage may be contracted in accordance with law by two persons without distinction as to their sex.’ Further, the matter is far from stagnant in the remaining jurisdictions; an additional 12 countries have a form of civil union or unregistered cohabitation. A number of the jurisdictions that have sought to maintain a distinction in respect of the status and rights of a different-sex relationship and that of a same-sex relationship have been challenged before both national courts and the ECtHR to varying levels of success, as set out below. A related question still unanswered, but pending before the Court (and set out below), is the lawfulness of excluding heterosexual couples from the right to access civil partnerships.

As regards this contemporaneously developing case law of the European Court of Human Rights, a number of recent decisions demonstrate a willingness on the part of the Court to support this international liberalisation of laws. An example is the recent decision in *Vallianatos and others v Greece*,⁴⁰ where, notwithstanding an acceptance of the lack of consensus amongst countries within the Council of Europe, the Court recognised the increasing recognition

³⁷ The majority of the Irish electorate voted in favour of amending the Irish Constitution on 22 May 2015 to a right to marriage equality, irrespective of the gender of the parties.

³⁸ 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), Denmark (2012), France (2013), England/Wales (2013), Scotland (2014) and Luxembourg (2015). An additional 14 have a legally recognised form of civil union or unregistered cohabitation.

³⁹ In February 2015 the President of Finland has signed a law introducing equal marriage rights following a narrow acceptance by the Finnish Parliament in November 2014. The law will have effect from 1 March 2017.

⁴⁰ Applications no 29381/09 and 32684/09; judgment delivered 7 November 2013.

and regulation of same-sex relationships, in varying formats, including the right to same-sex marriage in nine signatory states:⁴¹

‘a trend is currently emerging with regard to the introduction of forms of legal recognition of same sex marriage. In addition, seventeen member states authorise some form of civil partnership for same-sex couples. As to the specific issue raised in the present case, the Court considers that the trend emerging in the legal systems of the Council of Europe member states is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples. In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, includes same-sex couples in its scope ...’

The case heard before the Grand Chamber was brought by three same-sex couples and a not-for-profit organisation which provides psychological and moral support to gays and lesbians, who collectively claimed that Greek Law No 3719/2008,⁴² enacted in November 2008 creating the concept of ‘civil unions’, a partnership between two adults of different gender, was a violation of Art 8, taken together with Art 14 of the European Convention of Human Rights. The judgment of the Grand Chamber provides a very useful contemporary statement of not only the court’s understanding of the evolving application of Arts 8 and 14, but also a broad analysis of the comparative European and international law approach to non-marital partnerships within the legal systems of the Council of Europe. In addition to tracking the updated position of those states,⁴³ the judgment makes reference to the relatively progressive views of the Parliamentary assembly of the Council of Europe. Specifically Resolution 1728 (2010) adopted on 29 April 2010, entitled ‘Discrimination on the basis of sexual orientation and gender identity’, calls on member states to ‘ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000’, by providing, inter alia, for ‘the same pecuniary rights and obligations as those pertaining to different-sex couples; and measures to ensure

⁴¹ At para 91.

⁴² Law no 3719/2008 entitled ‘Reforms concerning the family, children and society’.

⁴³ The judgment at part B, paras 25–26 sets what it refers to as the ‘Comparative Law material’ in this context as follows: ‘25 The comparative law material available to the Court on the introduction of official forms of non-marital partnership within the legal systems of Council of Europe member States shows that nine countries (Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden) recognise same-sex marriage. In addition, seventeen member States (Andorra, Austria, Belgium, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Slovenia Spain, Switzerland and the United Kingdom) authorise some form of civil partnership for same-sex couples. Denmark, Norway and Sweden recognise the right to same-sex marriage without at the same time providing for the possibility of entering into a civil partnership. 26. Lastly, Lithuania and Greece are the only Council of Europe countries which provide for a form of registered partnership designed solely for different-sex couples, as an alternative to marriage (which is available only to different-sex couples).’

that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship'.⁴⁴

In considering the alleged discriminatory treatment of the applicants, the Grand Chamber refers to Recommendation CM/Rec (2010)5 of the Council of Europe which sets out required measures to combat discrimination on grounds of sexual orientation or gender identity, and notes the recommendation by the Committee of Ministers that Member States:⁴⁵

1. examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;
2. ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them ...'

The Grand Chamber further noted that Recommendation CM/Rec (2010)5 also requires that⁴⁶

23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.
24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.
25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.'

The position under European Union law was also considered by the Court and in particular, the commentary of the Charter of Fundamental Rights of the European Union in respect of Arts 7, 9 and 21 of the Charter, relating to discrimination. Article 7 asserts the right to respect for private and family life;⁴⁷

⁴⁴ Paragraphs 16.9.1 and 169.3 of Resolution 1728 (2010) cited in para 28 of the judgment.

⁴⁵ Paragraphs 1 and 2 of Recommendation CM/Rec (2010) 5 on measures to combat discrimination on grounds of sexual orientation or gender identity, set out in para 29 of the judgment.

⁴⁶ Paragraphs 23–25; cited at para 30 of the judgment.

⁴⁷ 'Everyone has the right to respect for his or her private and family life, home and communications.'

Art 9 provides a clear statement on the right to marry;⁴⁸ whilst Art 21 prohibits discrimination on a lengthy list of grounds.⁴⁹ All three articles are cited in full by the Court in considering the current and potential obligations of EU member states and, in assessing their impact, the Court was instructed by the Commentary of the Charter of Fundamental Rights of the European Union, prepared in 2006 by the EU Network of Independent Experts on Fundamental Rights, stating as follows in relation to Art 9:⁵⁰

‘Modern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few states still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry. At present there is very limited legal recognition of same-sex relationships in the sense that marriage is not available to same-sex couples. The domestic laws of the majority of states presuppose, in other words, that the intending spouses are of different sexes. Nevertheless, in a few countries, e.g., in the Netherlands and in Belgium, marriage between people of the same sex is legally recognized. Others, like the Nordic countries, have endorsed a registered partnership legislation, which implies, among other things, that most provisions concerning marriage, i.e. its legal consequences such as property distribution, rights of inheritance, etc., are also applicable to these unions. At the same time it is important to point out that the name “registered partnership” has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognizing personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage ...

In order to take into account the diversity of domestic regulations on marriage, Article 9 of the Charter refers to domestic legislation. As it appears from its formulation, the provision is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to “men and women” as the case is in other human rights instruments, it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples.’

Thus at this point of its judgment the Court noted and reiterated the capacity for signatory states to lawfully recognise same-sex marriages through domestic regimes, but again reiterated the position outlined in *Schalk v Kopf* and rejected any suggestion that such marriages must be positively facilitated by domestic marital laws.

⁴⁸ ‘The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.’

⁴⁹ ‘1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.’

⁵⁰ Paragraph 32.

In considering the merits of the case, the Court outlined the reliance by the Greek Government on the legitimate aims of Law no 3719/2008, which ‘should be viewed as a set of provisions allowing parents to raise their biological children in such a way that the father had an equitable share of parental responsibility without the couple being obliged to marry’.⁵¹ Thus, in limiting the availability of the union to heterosexual couples, the Greek Government sought to find other means of stabilising the relationship between heterosexual parents, in order to better secure both parental and child rights. Intriguingly the Court demonstrated that ‘the Greek legislature had shown itself to be both traditional and modern in its thinking’; in recognising the societal shift away from the traditional marital union, and creating an alternative legal framework, whilst continuing to limit the scope of that statutory-based status and associated rights solely to heterosexual couples. This motivation, when applied to the personal situation of the applicant couples, was justified in the submissions of the Greek Government on the basis ‘that the biological difference between different-sex and same-sex couples, in so far as the latter could not have biological children together, justified limiting civil unions to different-sex couples’.⁵² It was argued by the Greek Government that, by no longer necessitating marriage in order to allow a father to establish paternity and be involved in his child’s life, the limited availability of the civil union created by the impugned law could not thus be perceived as a violation of Arts 14 and 8 of the Convention. In their defence it was asserted that same-sex couples could simply not be regarded as being in a ‘similar or comparable situation to different-sex couples, since they could not in any circumstances have biological children together’.⁵³ In light of the fact of legislation on civil unions in other Council of Europe member states, the Greek Government added that Law no 3719/2008 differed from similar legislation in those states and was thus capable of being distinguished legitimately:⁵⁴

‘While those laws produced effects with regard to the financial relations between the parties, only the Greek legislation established a presumption of paternity in respect of children born in the context of a civil union. The Government concluded from this that Law no. 3719/2008 focused on the personal ties between the partners rather than the property-related aspects of their relationship.’

On the first issue, the Court recognised the absence of a dispute regarding whether the applicants’ relationship fell within the notion of ‘private life’ within the meaning of Art 8 of the Convention, and noting that, in light of the decision in *Schalk and Kopf v Austria*, and ‘in view of the rapid evolution in a considerable number of member States regarding the granting of legal recognition to same-sex couples, it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple [could not] enjoy “family life” for the purposes of Article 8’.⁵⁵ Consequently the Court was of the

⁵¹ Paragraph 82.

⁵² Paragraph 67.

⁵³ Ibid.

⁵⁴ Paragraph 68.

⁵⁵ Paragraph 73, quoting directly from *Schalk and Kopf* at 94.

view ‘that the applicants’ relationships in the present case fall within the notion of “private life” and that of “family life”, just as would the relationships of different-sex couples in the same situation’.⁵⁶ However, in its judgment the Court also accepted that the protection of the ‘traditional’ family ‘might justify a difference in treatment’ and accepted that it can be legitimate to ‘enact legislation to regulate the situation of children born outside marriage and also indirectly strengthen the institution of marriage within Greek society’. Equally such a distinction in treatment mandates respect for the principle of proportionality in the circumstances. In assessing this, the Court reaffirmed, with reference to the decisions in *Tyrer v the United Kingdom*⁵⁷ and *Goodwin v United Kingdom*,⁵⁸ that the Convention is a living and evolving document, subject to progressive interpretations in light of contemporary conditions and thus the state:⁵⁹

‘in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life.’

Thus the Court emphasised the need for a state to lawfully apply its margin of appreciation in a manner which reflects the narrow margin afforded to states in cases arising ‘where there is a difference in treatment based on sex or sexual orientation’. In such cases, relying upon the previous rulings in *Karner v Austria*⁶⁰ and *Kozak v Poland*,⁶¹ it was stated that ‘the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions at issue’.⁶² Consequently the burden of proof was placed firmly on the Greek Government to justify the limited availability of civil union to the residual couples, as reasonably securing the legitimate aims which they claim to pursue, ie ‘to bar same-sex couples from entering into the civil unions provided for by Law no. 3719/2008’.⁶³

Ultimately the Court was not convinced by the defence presented by the Greek Government and found in favour of the applicants on both key issues. First the Court concluded that the Greek Government had failed to justify the ‘difference in treatment arising out of the legislation in question between same-sex and

⁵⁶ Paragraph 73.

⁵⁷ 25 April 1978 Series A no 26.

⁵⁸ Application no 28957/95 ECHR 2002-VI.

⁵⁹ Paragraph 84, further citing *X and Others v Austria* [GC] Application no 19010/07 19 February 2013 in support.

⁶⁰ Application no 40016/98 ECHR 2003-IX.

⁶¹ Application no 13102/02 2 March 2010.

⁶² Paragraph 85.

⁶³ Paragraph 85.

different-sex couples who are not parents'.⁶⁴ Secondly, the Court declared itself 'not convinced by the Government's argument that the attainment through Law no. 3719/2008 of the goals to which they refer presupposes excluding same-sex couples from its scope'.⁶⁵ By way of additional comment and notwithstanding the lack of general consensus among the legal systems of the Council of Europe Member states on the issue of same-sex marriage, the court expressly acknowledged that:

'a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples ... the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples'

Thus, save for two exceptions, the Court noted that, when choosing to amend their laws or enact new laws in respect of registered partnership as an alternative to marriage, the law-makers in the Council of Europe states have chosen to include same-sex couples in its scope. In the context of what the Court referred to as a 'gradual evolution', the European Court of Human Rights concluded that the Greek Government had failed to offer 'convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008'.⁶⁶

Currently awaiting decision before the European Court of Human Rights are the cases of *Chapin and Charpentier v France*,⁶⁷ *Ferguson and others v United Kingdom*⁶⁸ and *Orlandi and others v Italy*.⁶⁹ The case of *Chapin and Charpentier v France* centres on the marriage of two men, arising from a civil ceremony rebelliously conducted by the Mayor of Bègles, in the French department of Gironde. The union was subsequently declared null and void by the French Cour de Cassation, where, in line with common law views, it declared a valid marriage to be the union of one man and one woman. In 2009 the European Court of Human Rights gave notice of the application to the French Government and declared its intention to put questions to the parties under Art 14 (prohibition of discrimination) in conjunction with Art 12 (right to marriage) and in conjunction with Art 8 (right to respect for private and family life) of the Convention. However, given that the French law has changed significantly in the interim and legalised same-sex marriage in 2013, it has been

⁶⁴ Paragraph 89.

⁶⁵ Paragraph 89.

⁶⁶ Paragraph 92.

⁶⁷ Application no 40183/07.

⁶⁸ Application no 8254/11.

⁶⁹ Applications no 26431/12, 26742/12, 44057/12 and 60088/12.

suggested that ‘the ECtHR could easily evade the broader issue of the right of same-sex partners to marry and instead rule on the specific facts of each case’.⁷⁰

Somewhat similarly in *Ferguson v United Kingdom*, pending before the European Court of Human Rights, the first to eighth applicants seek to challenge the lawfulness of the (then) non-extension of the right to marry to same-sex couples, whilst the ninth to sixteenth applicants seek to challenge the ongoing non-availability to heterosexual couples of the right to register a civil partnership. They claim on both issues the United Kingdom is in breach of the parties’ right to respect for family life under Art 8 of the Convention. As above it has been suggested that the fact of the more recent availability of marriage to same-sex couples in the United Kingdom might permit the Court to evade the broader issue of the right to marry: ‘the ECtHR will at a minimum need to address whether barring heterosexuals from accessing civil partnerships is discriminatory.’⁷¹

In *Orlandi and Others v Italy* notice of the multiple applications received against Italy was communicated to the Italian Government in 2013, and the Court similarly put questions to the parties under Art 8 and under Art 14, read in conjunction with Art 8 and/or Art 12 of the Convention. These cases arose in the first instance following the refusal by the Italian authorities to register homosexual marriages which had been lawfully contracted in other jurisdictions. The 12 applicants, six couples, had entered into marriages in jurisdictions where such unions were lawfully permitted. Their subsequent attempts to register the marriages in Italy were refused on the basis that such unions were contrary to the norms of Italian public order. Specifically in the matter of *Antonio Garullo and Mario Ottocento*, one of the six couples presenting before the European Court of Human Rights, the Rome Court of Appeal noted that such registration could not take place given that their marriage lacked one of the essential requisites to amount to the institution of marriage in the domestic order, namely the different sex of the spouses.⁷² In presenting these cases the applicants have raised the related absence under the Italian legal system of any other domestic framework for the legal recognition of a same-sex relationship. In light of the ruling in *Vallianatos and others v Greece*, this latter issue in particular may prove difficult for the Italian Government to refute.

Marriage equality is an issue of significant social and legal importance, yet quite differing approaches remain evident in Convention signatory states. 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 evolving towards the long-standing norms for opposite-sex unions. A number of the jurisdictions that

⁷⁰ E Bribosia, I Rorive and L Van den Eynde ‘Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience’ (2014) 32 Berkeley J Int’l Law 1 at 6.

⁷¹ Ibid.

⁷² Rome Court of Appeal decision of 13 July 2006.

have sought to maintain a distinction in respect of the status and rights of a different-sex relationship and that of a same-sex relationship have been challenged before both national courts and the European Court of Human Rights to varying levels of success. A related question still unanswered is the lawfulness of excluding heterosexual couples from the right to access civil partnerships. This issue continues to develop nationally and at the European Court of Human Rights with welcome evidence of an increasing acceptance of the right to equal treatment for all committed couples; thereby respecting and facilitating their choices in private and family life. The recently developed right to some form of legal recognition and status continues to move slowly towards a growing momentum towards a right to marriage for all. The broader case law centring on the definition and scope of the family under Art 8 equally demonstrates a capacity and willingness to expand the concept, with a view to reducing the scope for the exercise of a margin of appreciation and ultimately influencing all signatory states to favourably develop their governing laws.

FIJI AND SAMOA

RESOLUTION OF FAMILY DISPUTES IN FIJI AND SAMOA

*Jennifer Corrin and Clare Cappa**

Résumé

En 2003, les îles FIDJI ont créé une chambre juridictionnelle de la famille afin de régler les conflits familiaux. En 2014, les îles SAMOA ont également créé une nouvelle instance au sein de la Cour Fédéral : Le Tribunal Familial. L'objectif n'est pas tant d'appliquer les règles de droit commun au contentieux familial, mais plutôt d'instaurer un véritable modèle de droit de la famille et des procédures s'y rattachant. Ce chapitre débute par un aperçu rapide de la situation familiale et sociétale des îles FIDJI et SAMOA. Il se concentre ensuite sur le système juridique de chacun de ces États et les procédures existantes pour la résolution des conflits familiaux. Ce chapitre pose également la question fondamentale de l'opportunité de créer de nouvelles instances juridictionnelles avec comme promesses la préservation de la pluralité des systèmes juridiques en adéquation avec les cultures locales, tout en appliquant le droit commun. Il se conclue par l'examen des différents moyens existant pour apaiser les conflits familiaux et plus particulièrement de la possibilité d'adopter des décisions à visée thérapeutique.

I INTRODUCTION

Until relatively recently most small Pacific Island countries have had a three-tier state court model consisting of an inferior court (either a magistrates' or district court), a superior court (either a high court or supreme court), and a court of appeal. In some countries there is an additional right of appeal, either within the country or to the Privy Council. In some jurisdictions the structure has been supplemented by a court established by statute to deal with customary land disputes, and, in some cases, with other minor customary disputes. Family disputes have been dealt with within the basic structure, with jurisdiction in more serious cases, such as divorce and custody of children, often resting exclusively with the superior court.

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In developed countries it has become the norm for family disputes to be dealt with in a separate family court or division.¹ In 2003, Fiji followed suit with family divisions,² and in 2014 Samoa introduced a Family Court, as a division of the District Court.³ These forums have not been established to deal with family matters in accordance with customary laws, but to follow introduced patterns of family law and procedure. This might seem surprising, particularly in Samoa, where customary laws play such an important role in family arrangements,⁴ but the statutes establishing these forums have been modelled on legislation governing overseas courts and procedures. In this respect, they may be regarded as transplants, rather than *sui generis* innovations.

As both Fiji and Samoa have plural legal systems, they also have other forums outside the state court system for dealing with family dispute resolution. In many cases disputes will not be resolved by a state court, but by a chief or, in Samoa, a *matai*, or by a group of village leaders in a customary forum. Whereas state courts in both countries are modelled on common law courts which developed over centuries in England, ‘customary’ forums have evolved locally in response to the circumstances in which they came into being. Theoretically, this expands the choice of forums for resolving family disputes. However, state court orders may often be necessary to obtain documentation which will satisfy the state. For example, a divorce certificate may be required in order to be remarried under state law.

The chapter commences with a brief background to Fiji and Samoa and an introduction to family and society, which provides vital context for understanding the issues regarding resolution of family disputes. It then outlines the countries’ legal systems, and explains the processes available for family dispute resolution in Fiji and Samoa, including the relevant legislation. The chapter then considers the merits of the introduction of family courts in these jurisdictions and poses the fundamental question of whether the addition of further state courts is an appropriate measure of reform in jurisdictions with a mandate to promote local culture and plural legal systems, which recognise customary laws. It concludes by considering alternatives to mainstream adversarial dispute resolution, specifically the role of therapeutic jurisprudence in the resolution of family disputes.

¹ In some countries, courts have become even more specialised. See, eg, the Family Drug and Alcohol Court pioneered in London in 2008, which is going national in 2015: Monidipa Fouzder, ‘Pioneering Family Court to Go National’, *Law Society Gazette*, 18 February 2015.

² Family Law Act 2003 (Fiji), ss 15–23.

³ Family Court Act 2014 (Samoa), s 4(2)(b).

⁴ See, eg, Jennifer Corrin and Lalatoa Mulitalo, ‘Adoption and “Vae Tama” in Samoa’ in Bill Atkin (ed), *International Survey of Family Law 2011 Edition* (Jordan Publishing, Bristol, 2011) 313–334.

II BACKGROUND

(a) Fiji

Fiji is a small island state in the South Pacific Ocean lying about 1,100 nautical miles northeast of New Zealand's North Island. It is made up of about 322 islands and over 500 islets. It has a population of about 850,000, dominated by indigenous Fijians and Indo-Fijians. The official languages of Fiji are English, Fijian and Fiji Hindi. Fiji is divided into four divisions, which are further subdivided into a total of 14 provinces, plus the island of Rotuma, which has some autonomy. Below the provincial level, the country is divided into districts. Within each district, society is based around the koro (village), which is made up of extended family networks, with their own chiefs and councils. The head chief is called the *Turaga ni Koro*. Koros may be grouped together within a larger area, called a *tikina*. Communities are divided into groups united by blood and marriage, tracing descent primarily through the male line. The broadest grouping is the yavusa, members of which are united by descent from a common male ancestor. Within the yavusa are a number of extended family groups called mataqali. Each mataqali consists of several tokatoka, the smallest kinship group, made up of brothers, their sons and family members of their father's group. There is a system of registration of the birth of each child within his or her father's mataqali and this entitles the child to rights in relation to land, succession and titles. A child born outside marriage is registered as a member of the mataqali of the mother's father or brother and belongs to that group, unless the biological father claims the child.⁵

Fiji was a British Protectorate from 1874 until 1970, when it was granted independence.⁶ It became a republic in 1987, after a military coup. It has a common law system. The current Constitution, the third since independence,⁷ is declared to be the Supreme law.⁸ Other sources of law are legislation of the Parliament of Fiji, Decrees made by the President or the Head of Fiji's Military Government at certain times, English Acts of Parliament in force on 2 January 1875⁹ and common law and equity, and Ordinances made by the Governor prior to independence.¹⁰ The Constitution contains an extensive bill of rights including the rights of children;¹¹ right of access to courts or tribunals;¹² right

⁵ Asesela Ravuvu, *Vaka i Taukei – the Fijian Way of Life* (University of the South Pacific, Suva, 1983).

⁶ Constitution of Fiji 1970, brought into force by the Fiji Independence Order 1970 (UK).

⁷ Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990; Constitution Amendment Act 1997.

⁸ Constitution of the Republic of Fiji 2013 ('Constitution of Fiji'), s 2.

⁹ Adopted generally in Fiji by s 22 of the Supreme Court Ordinance 1875 and continued in force as part of 'the existing laws': Constitution of Fiji, s 173.

¹⁰ Constitution of Fiji, s 173.

¹¹ Constitution of Fiji, s 41.

¹² Constitution of Fiji, s 15.

to freedom of movement and residence;¹³ right to equality and freedom from discrimination;¹⁴ right to education;¹⁵ and the right to social security schemes.¹⁶

The principal legislation governing family matters is the Family Law Act 2003¹⁷ and the Family Law Regulations 2005. This legislation replaced piecemeal legislation with a comprehensive scheme governing divorce, financial relief, matrimonial property, custody and access, counselling and reconciliation and other related matters. It also established the family divisions of the High Court and the magistrates' court. Unlike most small Pacific Island countries, Fiji does not recognise customary laws as a source of state law, except in relation to customary land.¹⁸ However, many customary principles have been encapsulated in state legislation. Also, customary laws still operate outside the state legal system, within the village and tikina.

(b) Samoa

Samoa lies about half way between Hawaii and New Zealand and consists of two main islands, Savai'i and Upolu, and seven small islets. It has a land area of 2,934 square kilometres. It has been inhabited by Polynesian people since before 1000 BC.¹⁹ It now has a population of about 214,000, divided into 11 traditional districts.²⁰ Spread amongst those districts there are about 330 village-based communities, each made up of several aiga (extended family or clan).²¹ The Samoan concept of family is very different from the Western understanding of the term. At the head of each aiga is the *matai* (chief head) who has authority over all its affairs. Each village has a fono (council) responsible for governing village affairs, and each aiga is represented in the fono by their *matai*. Village societies are governed by a complex code of social rules. The official languages are Samoan and English.

Samoa is a parliamentary democracy, which gained independence in 1962. It has a plural legal system. The Constitution is declared to be the Supreme law.²² It embodies a less extensive bill of rights than Fiji's 2013 Constitution,

¹³ Constitution of Fiji, s 21.

¹⁴ Constitution of Fiji, s 26.

¹⁵ Constitution of Fiji, s 31.

¹⁶ Constitution of Fiji, s 37.

¹⁷ The Act came into force on 1 November 2005.

¹⁸ Native Land Act cap 133, s 3.

¹⁹ George Turner, *Samoa: a Hundred Years Ago and Long Before* (Institute of Pacific Studies, University of the South Pacific, 1884 reprinted).

²⁰ Since independence, Samoa has been divided into 41 territorial constituencies for election purposes: Constitution of Samoa 1960, art 44. The boundaries are set out in the Territorial Constituencies Act 1963.

²¹ Tuvale Te'o, 'The Constitution of the Samoan Family' (available at www.nzetc.org/tm/scholarly/tei-TuvAcco-t1-body1-d26.html, accessed 23 February 2011).

²² Constitution of Samoa 1960, art 2.

including the right to personal liberty;²³ rights regarding freedom of speech, assembly, association, movement and residence;²⁴ and the right to freedom from discriminatory legislation.²⁵

Other state law consists of colonial Ordinances,²⁶ legislation, and common law.²⁷ The state legal system includes a number of statutes governing family matters.²⁸ Legislation governing marriage, divorce and financial provision includes the Marriage Ordinance 1961; the Divorce and Matrimonial Causes Ordinance 1961; and the Maintenance and Affiliation Act 1961. This legislation was amended in 2010 by the Divorce and Matrimonial Causes Amendment Act 2010 and the Maintenance and Affiliation Amendment Act 2010, which introduced significant changes. Common law and equity also form an important part of family law, particularly in relation to matrimonial property.²⁹ Customary laws are recognised by the Constitution as a source of state law and still operate independently of the state in the village context.³⁰

In both Fiji and Samoa, the force of customary laws is still strong, particularly in relation to family matters. As stated by Powles in relation to Samoa, ‘Whole areas of personal relationships – such as kinship, marriage, children, and land-holding groups – may be nationwide spheres largely covered by customary law, where the State intervenes little, if at all’.³¹ Customary laws are generally based on communal, rather than individual rights. This has given rise to tensions between customary laws and state laws. Although, according to state law, the Constitution and legislation should prevail, in practice customary laws are widely applied without reference to state law.

²³ Constitution of Samoa 1960, art 6.

²⁴ Constitution of Samoa 1960, art 13.

²⁵ Constitution of Samoa 1960, art 15.

²⁶ During the period of German Administration, Proclamations were made by the Governor. Germany renounced rights in respect of Samoa by the Treaty of Peace 1919. Regulations were made by the Military Administrator of Samoa until 1920 when the Council of the League of Nations mandated power to administer Samoa to New Zealand, when Ordinances were made by the Administrator and later by the High Commissioner.

²⁷ English legislation in force at independence and some specific New Zealand Acts continued to apply after independence but, with a few exceptions, these have since been repealed: See further Jennifer Corrin Care, *Civil Procedure and Courts in the South Pacific* (Cavendish, Oregon, 2005) 32, 37–38. As to the relationship between these sources of law see Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2011), Palgrave MacMillan, Victoria, Chapter 3.

²⁸ Marriage Act 1961 (Samoa); Marriage Ordinance 1961 (Samoa); Maintenance and Affiliation Act 1967 (Samoa); Divorce and Matrimonial Causes Ordinance 1961 (Samoa).

²⁹ Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (Palgrave MacMillan, South Yarra, Victoria, 2011) Chapter 7.

³⁰ Constitution of Samoa 1960, arts 111 and 114.

³¹ Guy Powles, ‘The Challenge of Law Reform in Pacific Island States’ in Weisbrot and Opeskin (eds), *The Promise of Law Reform* (Federation Press, Sydney, 2005) 411.

III RESOLUTION OF FAMILY LAW DISPUTES IN FIJI

(a) The state court structure

Fiji is the only country of the region to have two levels of appellate court. Prior to the commencement of the 1997 Constitution, there was also provision for inferior courts to operate at a village level.³² In fact, these courts had not operated since 1967.³³ Under the 2013 Constitution the judicial power of the state is vested in the Supreme Court, the Court of Appeal, the High Court and the Magistrates Court.³⁴ Parliament is empowered to create other courts,³⁵ so, in theory it could create state courts at a village level. However, given that one of the main policies underlying the constitutional changes was to create a united Fiji for all citizens, this seems unlikely to happen under the current government.³⁶

The Supreme Court is the final appellate court of the state,³⁷ constituted by the Chief Justice, other appointed judges and, if necessary, justices of appeal.³⁸ It has exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal. The Court of Appeal consists of the President of the Court of Appeal, justices of appeal, and, if necessary, High Court judges.³⁹ It has jurisdiction to hear and determine appeals from judgments of the High Court⁴⁰ as of right in most cases,⁴¹ and otherwise with leave.⁴² The High Court consists of the Chief Justice, appointed judges, Masters of the High Court and the Chief Registrar of the High Court.⁴³ It has unlimited original jurisdiction to hear and determine civil proceedings,⁴⁴ and to determine appeals from all judgments of subordinate courts.⁴⁵ The Magistrates' Court consists of the Chief Magistrate and other Magistrates.⁴⁶ Jurisdiction is limited to the territorial division in which the court is situated.⁴⁷ Jurisdiction is also limited to a maximum amount, depending on the level of the magistrate.

³² Fijian Affairs Act 1945 and Fijian Affairs (Courts) Regulations 1948 (revoked 1967).

³³ See V Nadakuitavuki, 'Fijian Magistrates – An Historical Perspective' in G Powles and M Pulea (eds), *Pacific Courts and Legal Systems* (USP, Suva, 1988) 78–84.

³⁴ Constitution of Fiji 2013, s 97(1).

³⁵ Constitution of Fiji 2013, ss 97(1) and 102.

³⁶ The preamble to the Constitution of Fiji declares that 'all Fijians united by common and equal citizenry' and another major provision is a voting system of equal votes of equal value (s 55).

³⁷ Constitution of Fiji 2013, s 98(3).

³⁸ Constitution of Fiji 2013, s 98(1).

³⁹ Constitution of Fiji 2013, s 99. The Chief Justice may not sit in the Court of Appeal.

⁴⁰ Constitution of Fiji 2013, s 99(3).

⁴¹ Constitution of Fiji 2013, s 99(4); Court of Appeal Act Cap 12, s 12(1).

⁴² Court of Appeal Act Cap 12, s 12(2)(e) and (f).

⁴³ Constitution of Fiji 2013, s 100.

⁴⁴ Constitution of Fiji 2013, s 100(3). Proceedings must normally be commenced with High Court registry in the Division in which the cause of action arose: O4 r1 (Fiji).

⁴⁵ Constitution of Fiji 2013, s 100(5).

⁴⁶ Constitution of Fiji 2013, s 101.

⁴⁷ Magistrates' Court Act Cap 14, s 4(1).

(b) Fiji's Family Divisions

Part IV of the Family Law Act 2003 established the Family Division of the High Court and the subordinate Family Division of the Magistrates' Court,⁴⁸ which opened on 31 October, 2005.⁴⁹ The Family Division of the High Court must be presided over by a Judge, designated to the Family Division of the High Court by the Chief Justice.⁵⁰ The Family Division of the Magistrates' Court must be presided over by a magistrate, appointed to the Family Division of the Magistrates' Court by the Chief Magistrate.⁵¹ All judges and magistrates in Family Divisions must be suitable persons to deal with family law matters, 'by reason of training, experience and personality'.⁵² Both Family Divisions must have a Director of Counselling and other court counsellors as required. At present there is only the Director. Each Division must also have a registrar (and such deputy registrars as necessary).⁵³

The Family Divisions have jurisdiction in matrimonial causes and all other proceedings under the Family Law Act or where jurisdiction is conferred by written law.⁵⁴ The Family Division of the High Court has exclusive jurisdiction in relation to applications for orders of nullity of marriage and applications in relation to the Convention on the Civil Aspects of International Child Abduction (1890).⁵⁵ In addition to its original jurisdiction, the Family Division of the High Court hears appeals from the Family Division of the Magistrates' Court, which lie as of right.⁵⁶ Appeals from the Family Division of the High Court exercising original jurisdiction lie as of right to the Court of Appeal, but leave is required where the High Court is exercising appellate jurisdiction.⁵⁷

Both Family Divisions are governed by the Family Law Rules 2005,⁵⁸ supplemented if necessary by the High Court Rules or Magistrates' Courts Rules.⁵⁹ All proceedings are heard in closed court.⁶⁰ However, with minor exceptions in the case of children,⁶¹ and to allow evidence by affidavit at hearings,⁶² the normal rules of evidence apply. Free counselling is also provided

⁴⁸ Family Law Act 2003, ss 15 and 20.

⁴⁹ See www.judiciary.gov.fj/images/Strategic_Plan/strategic%20plan%20.pdf accessed on 24 February 2015.

⁵⁰ Family Law Act 2003, s 16(1).

⁵¹ Family Law Act 2003, s 20(2).

⁵² Family Law Act 2003, ss 16(2) and 20(3).

⁵³ Family Law Act 2003, s 23(2).

⁵⁴ Family Law Act 2003, ss 17(1) and 21(1).

⁵⁵ Family Law Act 2003, s 17(3).

⁵⁶ Family Law Act 2003, s 19(1).

⁵⁷ Family Law Act 2003, s 19(2)–(3).

⁵⁸ See also Family Law Regulations 2005 dealing with, eg, overseas orders.

⁵⁹ Family Law Act 2003, s 22 and Family Law Rules 2005, R1.02(3). See High Court Rules 1988 and Magistrates' Courts Rules Cap 14.

⁶⁰ Family Law Act 2003, s 185(1).

⁶¹ Family Law Act 2003, s 186.

⁶² Family Law Act 2003, s 187.

by the Family Court. This part of the Division is headed by a Director of Counselling. In some cases involving children counselling is compulsory.⁶³

(c) Customary forums

In Fiji many disputes are still resolved within the community. The form and process of customary forums differs from area to area within Fiji. However, there are some commonalities. As stated by the former Chief Justice of Fiji:⁶⁴

‘There are a number of traditional dispute settlement mechanisms that have existed in Pacific societies for a very long time. Some follow simple forms of apology where minor disputes are settled informally between families, whilst others take on a more structured court like process with some kind of formal assembly of disputants and community members presided over by a designated person or group of persons who act on behalf of the community to settle the dispute ... Social and family pressures of any and every kind are brought to bear on the disputing parties to shift ground, to accept, to compromise and to settle the dispute ... The common element of these various models of traditional dispute settlement in Pacific societies is characterized by one of a peaceful settlement, compromise and agreement where communal interests outweigh individual rights and interests.’

As noted, these forums involve the family or even the whole community, rather than just the individual family members. As stated by Ratuva, when writing about restorative justice:⁶⁵

‘[C]ustomary practices of conflict resolution have continued at the community level. Many of these have been successful in maintaining communal coherence and good relations. They are practised mainly at a communal level involving entire kinship groups although the dispute may have originated between two individuals. The cultural logic is that individuals are part of a larger socio-communal setting and that the whole group needs to be involved in repairing social fractures and rehabilitating those individuals concerned. The group becomes the guarantor for community peace and ensures that fractious individuals conform to collective expectations. In the Fijian language, community peace building translates roughly as *veisaututaki* and conflict resolution as *veivakameautaki*. One of the means by which these are achieved is *veisorosorovi*.’

⁶³ Family Law Act 2003, s 67.

⁶⁴ Chief Justice of Fiji, His Honour Justice Daniel V Fatiaki, ‘Opening address to Alternative Dispute Resolution (ADR) workshop’ (March 2005), Suva, Fiji Islands, cited in Ratu Filimone Ralogaivau, ‘Blending Traditional Approaches to Dispute Resolution in Fiji with Rule of Law – The Best of Both Worlds’, paper presented to the 3rd Asia Pacific Mediation Forum Conference held at the University of the South Pacific, Suva on *Mediating Cultures in the Pacific and Asia*, 26–30 June 2006, Pacific Islands Governance Portal, Digital Library, www.governance.usp.ac.fj.

⁶⁵ Stephen Ratuva, ‘Reinventing the Cultural Wheel: Re-conceptualising Restorative Justice and Peace Building in Ethnically Divided Fiji’ in Sinclair Dinnen, Anita Jowitt, and Tess Newton (eds), *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, Canberra, ANU, 2003) 149, 156.

As is evident from these quotes, the customary dispute settlement process is flexible. In this way, it differs greatly from the process in the state courts, which are bound by fixed rules of procedure and evidence.⁶⁶

IV RESOLUTION OF FAMILY LAW DISPUTES IN SAMOA

(a) The state court structure

The court structure in Samoa follows the standard model, with an inferior court (the district), a superior court (the Supreme Court), and an appeal court (the Court of Appeal), all established by the Constitution.⁶⁷ The Court of Appeal is constituted by the Chief Justice, judges of the Supreme Court and other persons appointed by the Head of State.⁶⁸ It hears appeals from the Supreme Court, as of right in cases involving a substantial question of law as to the interpretation or effect of the Constitution, or enforcement of any fundamental right,⁶⁹ and, with leave in matters of general or public importance, or on the basis of the magnitude of interests affected.⁷⁰

The Supreme Court consists of the Chief Justice and puisne judges.⁷¹ It has unlimited original jurisdiction⁷² throughout Samoa,⁷³ which may be exercised by a single judge,⁷⁴ and specific statutory jurisdiction.⁷⁵ It hears appeals from a district court as of right in cases involving \$1,000 or title to land,⁷⁶ or with leave of the district court. District Courts may be constituted by a judge or a *fa'amasimo fesoasoani*.⁷⁷ When constituted by a judge, it has jurisdiction to hear and determine actions up to \$10,000 in tort or contract, under a statute,⁷⁸ in equity;⁷⁹ and claims for the recovery of freehold land up to \$100,000.⁸⁰ Customary land is excluded from district courts' jurisdiction.⁸¹ Samoa has also established a Youth Court, which deals with young offenders.⁸²

⁶⁶ Family Law Rules 2005 (Fiji).

⁶⁷ Constitution of Samoa 1960, arts 65 and 75. The Judicature Act 1961, s 41 contains a parallel provision.

⁶⁸ The Constitution of Samoa 1960, art 75; Judicature Act 1961, s 41(2). The Head of State acts on the advice of the Judicial Service Commission.

⁶⁹ Constitution of Samoa 1960, art 80; Judicature Act 1961, s 5(2A).

⁷⁰ Judicature Act 1961, ss 51 and 54.

⁷¹ Judicature Act 1961, s 41(2).

⁷² Judicature Act 1961, s 31.

⁷³ Judicature Act 1961, s 32.

⁷⁴ Judicature Act 1961, s 32.

⁷⁵ See, eg, Administration Act 1975, s 5 (probate jurisdiction); Citizenship Act 1972, s 18(2) (enquiry into deprivation of citizenship).

⁷⁶ District Courts Act 1969, s 70.

⁷⁷ *Fa'amasimo fesoasoani* means assistant magistrate.

⁷⁸ District Courts Act 1969, s 23.

⁷⁹ District Courts Act 1969, s 28. The specific equitable jurisdiction is set out in the section.

⁸⁰ Or where the annual rental does not exceed \$10,000: District Courts Act 1969, s 25.

⁸¹ District Courts Act 1969, s 26.

⁸² The Young Offenders Act 2007, Part II.

(c) Samoa's Family Court

In 2014, Samoa passed the Family Court Act, establishing a Family Court as a division of the District Court.⁸³ Judges are appointed to the Family Court by the Head of State, on the advice of the Judicial Service Commission. A person appointed must be 'a suitable person to deal with matters relating to Family Law'.⁸⁴ The Registrar of the District Court is appointed as the coordinator of counselling, and may appoint authorised counsellors.⁸⁵

The Family Court has jurisdiction over matters arising under a number of family law Acts⁸⁶ which govern matters such as matrimonial causes,⁸⁷ guardianship and custody of infants,⁸⁸ and destitute and delinquent children.⁸⁹ According to the Act,⁹⁰ it also has jurisdiction under the Family Safety Act 2013, which deals with domestic violence. In practice, applications for protection orders under this Act are dealt with by a different division of the District Court, the Family Violence Court.⁹¹ The Family Court may order that proceedings be transferred to the Supreme Court if this is expedient in light of the complexity of the proceedings or questions in issue.⁹² The Family Court may also seek the opinion of the Supreme Court on any question of law arising before the Family Court.⁹³

The Court has an obligation to promote conciliation in proceedings⁹⁴ and, prior to a substantive hearing, parties must engage in alternative dispute resolution to the satisfaction of the Court, unless the Court is satisfied that there is no reasonable prospect of agreement being reached, or the circumstances are such that alternative dispute resolution is inappropriate.⁹⁵ Family Court proceedings are closed to all persons except for officers of the Court, parties, lawyers, witnesses, accredited media reporters and persons permitted to attend by the Family Court Judge.⁹⁶ A report of proceedings in the Family Court can only be published if information identifying the parties and children is not published.⁹⁷ The Family Court Rules of Samoa have yet to be

⁸³ Family Court Act 2014 (Samoa).

⁸⁴ Family Court Act 2014 (Samoa), s 5.

⁸⁵ Family Court Act 2014 (Samoa), ss 16 and 17. No counsellors have yet been appointed and the role is being fulfilled by Ministry of Courts and Justice Administration staff: email from Samoan lawyer to Jennifer Corrin, 10 March 2015.

⁸⁶ Family Court Act 2014 (Samoa), s 8(1).

⁸⁷ Divorce and Matrimonial Causes Ordinance 1961.

⁸⁸ Infants Ordinance 1961, ss 3–6.

⁸⁹ Infants Ordinance 1961, ss 15–20.

⁹⁰ Family Court Act 2014 (Samoa), s 8(1)(b).

⁹¹ Family Courts Plan', *Samoa Observer* (online), 9 October 2013, www.samoaoobserver.ws/other/legal/7422-family-courts-plan.

⁹² Family Court Act 2014 (Samoa), s 14.

⁹³ Family Court Act 2014 (Samoa), s 13.

⁹⁴ Family Court Act 2014 (Samoa), s 6.

⁹⁵ Family Court Act 2014 (Samoa), s 7.

⁹⁶ Family Court Act 2014 (Samoa), s 10.

⁹⁷ Family Court Act 2014 (Samoa), s 11.

brought into force, and, in the meantime, the District Court Rules 1971⁹⁸ or the Supreme Court (Civil Procedure) Rules 1980 apply.⁹⁹ The Mediation Rules 2013 of Samoa, which came into force on 4 December 2013, make mediation mandatory in all court proceedings unless a dispensation order is granted.

(c) Customary forums

In Samoa it has been said that¹⁰⁰

‘The notion of independent institutions in the nature of courts established specifically to decide and resolve disputes is not native to Samoan society. Resolution of disputes was effected through Faamatai institutions [the matai chiefly system] by faaleleiga [reconciliation or settlement] or resolution. Settlement of disputes by faaleleiga is commonly considered as the most appropriate course to adopt. Effecting settlement through the family or other traditional institutions is encouraged as members ought to have a better understanding of the parties and their disputes. Family members are urged to resolve and bury their differences as exposing family disputes to scrutiny by outsiders is regarded as evidence of a divided family and more importantly it results in other families acquiring knowledge of family internal affairs.’

The village *fono* or council of *matai* (chiefs) is a traditional body, which operated prior to colonial times. It has been formally recognised by legislation in the form of the Village Fono Act 1990.¹⁰¹ It consists of the assembly of the *alii ma faipule* or *matais* (chiefly heads of families or ‘*aiga*’) from the particular village.¹⁰² It exercises its power to deal with village affairs in accordance with custom and usage.¹⁰³ Under the legislation, the jurisdiction of the village *fono* is limited to persons ordinarily resident in the village and does not extend to persons, other than *matai*, residing there on Government, freehold, or leasehold land who are not liable in custom to render *tautua* to a *matai* of that village.¹⁰⁴ However, the traditional authority may extend beyond those limits and the village *fono* does not always act in compliance with the legislation. The legislation also provides for appeals, but the process does not lead back into the standard structure, but to the Land and Titles Court, which is a separate court established to deal with customary land disputes and chiefly title.¹⁰⁵ The continuing strength of traditional authority in Samoa is illustrated by cases

⁹⁸ Family Court Act 2014 (Samoa), s 12.

⁹⁹ Family Court Act 2014 (Samoa), s 13(3).

¹⁰⁰ Saleimoa Va'ai, *Samoa Faamatai and the Rule of Law* (National University of Samoa, Apia, 1999) 54.

¹⁰¹ The legislation affirms the customary authority of the Village Fono and confers further powers on it, but it also allows for an appeal to the Land and Titles Court, which arguably restricts its powers. For further discussion of the flaws in this legislation see Unasa Va'a, 'Local Government in Samoa and the Search for Balance', in Elise Huffer and A So'o (eds), *Governance in Samoa* (Asia Pacific Press, Canberra, 2000) 151, 159.

¹⁰² Village Fono Act 1990, s 2.

¹⁰³ Village Fono Act 1990, s 3(2).

¹⁰⁴ Village Fono Act 1990, s 9.

¹⁰⁵ Constitution of Samoa, art 103 and the Land and Titles Court Act 1981.

where individuals have been banished from the village by the village *fono* for not complying with customary rules.¹⁰⁶

V THE RATIONALE FOR A FAMILY COURT OR DIVISION

The resolution of family law matters often requires simultaneous consideration of a wide range of socio-legal issues and a detailed knowledge of the relevant legislation. As a consequence, family law lends itself to be considered as a specialist jurisdiction. This is one of the reasons for the emergence of separate family courts or divisions in more populous, developed countries. There are both advantages and disadvantages to this model. Some of these are common to all specialist courts, but some apply particularly to family courts and divisions.

(a) Advantages

- A separate family law court or division ensures that processes can be more focused and streamlined instead of splitting responsibility for family matters over different courts.¹⁰⁷ The increased efficiency that results from avoiding the unnecessary duplication¹⁰⁸ of paperwork is an obvious advantage, as is the speedier resolution of disputes as parties can bypass other courts which may already have a backlog of matters.
- Parties to court proceedings and any witnesses are often likely to find the process and surrounding rules of procedure and etiquette confusing. Anxiety caused by this confusion is likely to be intensified for those involved in family matters where so much emotional energy is being expended. A specialised forum which makes the court processes easier to navigate for parties to a dispute can seem less formal and more suitably focused on the issues than the procedures.
- A specialist family law court or division also has the advantage of ensuring that the adjudicators are familiar with, and increasingly experienced in,¹⁰⁹

¹⁰⁶ See, eg, *Lafaialii v Attorney General* (unreported, Supreme Court of Samoa, Sapolu CJ, 24 April 2003), accessible via www.paclii.org: [2003] WSSC 8; *Mauga v Leituala* (unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, March 2005), accessible in Leuluaialii Tasi Malifa, *Samoa's Democracy has Come of Age* (2005).

¹⁰⁷ As has been the case in Samoa, where jurisdiction over family matters was divided between the Supreme Court and the District Courts – see Lalotoa Mulitalo and Jennifer Corrin, ‘Reform of Maintenance and Divorce Laws in Samoa: Appropriate for the “Aiga”?’ in Bill Atkin (ed), *International Survey of Family Law 2012 Edition* (Jordan Publishing, Bristol, 2012) 283, 285; and is still the case in Fiji, where jurisdiction over family matters is divided between the High Court and the Magistrates’ Court.

¹⁰⁸ Lalotoa Mulitalo and Jennifer Corrin, ‘Reform of Maintenance and Divorce Laws in Samoa: Appropriate for the “Aiga”?’ in Bill Atkin (ed), *International Survey of Family Law 2012 Edition* (Jordan Publishing, Bristol, 2012) 283, 296.

¹⁰⁹ The Family Law Act 2003 (Fiji), s 16(2) provides that judges or magistrates appointed to a Family Division must be, ‘by reason of training, experience and personality, a suitable person to deal with matters of family law’; s 20(3) makes the same provision for the Magistrates’

the types of issues that may arise, and informed about the complexities to be expected from these types of proceedings.¹¹⁰ This is of obvious benefit to the parties. It also enhances the efficiency and effectiveness of the justice system as a whole, as the same few judges/magistrates build up jurisprudence in the family law area and apply it in a consistent manner. Ancillary benefits include more accessible family law reports or resources specific to family matters.

(b) Disadvantages

- Adjudicators and legal representatives may feel that they are limiting their chances of moving into other areas because they are limiting their skills to a particular type of adjudication. Further, in the family context, the high price of specialisation for those involved in the court process is the heavy emotional toll of having to deal with such sensitive issues on a daily basis.¹¹¹
- The cost of establishing and maintaining the infrastructure for a separate court or division dealing exclusively with family law matters is high. These may not be proportionate to the benefits derived, especially if funds are diverted from other areas of the justice system. This is particularly significant in the South Pacific where the justice system is often under-resourced.
- While a separate family court or division may simplify family proceedings and offer avenues for mediation or conciliation, it is still part of a system which is adversarial in nature. This is really a disadvantage of state proceedings, rather than a disadvantage of a separate forum within the state hierarchy, and will be discussed further below.

Obviously these advantages and disadvantages must be weighed carefully against each other. More efficient and effective access to justice is particularly important in a family law context given the sensitive nature of disputes and the fact that children are often involved. However, as discussed further below, there are other factors at play in these plural legal systems, which may cast a different light on the question of the appropriate forum.

VI PROBLEMS ARISING

In the context of Fiji and Samoa, there are more specific factors at play in a consideration of the best forum for resolution of family disputes. The Family Divisions in Fiji and the Family Court of Samoa are both based on the common

Court. Similarly, the Family Court Act 2014 (Samoa), s 5(2) specifies that a person appointed to the Family Court must be 'a suitable person to deal with matters relating to Family Law'.

¹¹⁰ Such as the dynamics of family arrangements within a Fijian/Samoan context.

¹¹¹ See Annie Cossins, 'Prosecuting Child Sexual Assault Cases: To Specialise or Not, That is the Question' (2006) 18 *Current Issues in Criminal Justice* 318–342 for a discussion of burn-out in prosecutors in child sexual offence cases.

law model. Further, the legislative schemes which they apply are modelled on foreign laws, of Australia¹¹² in the case of Fiji, and New Zealand¹¹³ in the case of Samoa, although in both cases there are some differences.¹¹⁴ The question arises whether these forums are suitable for resolving family disputes in the context of the very different cultures and legally pluralistic systems of Fiji and Samoa. The South Pacific is a region with a rich cultural heritage illustrated by linguistic and tribal diversity. For the majority of people in Fiji and Samoa, particularly outside urban areas, the social system within which they go about their daily lives is far removed from the realms of the state. Despite the importance of developing a legal system which is responsive to the requirements of the society in which it operates, to date most reforms in the legal sector have not been preceded by an informed debate about developing more resonant institutions. Nor has there been any detailed consideration of the distinguishing features in the legal and social systems of South Pacific states which might form the basis for the development of a departure from the common law model of courts.

For a number of reasons, a family court or division may be ill-equipped to adjudicate on aspects of family life which have deep roots in tradition or custom. As foreshadowed above, one of the striking differences between the state and customary legal systems is that they are underpinned by very different norms. In particular, collective rights have more resonance in the Pacific than individual rights. As stated by Judge Mere Pulea, the former and first judge allocated to the Family Division of the Magistrates' Court in Fiji:¹¹⁵

'The conceptual starting point in the Family Law Act focuses on individual rights especially those of parents whilst customary law in Fiji society is based on communal rights. It is therefore understandable that there is a tension between the rights of the individual and the collective rights of the group ...'

This emphasis on collective rights, together with the patriarchal and status-based norms underpinning customary societies in rural areas of Fiji and Samoa, often influence the way decisions are made regarding the custody of children and property rights. Decisions made within the extended family or by traditional leaders may be very different to those made by a state court. Accordingly decisions regarding custody of children and rights of wives made within the extended family or by traditional leaders may be very different from those made by a state court.¹¹⁶ In Fiji, this is illustrated by the customary rule that, if a child is born out of wedlock, the biological father has the right to either abandon the child to the mother or claim the child and bring him or her

¹¹² Family Law Act 1975 (Australia).

¹¹³ See Family Proceedings Act 1980 (NZ).

¹¹⁴ See, eg, the provisions for parental maintenance in the Family Law Act 2003 (Fiji), s 159.

¹¹⁵ Mere Pulea, *A Possible Solution to the Age-Old Problem – Nonpayment of Maintenance*, at www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/Pulea.pdf, accessed 24 February 2015.

¹¹⁶ For examples from the neighbouring country of Solomon Islands see *Sukutaona v Houanibou* [1982] SILR 12; *Re B* [1983] SILR 223; *K v T* [1985/86] SILR 49; *Sasango v Beliga* [1987] SILR 91.

into his *mataqali*.¹¹⁷ Another example from Fiji is that, where spouses separate, if the mother returns to her family or moves away from the father's clan, she will not be entitled to maintenance for her child under custom unless she returns the child to the father's clan.¹¹⁸ Of course, these rules conflict with human rights norms, and this may be seen as a reason for having disputes resolved within the state system.¹¹⁹ As mentioned above, there is tension between customary laws and human rights, but this complex issue is outside the scope of this chapter.¹²⁰ However, it should be noted that it cannot be assumed that state courts will always give preference to human rights over customary laws as there are several decisions where this has not been the case.¹²¹

The other important difference between the state and customary legal systems lies in procedure. While some tribunals and bodies have an inquisitorial or 'problem-solving' approach, with relaxed rules of evidence, this is not yet the case in Fiji or Samoa. Whilst procedure in both the Family Divisions and the Family Court include counselling and conciliation procedures,¹²² and, in the case of the Family Court, compulsory alternative dispute resolution,¹²³ family law proceedings themselves are still fundamentally adversarial in nature.¹²⁴ Fiji's Family Law Rules are not a radical departure from the High Court Rules or Magistrates' Courts Rules.¹²⁵ There are some concessions regarding evidence. For example, evidence in chief is normally given by affidavit,¹²⁶ but in most instances the rules of evidence apply.¹²⁷ As mentioned above, until the Family Court Rules of Samoa are brought into force,¹²⁸ the District Court

¹¹⁷ Asesela Ravuvu, *Vaka i Taukei – the Fijian Way of Life* (University of the South Pacific, Suva, 1983).

¹¹⁸ Mere Pulea, *A Possible Solution to the Age-Old Problem – Nonpayment of Maintenance*, available at www.ajja.org.au/Ind%20Courts%20Conf%2007/Papers/Pulea.pdf, accessed 24 February 2015.

¹¹⁹ As argued by the Fiji Women's Rights Movement and the Fiji Crisis Centre in their submission to the Commission of Inquiry on the Courts, *Report of the Commission of Inquiry on the Courts – Fiji* (Fiji Islands, 1994) 172–173.

¹²⁰ See further Jennifer Corrin, 'From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post-Colonial Legal Systems of the South Pacific' (2009) 58 (1) *International and Comparative Law Quarterly* 31; Jennifer Corrin, 'Reconciling Customary Law and Human Rights in Melanesia' (2004) 4(1) *Hibernian Law Journal* 53.

¹²¹ See, eg, *S v H* (unreported, Magistrates Court, Fiji 1988), cited in Imrana Jalal, *Law for Pacific Women* (Fiji Women's Rights Movement, Fiji, 1998) 312–313; *Ta'amale v The Attorney-General* (unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, 18 August 1995), accessible via www.paclii.org: [1995] WSCA 12; digested in [1996] 2 *CHRLD* 257. For an example from neighbouring Solomon Islands, see *Tanavalu v Tanavalu* (unreported, High Court, Solomon Islands, Awich J, 12 January 1998), accessible via www.paclii.org: [1998] SBHC 4.

¹²² Family Law Act 2003 (Fiji), ss 10 and 11, Div 3; Family Court Act 2014 (Samoa), s 6.

¹²³ Family Court Act 2014 (Samoa), s 7; Mediation Rules 2013 (Samoa), R4.

¹²⁴ See, eg, Family Law Rules 2005 (Fiji).

¹²⁵ High Court Rules 1988; Magistrates' Courts Rules Cap 14.

¹²⁶ Family Law Rules 2001 (Fiji), O5.2(5).

¹²⁷ In practice, there is some room for flexibility if a family court judge is inclined to take a less adversarial approach. See, eg, Mere Pulea, *A Possible Solution to the Age-Old Problem – Nonpayment of Maintenance*, at www.ajja.org.au/Ind%20Courts%20Conf%2007/Papers/Pulea.pdf, accessed 24 February 2015.

¹²⁸ There is some suggestions that the Family Court Rules may be in use in the Family Court: email

Rules 1971¹²⁹ or the Supreme Court (Civil Procedure) Rules 1980¹³⁰ apply. Evidence is governed by the Evidence Ordinance 1961 and, once proceedings are under way, the Family Court is still an adversarial environment. In both Fiji and Samoa, this approach runs counter to the conciliatory, group-oriented approach to resolving disputes within the community.

Further, customary forums may deal with a problem holistically; there is no division drawn between civil law, criminal law and family law. Common law proceedings are generally limited to dealing with disputes falling within one of these categories, which will be brought before them by individuals, or in criminal cases the state, after the dispute has become serious or an offence has been committed. The customary process deals with the community, any member or group of members of which may step in at the first sign of trouble to block the conflict. Further, the adversarial model of dispute resolution encourages parties to maintain their 'position' and relinquish decision-making control to a third party. There may be cases where intervention of the state is vital, for example, where a child is at risk of abuse, but child protection is not the province of the family divisions under discussion in this chapter. In other cases, adversarial procedure may promote poor self-concept and reinforce a feeling of victimisation, preventing the parties from accepting responsibility and 'owning' the result and therefore the long-term outcomes.¹³¹ Non-adversarial forms of dispute resolution, such as those based on therapeutic jurisprudence, which aim to settle the dispute while still respecting the importance of the other parties and their needs, have a greater ability to reflect community interests.

Another problem with adversarial proceedings is that a court may normally only make orders against the parties to the proceedings. In most family law cases, third parties may not intervene or be compelled to take action. However in customary societies, care of children and maintenance of family members are often obligations which are shared by the extended family and sometimes the broader community. Whilst there may be some limited scope for involving relatives in state court proceedings, this falls far short of calling on the extended family network to produce the result which is in the best interest of the parties and their children.

There may also be problems in adducing evidence to the requisite standard of proof. This problem is ameliorated by relaxation of the rules of evidence in most family proceedings. For example, Samoa's Maintenance and Affiliation Act empowers the court to 'receive any evidence that the Judge or the Court thinks fit, whether the same is otherwise admissible in a Court of law or not'.¹³²

from Samoan lawyer to Jennifer Corrin, 10 March 2015, even though the Attorney-General's Office has confirmed that they are not yet in force: email from Leitu Moananu, State Solicitor, to Jennifer Corrin, 9 March 2015.

¹²⁹ Family Court Act 2014 (Samoa), s 12.

¹³⁰ Family Court Act 2014 (Samoa), s 13(3).

¹³¹ Alfred Allan, 'Therapeutic Jurisprudence in Family Law' Paper presented at the Family Court of Western Australia's *In the Child's Best Interest Conference*, Perth 9 November 2001.

¹³² Maintenance and Affiliation Act 1967, s 56.

However, it may be difficult for parties who are attempting to depart from customary rules or practices to find witnesses willing to give evidence in a state court. In turn, adjudicators may feel hampered by having to resolve family disputes with what may be insufficient evidence or information to assist them.

Further, the establishment of additional state courts or divisions does not remove the barriers that prevent many people from effective access to justice. As opposed to customary forums which are based locally, courts are usually restricted to urban centres. This may make it difficult for some people to access them. Some parties may find it difficult to navigate the complex legal process, or adequately represent themselves.

Even if the expansion of the state court system is the most appropriate forum for dealing with family matters in Fiji and Samoa, in those South Pacific environments where resources are already limited there is a very real question of whether this is the best use of resources. It is hard to come to a conclusion on this matter as statistics for the number and types of family matters going through the Family Divisions and Family Court are not available, although there is some evidence that the majority of cases heard by the Family Division of the Magistrates' Court in Fiji are child maintenance cases.¹³³ In terms of resource allocation, provision for a Family Division is perhaps more defensible than a separate court. However, in Fiji, the legislation has set up a separate Division and a separate Registry in the Supreme Court and the District Court,¹³⁴ which would seem to defeat the aim of having one body to deal with family matters.¹³⁵

VII A SOLUTION WHICH LINKS CUSTOMARY AND COMMON LAW

A more holistic and therapeutic way of managing and solving interpersonal legal disputes is found in movements which are based on the concept of therapeutic jurisprudence – such as restorative justice and collaborative law. These practices preference a community-centred non-adversarial approach to dispute resolution, which attempts to mitigate the harms caused by an overly adversarial emphasis in disputes in which there is no clear 'winner'. As such, they are ideally suited to family law matters and are in fact operational in many

¹³³ For the 6 months of January to June 2006, out of the 149 cases filed for maintenance or contribution in the Suva Family Magistrate's Court, 121 were for child maintenance: Mere Pulea, *A Possible Solution to the Age-Old Problem – Nonpayment of Maintenance*, at www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/Pulea.pdf, accessed 24 February 2015.

¹³⁴ Family Law Act 2003 (Fiji), ss 15 and 20.

¹³⁵ The desirability of one registry and one forum to deal with family matters was put forward in relation to Samoa in Jennifer Corrin and Lalotoa Mulitalo, 'Reform of Maintenance and Divorce Laws in Samoa: Appropriate for the "Aiga"?' in Bill Atkin (ed), *International Survey of Family Law 2012 Edition* (Jordan Publishing, Bristol, 2012) 283–298, 296.

other jurisdictions.¹³⁶ In the context of plural societies, especially those where customary laws and community values are strong, the principles behind therapeutic jurisprudence and collaborative law offer some advantages for the area of family law.

Although there has been much written in an attempt to distil the essence of therapeutic jurisprudence¹³⁷ it remains a little understood and peripheral movement. However, its proponents believe that it is possible to redress some of the more harmful characteristics which underpin the adversarial style of law and which render it less suitable to societies such as those in Fiji and Samoa. The first is the acknowledgement that law does not operate in isolation. It has a social effect and therefore the decisions made may have far-reaching repercussions for parties other than those represented in the actual courtroom. The second is that jurisprudence is often non-therapeutic – that is the law and legal actors often take a greater toll on individuals and society than can immediately be quantified. The third is that the legal process must be perceived as fair and just, and that this perception will only be gained if individuals have had a chance to participate, an opportunity to tell their story, and to perceive that their story has been respected by the decision-maker.

Proponents of therapeutic jurisprudence, and other alternative dispute resolution stratagems, explore the healing power of the law. They believe that the negative effects of the law – in terms of financial, emotional and psychological well-being – are often overlooked in those cultures which emphasise individual rights. Taking a holistic approach to a family's well-being,¹³⁸ and preferring a community welfare approach to an individual rights approach, will deliver more far-reaching and long-lasting benefits to both the parties involved in the dispute, and the communities to which those parties belong.¹³⁹

The principles which underpin therapeutic jurisprudence are relevant to societies which are striving to maintain cultural resonance in their dispute resolution processes, especially those who wish to maintain a community-based approach. By working collaboratively, parties are able to develop a workable relationship and create a framework that focuses on preserving the concept of 'family'.¹⁴⁰ Minimising the effects of strict rules and hierarchies, eliminating

¹³⁶ Michael S King, 'Therapeutic Jurisprudence Initiatives in Australia and New Zealand and the Overseas Experience' (2011) 21(1) *Journal of Judicial Administration* 19–33.

¹³⁷ Bruce Winnick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) (NC Carolina Academic Press, Durham, 2003).

¹³⁸ Michael S King and CL (Lou) Tatasciore, 'Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Based Approach in Care and Protection Applications' (2006) *eLaw: Murdoch University Electronic Journal of Law, Special Series*, 78, at <https://elaw.murdoch.edu.au>, accessed 28 February 2015.

¹³⁹ Sharyn Roach Anleu and Kathy Mack, 'Australian Magistrates, Therapeutic Jurisprudence and Social Change' in *Transforming Legal Processes in Court and Beyond: Papers from the 3rd International Conference on Therapeutic Jurisprudence* (Perth 7–9 June 2006) 173–186.

¹⁴⁰ Claire Biesot, Anne-Marie Rice and Andrew Caple, 'Diffusing Family Distress: Collaborative Law in the Family Law Context' (2013) 32(1) *The Arbitrator and Mediator* 77–83.

pomp and ceremony and emphasising the importance of individuals being heard in a culturally sensitive way are all components of a movement which could go a long way towards combining the strengths of the legal system with the healing effects of a community-based approach.

VIII CONCLUSION

As discussed above, there are advantages to having family disputes resolved in a separate court or division, including more streamlined processes, focused proceedings, less formality and therefore more flexibility, and the development of specialist expertise. However, there are also some disadvantages, common to all specialist jurisdictions, which include financial and resource costs, the challenges for adjudicators of expanding their skill sets, and the difficulty in maintaining perspective when immersed in only one type of, often highly sensitive, dispute.

Whether family matters are dealt with in the mainstream courts or in a separate state forum, they are still subject to many of the restrictions which govern all common law courts. The idea of moving outside this structure is particularly appealing in plural societies, where the question of whether particular introduced laws, and the common law legal system as a whole, are suitable for the culture in which they operate has yet to be fully explored. The creation of additional state courts, rather than the introduction of a more culturally appropriate forum, seems to be a questionable measure of reform. Developing a forum which allows for the involvement, not only of the parties, but also their extended family, and, in some cases, broader kinship groups might lead to better outcomes, not only for the parties, but also for the communities to which they belong. Such a forum might incorporate some of the principles which underpin therapeutic jurisprudence and move away from the adversarial procedure to a more inclusive process. It might also incorporate customary ceremonies, such as the Fijian apology ceremony, after which parties reconcile and are supposed to leave behind any ill-will towards each other.¹⁴¹

As stated by Judge Mere Pulea, well before she became a judge of the Family Division of the Magistrates' Court:¹⁴²

'[W]hat needs to be looked at is the possibility of bringing together a comprehensive system of –

- (a) the traditional concepts and practice of the administration of justice, and
- (b) the more western concepts and practice as we see them developing today, so that personnel are sensitized to the community and meet community needs.'

¹⁴¹ Asesela Ravuvu, *Vaka i Taukei – the Fijian Way of Life* (University of the South Pacific, Suva, 1983) 110.

¹⁴² Mere Pulea, 'Pacific Courts and Personnel' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific, Suva, 1988) 37, 40.

In saying this, Pulea was not advocating a return to the 'old pre-colonial system but the constructive use of the present and existing systems'.¹⁴³ It remains to be seen whether the new forums for resolving family disputes in Fiji and Samoa will prove to be a good fit with the social fabric of those countries.

¹⁴³ Mere Pulea, 'Pacific Courts and Personnel' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific, Suva, 1988) 37, 40.

FRANCE

A CHRONICLE OF FRENCH FAMILY LAW

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Résumé

Quoi de neuf cette année en droit français de la famille? Si l'on ne note aucun bouleversement profond du *corpus* législatif, de nombreux petits aménagements ont été apportés avec une loi dite de simplification du droit (I) et différentes mesures intéressant les le droit des couples (II). Du côté de la jurisprudence, rappel et clarification semblent les mots d'ordre: en matière d'expertise génétique *post mortem* (III), en matière de mariage entre personnes de même sexe impliquant un conjoint étranger dont la loi personnelle l'interdit (IV) et quant à la notion de laïcité « à la française » (V), mais il est vrai que dans ce dernier domaine la Cour européenne des droit de l'Homme est également intervenue (VI). Toutefois les magistrats n'ont pas l'exclusivité de cette volonté de rappel et clarification: la Ministre de la Justice a également souhaité rappeler aux magistrats les effets qu'avait en France une *kafala* prononcée dans un pays de droit musulman (VII). L'heure est aussi au bilan spécialement en matière d'exercice de l'autorité parentale dans les couples séparés (VIII) et d'adoption internationale (IX). Le législateur va-t-il en tirer des enseignements? Les conclusions que l'on peut tirer des études menées dans ces deux domaines annoncent-elles des réformes? Peut-être...car il semble bien qu'un vent de changements souffle aujourd'hui sur le droit français. Changements non effectifs, mais annoncés en matière de fin de vie, spécialement de directives anticipées (X), qui risquent bien d'ailleurs d'être influencés par la décision qui sera prochainement rendue par le Conseil d'État dans la très médiatique affaire Vincent Lambert (XI). Changements encore non effectifs aussi, mais absolument inéluctables quant au sort que le droit français réserve aux enfants nés à l'étranger d'une gestation pour autrui (XIII) depuis la condamnation de la France par la Cour européenne des droits de l'Homme dans les affaires *Mennesson* et *Labassée* (XII).

What is new this year in French family law? While the legislative *corpus* has seen no major upheaval, numerous yet minor improvements were introduced through the so-called legal simplification law (I), and various measures affecting

* A chronicle collectively written 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. Under the direction of Christine Bidaud-Garon and Hugues Fulchiron, this collective chronicle was written by Bastien Baret, Marine Bathias, Younès Bernand, François Chénéde, Clara Delmas, Jézabel Jannot, Guillaume Millerieux, Aurélien Molière, Amélie Panet, Stessy Tetard and Marcos Vinicius Torres.

the rights of couples (II). Concerning case law, recall and clarification appear to be the key words for *post mortem* genetic expertise (III), same-sex couples involving a foreign spouse – which personal law prohibits (IV), and for the concept of ‘French’ secularism (V), although the European Court of Human Right was also involved in the latter area (VI). However, this recalling and clarification effort is not exclusive to judges. For example, the Minister of Justice has reminded judges of the effects that a *kafala* pronounced in a country of Islamic law (VII) can have on the French territory. This was also a time to review other aspects including the exercise of parental authority in separated couples (VIII) and international adoption (IX). What will the legislature learn from this? Do any potential conclusions from existing studies in both areas announce impending reforms? It might well be the case, because French law is being swept by winds of change. Planned yet unimplemented amendments were announced on the subject of end-of-life, especially concerning advance directives (X), which may well be influenced by the impending decision of the Council of State in the high-profile, *Vincent Lambert* case (XI). Finally, further unimplemented yet absolutely inevitable amendments to French law concern children born abroad to a surrogate mother (XIII), arising from the condemnation of France by the European Court of Human Rights in the *Mennesson* and *Labassée* cases (XII).

I MODERNISATION OF FAMILY LAW AND FAMILY HERITAGE: ON CERTAIN INNOVATIONS ARISING FROM THE LAW OF 16 FEBRUARY 2015¹

The Law of 16 February 2015 on the modernisation and simplification of law and procedures in the fields of justice and domestic affairs² contains several provisions relevant to family law and family heritage, the most significant of which we present below in a selective albeit not exhaustive fashion. Some provisions are immediately applicable, whereas others depend on the adoption, within a short period of time (8 or 12 months as indicated), of a future ordinance by the Government, authorised by law to legislate to such an end.

(a) Legal protection of the property of minors – simplification of legal administration rules

French law provides that the administration of the child’s property is placed ‘under supervision of the guardianship judge’³ (Art 389-2 Civil Code), when only one parent exercises parental authority. Under this regime, which therefore differs from that of ‘pure and simple’ legal administration – applicable whenever both parents have joint parental authority – the administrator can exclusively perform maintenance or administration actions, but requires further

¹ By Jézabel Jannot, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3.

² *Journal officiel* 17 February 2015 (JORF n° 0040, p 2961).

³ The guardianship judge is a judge of the judiciary responsible in particular for organising and running the guardianship of minors and adults under protective supervision.

judicial authorisation for most serious actions, such as disposals. According to the impact study carried out as part of the preparatory work of the Law of 16 February, these rules appear generally binding in practice and of complex application, besides the fact that many of the relevant properties escape any sort of legal supervision in the absence of judge involvement. The law of 16 February (Art 1, I, 1) authorises the Government to adopt the necessary measures within 8 months to simplify the legal administration regime known as ‘judicial supervision’, by granting the judge’s systematic authorisation ‘of acts that could have a serious, substantial and definitive effect on the minor’s property’. The Government also aims to clarify the rules for the control of management accounts for legal administration, for the sake of legal certainty, as it was revealed that the practical interpretation of current rules proved seriously challenging.

(b) Arrangements for the legal protection of adults – creation of an interfamily entitlement and minor amendments to the current system

The stated objective of the reform is the simplification of certain aspects of the current system, as a way to better meet the needs of vulnerable people and their families and, *as stated*, by the legislature, ‘without questioning the principles of the reform adopted in 2007’,⁴ ie the principles of necessity, subsidiarity and proportionality of protective measures. From this standpoint, the law of 16 February entitles the Government to develop, by 17 October 2015, the current law, by providing ‘an entitlement mechanism by law’ (Art 1 I, 2) for the benefit of parents, children, siblings, partners in a civil partnership or co-habitees, of an adult unable to express his will, allowing his representation or the performance of certain acts on his behalf without the need to impose a legal protection measure. This mechanism, which is modelled on those existing for the benefit of spouses (Arts 217 and 219 Civil Code, under the primary scheme;⁵ Arts 1426 and 1429 Civil Code, under the statutory matrimonial regime) should help – according to the explanatory memorandum – in strengthening the subsidiarity principle of protection measures. Article 1 II of the reform introduces direct amendments to certain provisions of the Civil Code, essentially concerning the provision of housing for individuals (amend Art 426 Civil Code), guardianship budget (amend Art 500 Civil Code), or duration of the protection measure. Regarding the latter point, we should note that current articles (Arts 441 and 442 of Civil Code) have been completed to reflect in practice the effects of serious pathologies: supervision measures can now be initially *taken* for periods exceeding their theoretical duration (which is still 5 years – this was one of the major innovations of the 2007 reform ...), to a maximum of 10 years, by reasoned decision and assent of a doctor set out in a list drawn up by a French prosecutor, if the alteration of the personal abilities of the adult concerned ‘do not appear likely to see improvement based on

⁴ Law No 2007-308 of 5 March 2007 reforming the legal protection of adults.

⁵ The primary system consists of the set of rules from which spouses may not derogate whatever their matrimonial regime.

scientific medical evidence'. Upon *renewal* of guardianship, for example a curatorship as in our case, the protective measure may be renewed under identical conditions for a period over 5 years, without exceeding 20 years.

(c) Law of inheritance and gifts – simplification of authentic will procedure

The main innovation of the reform (Art 3, II, 2) lies in the relaxation of the formal requirements of the authentic will, with a view to allowing (finally!) its use by non-French speaking individuals, as well as by deaf and/or mute people, who were being subject to unfair discrimination and effectively unable to bequeath via public act. Pursuing the objective of the general principle of non-discrimination, the new Art 972 of the Civil Code provides in particular, under strictly controlled conditions, the hitherto refused use of an interpreter, including for sign language. Furthermore, it should be noted the establishment of a 'simplified' proof for the capacity of heir for estates of small amount (Art 4 of the reform).

(d) Families and animals – sensitivity enters the Civil Code!

The Law of 16 February provides a legal definition of animal as an '*alive and sentient being*', albeit noting that 'under animal protection laws, animals *are subject* to the property regime'. This definition (which according to some only concerns *pets*, as the law makes no distinction here in the animal kingdom) underlies the new article of the Civil Code, Art 515-14, which the legislature inserted as the introduction to the second Book entitled 'On property and various changes to ownership', just before its first Title on the 'Distinction of property'. The place thus granted to this article, as well as the language used ('submitted or subject to'), fuels the debate on the status of animals: do they remain property from a legal standpoint? A mere thing? Have we created – should we create – a new legal category? Or was this just a purely symbolic exercise?

II NEWS IN FAMILY LAW: ON THE RIGHTS OF COUPLES⁶

After a hectic 2013, particularly due to the adoption of the law of 17 May (No 2013-404) opening marriage to same-sex couples, 2014 appeared rather calm. Not for lack of news, but because all of the news items referred to particular aspects. Thus, small changes instead of a major revolution. This part seeks to review two of them.

⁶ By Aurélien Molière, Assistant Professor at Université Jean Moulin – Lyon 3, Family Law Centre.

First, we shall cover various developments concerning housing. Since 1804, Art 1751 of the Civil Code has provided that each spouse becomes a leaseholder if family housing is ensured by means of a lease. Co-ownership exists regardless of whether the lease contract was concluded by one spouse alone, and even if this happened before marriage. Thus, it protects the non-contracting spouse by granting the latter the same rights held by the signatory spouse. The exclusivity of this arrangement to married couples has been criticised, given that partners in a civil partnership also lead a common life albeit fail to benefit from such regime. The law of 24 March 2014 (No 2014-366) has largely addressed this situation. A difference persists nonetheless. While lease co-ownership is a direct consequence of marriage, partners require a joint application to that end. Therefore, the protection of the non-contracting partner is uncertain and entirely dependent on the goodwill of the contracting one. Accordingly, marriage retains its appeal by the direct protection it provides.

Secondly, we address various developments in the prevention of couple over-indebtedness. French law provides that a spouse or partner engages his or her spouse in the acts performed to meet the needs of everyday life. In principle, this form of domestic solidarity excludes loans, save for those under a certain threshold. Previously, this threshold was assessed for each act, independently of the other commitments of the couple. The Law of 17 March 2014 (No 2014-344) provides that such assessment must be of a global nature, thus considering all loans. Accordingly, should we wish to determine whether a loan carries a joint liability, we must ascertain if the cumulative amount borrowed by the couple appears consistent with the household lifestyle. This global assessment should help avoid couple over-indebtedness.

This year also saw numerous reconsiderations of the marital property regime. In particular, a new draft bill was filed on 21 January 2015 by several members of the French Parliament. The bill seeks to change the legal marital regime, proposing the replacement of community of property by separation of property. This proposal rests on two reasons: First, the seemingly straightforward liquidation of property under this regime. This argument is however not admissible. Technically, the separation of property is rarely complete, and joint possession, whether sought or presumed, invariably complicates things. It may even give rise to – at times tenacious – litigation upon separation. Furthermore, the community of property presents numerous advantages. Should we deprive the majority of spouses because the separation of property makes life easier for those responsible for its liquidation? That would be hardly acceptable. The second reason concerns liabilities and refers to the fact that a spouse alone may engage the community for his or her own debts. The indebtedness of one spouse affects the common property and, accordingly – at least in part – that of his/her spouse. Are we thus suggesting a regime change because of indebted married couples? The legal regime is not a constraint; it is certainly required, but only when spouses fail to express their preference in this respect. It contributes to the image of marriage: a union of people and their properties. Moreover, this property co-ownership, even if it also applies to debts, has a significant

advantage for spouses of lesser financial means, who will benefit from the wealth-effect of marriage. Therefore, rather than trying to alter again the essence of marriage, it would be preferable to provide further information to future spouses, while maintaining, as is already the case, the option of choosing a different regime, ie that of separation of property. This is the most reasonable solution, which guarantees both the interests of spouses and the meaning of marriage.

III PROCEDURAL BARRIERS TO POST-MORTEM GENETIC TESTING⁷

In a case decided by the Court of Cassation of 13 November 2014,⁸ the applicant, born in 1950, had been recognised by his mother and then by the person he thought to be his father, before being legitimised⁹ by their subsequent marriage. Fifty years later, his putative father (in 2002) and his mother (in 2009) informed him that his real father was indeed his godfather – a relative of his legal father – who passed away in 1953. At that point, he sought through the competent courts the exhumation of the body of his alleged father, as well as a DNA analysis, to establish with certainty that ancestry. On 16 June 2011, the Court of Appeal of Aix-en-Provence declared his application inadmissible on the ground that Art 16-11 of the Civil Code, on the one hand, reserves genetic testing to confirm or deny parentage relationships (impossible in this instance due to prescription) and, on the other hand, prohibits post-mortem genetic identification, unless approved by the deceased while alive.

Before the Court of Cassation, the applicant argued that the refusal was contrary to Art 8 of the ECHR, which guarantees the right to respect of private and family life. In support of this assertion, he could consider invoking the judgment *Pascaud v France* (16 June 2011, No 19535/08) or *Jäggi v Switzerland* (13 July 2006, No 58757/00), in which the ECtHR had already shown its willingness to consider late requests for post-mortem genetic testing, upholding the right to identity over all other considerations: dignity of the human person, family peace, respect for the remains.

This argument was however not considered by the Court of Cassation, which criticised the Court of Appeal for not having raised on its own motion the inadmissibility alleging lack of questioning of the rights-holders of the deceased. According to the First Civil Chamber, the admissibility of an ‘action seeking the recognition of ancestry via genetic testing’ (it was more a *sui generis* action to

⁷ By Chénéde François, Professor at Université Jean Moulin – Lyon 3.

⁸ Cass Civ 1, 13 November 2014, No 13-21018.

⁹ Legitimation was the change in legal status in favour of an illegitimate child when, following the subsequent marriage of the parents or a favourable judgment, the child acquired legitimate status, ie children born in wedlock. Ordinance No 2005-759 of 4 July 2005 on the reform of parentage has removed from the Civil Code any distinction between legitimate, legitimised or natural children, eliminating such terms altogether.

understand the origins than an authentic action to establish parentage) is necessarily subject – given that exhumation is required – to the questioning of the rights-holders of the deceased.

Although the technical correctness of the solution is undeniable, it is regrettable that such inadmissibility has not allowed the Court of Cassation to rule on the substantive arguments of the appeal.

IV SAME-SEX MARRIAGE: A NEW VALUE DEFENDED BY FRENCH PUBLIC POLICY IN INTERNATIONAL AFFAIRS¹⁰

The Court of Cassation, in a judgment of 28 January 2015,¹¹ responded to a question in many authors' minds since the entry into force of the Law of 17 May 2013¹² authorising same-sex marriage in France: Is 'gay marriage' part of French public policy on international affairs?¹³

The decision concerns the marriage of two men living in France, a Moroccan national and a French national. On 10 August 1981, France and Morocco signed a bilateral agreement concerning the status of persons and family, as well as judicial cooperation. This was applicable, which ruled out the implementation of the conflict rule of Art 202-1 of the Civil Code.¹⁴

Under the traditional approach taken by the Court of Cassation, Art 5 of the Moroccan Convention should be applied, leading to the implementation of the Moroccan law regarding substantive requirements of marriage for the Moroccan spouse. According to Moroccan law, which prohibits same-sex marriage, this union could not be celebrated in France. However, Art 4 of that Convention classically reserves the use of the public policy exception. Accordingly, the Court of Cassation used this reserve to prevent the application of Moroccan law, and established same-sex marriage as a principle belonging to the French public order in international affairs.

¹⁰ By Bastien Baret, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3.

¹¹ Cass Civ 1, 28 January 2015, No 13-50059. On this decision, see *Dalloz*, 2015, p 464, H Fulchiron 'Mariage de personnes de même sexe: exception d'ordre public international'.

¹² Law No 2013-404 of 17 May 2013 opening marriage to same-sex couples.

¹³ On this subject, see: C Reydelle 'Same-sex marriage between a French and a Moroccan: can it be celebrated with respect to the Franco Moroccan convention?' 2014, *TISFL*, p 140.

¹⁴ 'Les qualités et conditions requises pour pouvoir contracter mariage sont régies, pour chacun des époux, par sa loi personnelle. Quelle que soit la loi personnelle applicable, le mariage requiert le consentement des époux, au sens de l'article 146 et du premier alinéa de l'article 180. Deux personnes de même sexe peuvent contracter mariage lorsque, pour au moins l'une d'elles, soit sa loi personnelle, soit la loi de l'Etat sur le territoire duquel elle a son domicile ou sa résidence le permet' ('The capacities and conditions required for marriage are governed, for each spouse, by his or her personal law. Whatever the applicable personal law, marriage requires the consent of the spouses within the meaning of Article 146 and the first paragraph of Article 180. Two people of the same sex may marry if this is allowed, for at least for one of them, by either the applicable personal law or the law of the State where he or she resides).

This decision appears to be part of a logic corresponding to the concept of public order and the issue of ‘marriage for all’. According to the principle of topicality of public order, the contents of the latter depend on the ‘notions and understandings in force at the time the judge rules’.¹⁵ Before the Law of 2013, public order considerations could have prevented the application of a foreign law allowing same-sex marriage. Today, however, the situation is different. Henceforth, refusing to apply a law prohibiting such a marriage is permitted in the name of respect for public order. Nevertheless, this new legislation has created a new principle of such importance that it must be integrated into the values protected by international public order. While opinions may differ,¹⁶ it seems that the legislature’s behaviour points towards a positive response. The formulation of the rule of law seems to hint towards a desire to extend this vision of marriage as widely as possible, as well as the willingness – politically endorsed – to renegotiate such bilateral agreements and adapt them to our new notion of marriage. Moreover, one can notice the influence of the Belgian legislation, on which 2013 law is modelled, which incorporates this notion of marriage in its international public policy.

It should also be noted that, according to certain authors,¹⁷ the non-implementation of public order would have been inconsistent, because it would have prevented a French national from marrying in France the person of his or her choice, on the sole criterion of nationality of the spouse. However, given the possibilities introduced by Art 202-1, such a difference in treatment would have been difficult to defend before the ECtHR.¹⁸

Therefore, the Court of Cassation has decided to integrate this new notion of marriage into our international public order. This, however, has not been formulated as a general principle but by referring to the terms of Art 202-1. Consequently, this should allow for some harmonisation, ie the solution will be identical under the law of a foreign country, with which there is no international convention, or under the law of a foreign country subject to such a convention. The situation creates nevertheless certain doubts as to the implementation conditions of public order in such an area, and more generally, on the scope of the new principle.

Under the terms of the judgment, public order considerations may prevent the application of a foreign law on the basis of similarity of values and principles, rather than on geographical proximity. Indeed, it will be implemented as the law of residence, domicile, or the personal law of any spouse allows same-sex marriage. It also means that we now consider the couple and not the individual

¹⁵ B Audit and L D’avout, *Droit international privé* (7th edn, Economica, Paris, 2013) 376.

¹⁶ ‘Or dans l’esprit du législateur comme dans celui du gouvernement, l’application de la convention visait à appliquer la loi personnelle prohibitive’, J Dubarry, ‘Le mariage pour tous au nom de l’ordre public international de proximité !’, *RJPF*, 2015, n°2 ; L Gannage, ‘L’ordre public militant: le mariage pour tous face aux systèmes de tradition musulmane’, *JCP G*, n°12, 2015, 318.

¹⁷ A Devers and M Farge, ‘Mariage homosexuel franco-marocain : contradiction entre les motifs et le communiqué de la Cour de cassation’, *Droit de la famille*, 2015, n°3, comm 63.

¹⁸ H Fulchiron, above n 11.

to determine the applicable law, where substantive requirements were traditionally considered for each spouse under each's personal law.

Thus, the Court incorporates directly the terms of the law and, in doing so, establishes a whole new procedure for public policy implementation. This generates valid concerns as to the scope of that judgment concerning trigger conditions for the public policy exception. This confusion is accentuated in reading a press release issued by the Court on its judgment, a document stating that public policy must be implemented in two situations: if geographical proximity (attachment of foreign spouse to France) exists, or if 'the State with which the convention was concluded does not allow same-sex marriage but does not reject it universally'. However, these two conditions do not appear in the judgment. Even if press releases have no legal value, they represent a point of view of the Court on its own decision¹⁹ and, therefore, contribute to the uncertainty surrounding the future implementation of public policy. As noted by some authors,²⁰ the Court of Cassation seems to convey with its communications its doubts on the scope and boldness of its own judgment.

In conclusion, it is worth noting that, while many questions remain about the implementation terms of the public order exception in this area, this judgment enshrines and establishes same-sex marriage in French international public policy. This consistent decision reinforces,²¹ correctly or not, the willingness in 2013 by the French legislature to extend this new notion of marriage as much as possible.

V FRENCH-STYLE SECULARISM: THE PRINCIPLE OF 'LAÏCITÉ'...²²

For several years, the case of the *Baby Loup* nursery stirred French public opinion, as it seemed to involve one of the foundations of the French legal system and, even more so, a pillar of French society: the principle of secularism (principle of 'laïcité'). The issue brought before the court, which may surprise some foreign readers used to other ways of organising the relationship between religion and society, is quite revealing of the French conception of secularism, bearing in mind that each society tries to strike a balance between individual freedom and respect for 'living together' (to use the French expression enshrined by the ECtHR in its judgments on the prohibition of concealing one's face in the public space – see below²³), based on its history, values and collective project.

¹⁹ P Deumier, 'Les communiqués de la Cour de cassation: d'une source d'information à une source d'interprétation', *RTD civ*, 2006, 510.

²⁰ Eg H Fulchiron, above n 11.

²¹ R Libchaber, 'Le complexe de la Castafiore', *Dalloz*, 2015, 481.

²² By H Fulchiron, Professor at Université Jean Moulin – Lyon 3, Director of the Family Law Centre.

²³ ECtHR, *SAS v France*, 1 July 2014, Appl No 43835/11.

In this case, the Baby Loup association was managing a nursery in a district of the Parisian suburbs, under seemingly very harsh conditions. In its statutes, the association claimed to seek the ‘development of an action directed towards childcare in disadvantaged areas, and at the same time, work for the social and professional integration of women in the neighbourhood’. Its rules of procedure required its employees to adopt, in the exercise of their functions, an ‘attire and attitudes deemed to be respectful of freedom of conscience and the dignity of all’ and stated that ‘the principle of freedom of conscience and religion of each staff member cannot hinder the respect for secularism and neutrality principles that apply in the exercise of all the activities developed by Baby Loup, both on the premises of the nursery, its annexes or while escorting outdoors the children entrusted to the nursery’. Ms Y joined the association in 1991 as an educator and became deputy director of the nursery. Between 2003 and 2008, she took parental leave. On her return to work, she presented herself with a headscarf and refused to remove it. She was dismissed based on the provisions of the Labour Code, according to which (Art L 1121-1.): ‘No one can restrict human rights and individual and collective freedoms with justifications unrelated to the nature of the task to be performed or in a manner that is disproportionate to the aim pursued’;²⁴ trial judges deemed the rules of procedure lawful and the dismissal thus justified. For them, the Baby Loup association undertakes a public service function (it fulfils a task of general interest, often assumed by public services, and receives subsidies from public bodies); its employees are therefore required to respect the principle of secularism.

The Court of Appeal of Versailles confirmed that the dismissal was justified, albeit avoiding the disputed basis the first judges used for their decision. This deemed the restriction of employees’ religious freedom as justified by the nature of the task to be achieved and proportionate to the aim pursued. The Social Chamber of the Court of Cassation begged to differ:²⁵ ‘The principle of secularism established by Article 1 of the Constitution shall not apply to employees of employers under private law which do not manage a public service’.²⁶ On remand,²⁷ the Versailles Court of Appeal stood its ground.²⁸ In

²⁴ See also Art L 1321-3 ‘transposant la règle en matière de règlement intérieur et art. L. 1332-1 prohibant toute sanction, tout licenciement, toute mesure discriminatoire, directe ou indirecte, en raison, notamment, de son sexe, de ses mœurs ou de ses convictions religieuses, sauf “lorsqu’elles répondent à un exigence professionnelle essentielle et déterminante et pour autant que l’objectif soit légitime et l’exigence proportionnée”’ (Art L 1321-3 transposing the regulation concerning rules of procedure and Art L 1332-1 prohibiting any sanction, dismissal, discriminatory measure, whether direct or indirect, in particular because of sex, morals or religious convictions, save “if they respond to a genuine and decisive occupational requirement and provided that the objective is legitimate and the requirement is proportionate”).

²⁵ Soc 19 March 2013, No 11-28845.

²⁶ In a judgment of the same day (No 12-11690), the Court stated that the principle of secularism, however, is applicable to all public services, ‘including those provided by organisations under private law’.

²⁷ The French Court of Cassation is the judge of the law, not the facts. If it overturns a decision due to the incorrect application of the rule of law, it returns the same to a trial court to resume the case and provide a concrete solution.

²⁸ Paris 27 November 2013, n° 13/02981. On remand, the appeal judge is not bound to follow the decision in law by the Court of Cassation.

its view, the Baby Loup association would be a ‘trend organisation’ or, according to the European terminology, a ‘belief organisation’. According to the 2000/7818 Directive of the European Union, a ‘belief organisation’ develops²⁹ ‘professional activities of Church and other public or private organizations with an ethos based on religion or belief’. In such a company, treatment differences arising from the religion or belief of a person do not constitute discrimination ‘if, given the nature of these activities or the context in which they are conducted, religion or belief constitute a genuine, legitimate, and justified occupational requirement with regard to the ethics of the organization’. The ECtHR has established this idea in judgments *Obst and Schüth v Germany*³⁰ and *Siebenbaar v Germany*:³¹ an employer with an ethos based on religion or philosophical belief can impose specific loyalty obligations on its employees. These obligations can justify the dismissal of an employee who exhibits behaviours deemed inconsistent with the organisational ethos, at least insofar as a fair balance between the private interests involved has been attained: freedom of conscience and religion of the employee on the one hand, and the need to preserve the principles and values held by the organisation on the other hand. For the judges of Versailles, the protection of freedom of conscience and religion of children, as well as the respect for the plurality of religious options of women in a multi-faith environment, justify the imposition of the principle of neutrality on employees.

The idea that there could be companies of a ‘secular’ tendency, given the tasks of general interest that they would undertake, has generated a heated debate. Upon application, the Court of Cassation refused to take part in this debate.

In a highly anticipated decision, the Plenary Assembly³² overturned the analysis of the appeal judges of Versailles, but confirmed the validity of the dismissal. According to the Court, the judgment rests on erroneous albeit overabundant reasons to describe the Baby Loup association as a belief organisation, since the latter did not seek to promote or advocate for certain religious, political or philosophical beliefs but, according to its statutes, ‘to develop an action directed towards childcare in disadvantaged areas and to work for the social and professional integration of women ... irrespective of political or religious option’.

However, reviewing the nature of the functions in the particular context of a small business, where employees were in direct contact with children and their

²⁹ Directive No 78/2000 / EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³⁰ ECtHR, 223 September 2010, *Obst and Schüth v Germany*, No 425/03 (for the Mormon Church).

³¹ ECtHR, 3 February 2011, *Siebenhaar v Germany*, No 1620-1603 (for the Protestant Church of Baden).

³² Plén Ass 25 June 2014, No 13-28369. Upon a new appeal (the Court of Appeal refused to follow the solution proposed by the Court of Cassation), the Court of Cassation convened in Plenary Assembly, bringing together judges from every Court Chamber. This time, the legal solution adopted was imposed on the trial court, at least in the particular case in which it was given.

parents, and given the nature of the tasks performed by employees, the Court of Cassation considered that ‘the restriction of the freedom to manifest her religion enacted by the rules of procedure was not of a general nature, but sufficiently specific, justified by the nature of the tasks performed by employees of the association, and proportionate to the aim pursued’. In the process, it validated the dismissal.

Refusing manipulation attempts by advocates and adversaries of French secularism, the Court of Cassation therefore attempted to reconcile the rights of the employee, the purpose of the organisation and the collective values at stake. However, the story is not over: the ECtHR should decide on the case. Whenever this happens, it may well be that this nursery, the symbol of a certain conception of ‘living together’ in a neighbourhood marked by diversity and insecurity, would have closed its doors for lack of financial means.

VI THE INDIVIDUAL’S FREEDOM OF RELIGION PUTS TO THE TEST THE FRENCH PRINCIPLE OF ‘LIVING TOGETHER’ (A COMMENTARY OF THE DECISION OF THE ECtHR, *SAS V FRANCE*, GRAND CHAMBER, 1 JULY 2014, APPLICATION N° 43835/11)³³

It has been 5 years since France has shed light on the question of a blanket ban on the full-face veil by introducing in its legislation a law ‘prohibiting the concealment of one’s face in public places’.³⁴ Actually, the intention of banning the full-veil constituted its triggering factor, but a general provision on concealment of the face appeared to be the only viable solution regarding the rights and freedoms guaranteed by the French Constitution and the ECHR.³⁵

Unsurprisingly, a young Muslim woman, who regularly wears the burqa and the niqab in accordance with her religious faith, culture and personal convictions, contested the conventionality of this law. The ECtHR was seized to evaluate if the French State had struck a fair balance between the right to respect for private life (Art 8 ECHR) regarding an individual’s desired appearance, the freedom to manifest religious beliefs (Art 9 ECHR) and public safety, as well as the rights and freedoms of others, enunciated as the principle of ‘living together’.

The reasoning of the ECtHR responds to a very particular and gradual method, to control the attitude of the Member States having regard to the fundamental rights and freedoms of their citizens. In the present case, the Court easily wiped out the questions of the applicability of Arts 8 and 9 regarding the full-face veil, as well as highlighting the ‘continuing interference’ of France in the rights of the

³³ By Clara Delmas, PhD student in Law, Université Lumière Lyon II.

³⁴ Law n° 2010-1192, 11 October 2010.

³⁵ See the ‘study on the possible legal grounds for banning the full-veil’ from the French *Conseil d’Etat*, report presented to the Prime Minister on 30 March 2010.

claimant (§110), in that the Law of 11 October 2010 confronts the applicant with the dilemma of dressing in accordance with her religion and facing criminal sanction, or complying with the law and renouncing to the manifestation of her beliefs.

The peculiarity of this decision concerns two points of the reasoning: first, the use of the French principle of ‘living together’ as a legitimate aim to justify an interference in the rights of the claimant;³⁶ and secondly, the questionable recourse to the doctrine of the margin of appreciation to avoid a condemnation of France.³⁷

Indeed, by taking into account the role of the face in social interaction and in social community, as held by France in its arguments, the Court recognised that the principle of ‘living together’ could be linked to the original legitimate aim of the protection of the rights and freedom of others (§§121-122). In other words, the ECtHR ‘Europeanises’ the French notion, that seems rather ‘far-fetched and vague’³⁸ than just flexible as it was highlighted (§122). This endorsement leads the European judges to analyse the necessity of the French law in a democratic society, ie in a society based on ‘pluralism, tolerance and broadmindedness’ (§128),³⁹ having regard to the legitimate aim of ‘living together’. In this appreciation, the Court points out the risks of validating the French law: excessive character of the measure (§145), threat to the identity of women wearing the full-face veil (§146), contribution to the creation of stereotypes and expressions of intolerance (§149). However, from the perspective of ‘living together’ as a choice of society (§153), and because there is ‘no European consensus against a ban’ (§156), France has a *wide margin of appreciation*. This *wide margin of appreciation* justifies the French interference, the French law prohibiting the concealment of the face in public space, and therefore, the ECtHR concluded with a large majority⁴⁰ in favour of non-violation of Arts 8 and 9 of the Convention.

Endorsement of a selective pluralism, political decision-making, instrumentalisation of the margin of appreciation, numerous criticisms have been formulated against the reasoning adopted in this decision, and raising, once more, the thorny research of *equilibrium* ...

³⁶ See L Burgogue-Larsen, ‘Freedom of religion’ *AJDA* 2014, 1768.

³⁷ See B Bonnet, ‘The ECHR and the ban on concealing the face in public spaces – When the national margin of appreciation is granted’ *JCP G*, 21 July 2014, No 29, 835.

³⁸ See the partly dissenting opinion of Judges Nussberger and Jäderblom under the ECtHR decision, *SAS v France*, 1 July 2014, Appl n° 43835/11.

³⁹ This principle is regularly referred to by the ECtHR; see the case *Leila Sahin v Turkey*, Grand Chamber, 10 November 2005, Appl n° 44774/98, §108.

⁴⁰ Fifteen judges against two.

VII KAFALA – CIRCULAR ON THE LEGAL EFFECTS OF KAFALA (PROVISION OF CARE) IN FRANCE⁴¹

The circular of 22 October 2014 on the legal effects of *kafala* in France was eagerly anticipated. Published in November 2014,⁴² it helps in clarifying the legal situation of children who have been subject to *kafala* in their country of origin.

As Islamic law prohibits adoption, the institution of *kafala* allows entrusting minors⁴³ to a person or a couple, where at least one partner – the *kafil* – is Muslim to ensure their protection, education and maintenance. Children cared for in this way on French territory are mainly of Moroccan and Algerian origin. Therefore, the circular seeks to clarify the modes of establishment and effects of the Algerian⁴⁴ and Moroccan⁴⁵ *kafala*, and explains the legal effects that this provision of care can produce in France.

First, the circular establishes the principle of automatic recognition of court decisions on the provision of care by *kafala*, since its validity is not contested. Thus, the exequatur (which allows a right to be enforced or executed) is no longer necessary. However, this remains an option, particularly as an easier way for people providing children care to offer evidence – using a French judgment – of their relationship with the child and the care provided, to be ultimately granted certain rights, for example social benefits. Under this assumption, the conditions for granting the exequatur will vary according to whether the home state of the decision for the provision of care is related to France by an international convention; regardless, the circular specifies that only a decision emanating from a judicial authority may be granted the exequatur, leaving aside notarial or *adoul* acts, or any provision of care not approved by a judge.

The circular points out that the *kafala* neither creates a parent–child relationship nor affects the status of individuals. Therefore, the exequatur decision does not allow mentioning the provision of care on the civil status register. Indeed, *kafala* is not an adoption. It is a child protection mechanism, which can be likened to a delegation of parental authority or guardianship.

Thus, this matter is governed by Council Regulation (EC) No 2201/2003 of 27 November 2003 so-called Brussels IIa regarding jurisdiction, and by the Hague Convention of 19 October 1996 regarding the applicable law: the French judge

⁴¹ By Amélie Panet, Doctor in law, Marie Curie COFUND Postdoctoral Fellow, University of Liège.

⁴² BOMJ, 28 November 2014, JUSC1416688C.

⁴³ Up to 19 years of age in Algeria, 18 in Morocco and for girls, until their marriage or their financial autonomy.

⁴⁴ In Algeria, the *kafala* may be decided by the court president (known as judicial *kafala*). It can also be ordered by a notary, without judicial control (notarial *kafala*) or the approval by the judge, which makes it equivalent to a judicial *kafala*.

⁴⁵ In Morocco, *kafala* may be imposed by the judge or by an *adoul* (whose role is similar to that of a notary). The *kafala* imposed by an *adoul* is comparable to a contract and, even when approved by a judge, it does not produce the effect of a judicial *kafala*.

will be competent⁴⁶ and French law shall apply,⁴⁷ insofar as the child whose care is delivered by *kafala* lives in France.

As regards the effects themselves, the circular considers two cases. First, for children with no known parentage or orphans, the provision of care by *kafala* produces the effects of guardianship of a minor, and the care situation is comparable to that of a tutor. Moreover, for children with known parentage and living parents, the provision of care by *kafala* produces effects similar to those of a delegation of parental authority – whether total or partial.

Finally, the circular provides background on the adoption of children being cared for by *kafala*: if they are indeed French nationals, the change of their personal law leaves to French law the determination of their adoptability. Based on the position taken by the ECtHR in the case of *Harroudj*,⁴⁸ the circular then urges that a favourable opinion be given to the requests for adoption of children who have acquired French nationality. The living relatives of the child under care by *kafala* must also give their consent; otherwise, only a simple adoption could be decided as the child comes of age. However, if the child is orphaned or abandoned, the circular invites the carers to refer to the guardianship judge, so that the latter may establish a family council to approve the adoption of the child.

VIII CHANGES IN PROCEDURES FOR EXERCISING PARENTAL AUTHORITY IN SEPARATED COUPLES SINCE 2000⁴⁹

In the 2000s, the emergence of new family models led the French legislature to adopt two major reforms, which substantially affected how parental authority is exercised.

Law No 2002-305 of 4 March 2002 establishing equal rights for children irrespective of the status of their parents redefined parental authority by defining it as a function the purpose of which is to protect the child's safety, health and morality,⁵⁰ while respecting the principle of co-parenting.⁵¹ Furthermore, Law No 2004-439 of 26 May 2004 on divorce sought a two-fold

⁴⁶ Article 8 of the Brussels IIa Regulation.

⁴⁷ Article 15 of the 1996 Convention of Hague.

⁴⁸ ECtHR, 4 October 2012, *Harroudj v France*.

⁴⁹ Marine Bathias, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3.

⁵⁰ Article 371-1 of the Civil Code: 'Parental authority is a set of rights and duties the aim of which is the child's interest. Until the child comes of age or emancipates, his parents are responsible for protecting his safety, health and morals, to ensure his education and allow its development, with due respect to his person. Parents involve the child in decisions affecting the same, according to his age and maturity'.

⁵¹ Section 287 of the Civil Code, which provides that 'parental authority is exercised jointly by both parents', seems to be the translation of a better application of the co-parenting principle.

purpose: simplifying and pacifying divorce proceedings by encouraging spouses to find common ground and build consensus, in particular concerning parental authority.

Specifically, the exercise of parental authority is attached to the establishment of parentage. Therefore, parental separation does not affect the rules for conferring parental authority.⁵² The exercise terms reflect the same intent to preserve the connection between parents and children because of their birth.

The guardianship judge ruling on the exercise the terms of parental authority following separation must question the residence of the child, visiting rights and accommodation, and the contribution to maintenance and child education. In France, unmarried parents are not required to involve the Courts to arrange their separation with respect to the minor child. The obligation however emerges if they fail to reach an agreement on the matter.

According to a survey conducted in June 2012 on ‘decisions of family judges (JAF) concerning minors’ residence’,⁵³ the JAF made approximately 126,000 decisions concerning minors’ residence. Of all these judgments, 66,000 were for married couples divorcing and 60,000 for separated unmarried couples.

Overall, decisions establishing the minors’ residence have significantly grown in recent years. For example, there are now twice the alternating residence arrangements as in 2003.⁵⁴ This growth was primarily due to progress of agreements between parents on this issue, and also reflects a desire not to favour one parent over another when both present identical skills and availability to ensure the child’s education.⁵⁵ Nevertheless, establishing the main residence at one of the parents’ house remains by far the most common option, accounting for 73 per cent of all divorce cases and 79 per cent of non-divorce cases. In this situation, the judge largely provides for traditional visiting rights and accommodation.⁵⁶

Finally, the alimony payment represents the contribution towards the children’s maintenance and education. This is closely related to the child’s residence arrangement, and is much more common in cases of habitual residence with the mother (82%) than with the father (31%), or in alternate residence arrangements (23%).⁵⁷ At present, its amounts to €170 on average per month per child for all cases (divorce and non-divorce). While this amount decreased

⁵² This principle is enshrined in Art 373-2 of the Civil Code.

⁵³ Survey conducted by the Sub-Directorate of Statistics and Studies (SDSE) ‘Survey of JAF decisions on minors’ residence’ June 2012.

⁵⁴ In 2003, only 12 per cent of divorce decisions and 8 per cent of non-divorce decisions provided for alternating residence arrangements. In 2012, 17 per cent of divorce decisions and 11 per cent of non-divorce decisions provided for alternating residence arrangements.

⁵⁵ According to the SDSE survey, alternating residence arrangements have mostly grown among friendly divorces (30%) for children between 6 and 14 years of age.

⁵⁶ Traditional visitation and accommodation are arranged as follows: one visit every two weekends and half of school holidays.

⁵⁷ See SDSE survey, above n 53.

by 10 per cent since 2003, the direct assumption of certain expenses (tuition, canteen, extra-curricular outings, etc) experienced a definite growth in recent years.

Ultimately, parenting understood as ‘the cultural function of care, protection and education of the child’,⁵⁸ lies at the heart of any decisions taken by the family court when deciding how parental authority should be exercised upon separation. This recognition is part of a more global trend to consider parents for their intrinsic qualities, and appears as a major change driver in our family law.

IX THE DECLINE IN INTERNATIONAL ADOPTION⁵⁹

In February 2015, the National Institute for Demographic Studies (INED) published a study on international adoption in France and worldwide. It appears that, while the number of international adoptions in France saw a significant increase (from 971 to 4,136) from the 1970s until the mid-2000s, this number fell by two-thirds between 2005 and 2013 (1,343 in 2013). Moreover, the share of ‘children with special needs’ (children older than 5 years, siblings, or suffering from a disease) has increased significantly, accounting for nearly 70 per cent of total international adoptions. What underlies this decline? INED’s study suggests two main causes.

The shortage of adoptable foreign children is due to structural, demographic and economic reasons. First, the decline in mortality and rising living standards, including in the poorest countries, contribute *de facto* to reducing the volume of orphans. Secondly, the massive distribution of contraceptive and abortive techniques as well as the recognition of a plurality of couple-life arrangements reduce the number of unintended pregnancies and abandoned children. Finally, the rise in living standards in countries providing children for adoption allows developing policies to support orphans and abandoned children, and also led to a greater number of adopting ‘local’ couples. We witness, contrary to the thesis of the ‘clash of civilizations’ advocated by Samuel Huntington,⁶⁰ civilizations drawing nearer.⁶¹

Furthermore, the decline in the number of adoptable children internationally is exacerbated by certain political or legal decisions. Since 2006, for example, China reserves the international adoption of minors to married heterosexual couples, the members of which hold a bachelor’s degree, work, and do not suffer from morbid obesity. Numerous countries have also implemented a moratorium on international adoptions to make their practices compliant with the Hague Convention and eradicate child trafficking (Romania, Bulgaria, Guatemala, Vietnam).

⁵⁸ H Fulchiron and Ph Malaurie *La Famille* (Defrenois, 4th edn, 2011, Paris) No 1431.

⁵⁹ Younès Bernand, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3.

⁶⁰ SP Huntington *The Clash of Civilizations* (ed Odile Jacob, Paris, 2000).

⁶¹ E Todd and Y Courbage *The Rendezvous of Civilizations* (ed Seuil, Paris, 2007).

This shortage is not without consequences for France, especially since international adoption was expected to address the drop in French adoptable children. Indeed, we must remember that 83 per cent of children adopted in the plenary form are international adoptees, and that there are nearly 25,000 approved French candidates waiting for a child. On the other hand, France extended adoption to married same-sex couples in 2013, which potentially inflates the number of child adoption contenders.

In short, the adoption decline forced couples or singles to seek mechanisms outside the traditional adoption route. Two methods are particularly sought: medically assisted procreation (or agreed between individuals) and surrogacy agreements. Thus, while reserving medically assisted procreation to heterosexual couples,⁶² French law does not preclude, after having resorted to artificial insemination with a donor, a lesbian couple from relying on this situation to allow the mother's spouse to adopt the child.⁶³ This constitutes therefore a total reversal of the purposes of adoption, since the intent here is unrelated to caring for an abandoned, helpless child or lacking known parentage (ie giving a family to a child), but rather seeks to 'manufacture' the child's adoption (give an unborn child to a family).

The decline of international adoption could also encourage the practice of surrogacy, which is indeed prohibited by French law.⁶⁴ It nonetheless enjoys a certain benevolence from the ECtHR on behalf of the child's right to identity.⁶⁵

X ADVANCE DIRECTIVES: SOON TO BE BINDING PROVISIONS?⁶⁶

The Law of 22 April 2005 introduced into French law Art L 1111-11 of the Code of Public Health, the so-called advance directives mechanism. In essence, it allows adults to submit advance directions for end-of-life arrangements provided this would prove infeasible later on. Thus, they can formalise their wishes concerning the limitations or discontinuation of treatment.

At present, however, such guidelines lack any binding force; they constitute mere indications which the doctor may ignore. Before being enshrined in French law, this issue was nonetheless hotly debated. Authors were sceptical or openly critical of all solutions presented. No proposal won unanimous support. On the one hand, non-binding directives were considered as lacking appeal and interest. In fact, why bother writing them at all if, as the unconscious patient nears his death, the accompanying doctor can lightly ignore any end-of-life arrangements of the former? On other hand, binding directives may force

⁶² Article L 2141-1 of the Public Health Code.

⁶³ Cass, Opinion, 22 September 2014.

⁶⁴ Article 16-7 of the Civil Code.

⁶⁵ ECtHR, 26 June 2014, *Mennesson v France*, req No 65192/11 and *Labassée v France*, req No 65941/11. Cf below Part XII and Part XIII.

⁶⁶ Stessy Tetard, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3.

doctors to abide by decisions made in times long past, which could prove ineffective and/or obsolete at the present time. In particular, such wishes might no longer meet the current wishes of interested parties who, upon drafting their directives, possibly ignored the evolution of medical treatments and pain management options. Thus, between excess of medical paternalism and the patient's absolute autonomy, the legislature chose the former.

Was this the right choice? It was the most prudent for sure. It will not, however, be a long-lasting one, because the French legislator intends to reconsider its position. We hope that the spirit of compromise that drove the development of the guidelines has left its mark and will not be eliminated today. Thus, in accordance with the wishes of the French National Ethics Council, the planned reform seeks to make such directives binding, unless the doctor deems them to be manifestly inappropriate from a strictly medical standpoint. If the reform is adopted, the principle will be overthrown. Thus, the doctor's freedom will become a constraint, while his or her substantial leeway and decision-making ability would be significantly curtailed. While this measure will strengthen advance directives and reaffirm their importance, they are likely to remain an imperfect – and often ineffective – mechanism. Indeed, the reform proposal does not solve the main problem of these directives: the lack of publicity. No matter how much advanced directives are strengthened, if doctors are simply unaware of their existence, they will not achieve their aim. At present, the issue is that advance directives are kept in the patient's medical record or held by the patient or a person of his or her choosing. Except in the first case, it might well be that they never reach the relevant doctor and, thus, become perfectly useless. For now, however, the reform does not intend to strengthen publicity; we can only hope that the parliamentary debate will somehow bridge this gap, improving the text to make this mechanism more effective.

XI END OF LIFE: THE CASE OF VINCENT LAMBERT (COUNCIL OF STATE)⁶⁷

A delicate press case has been referred to the Council of State, which has to decide if doctors could keep Vincent Lambert artificially alive whereas he has, since 2008, been in a persistent vegetative state and unable to express his wishes. This case has re-opened the debate on euthanasia in France and showed the limits of the Leonnetti Act, dated 22 April 2005, on patients' rights and end-of-life situations.⁶⁸

Hospitalised at the University Health Centre (UHC) of Reims, the patient, quadriplegic, was in a medical unit specialised in patients with a minimum state of consciousness. He received daily health care to guarantee his comfort and was artificially hydrated and fed. As his state of health was not going to

⁶⁷ Guillaume Millerioux, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3.

⁶⁸ Patients' rights and end-of-life situations Act (n° 2005-370), 22 April 2005.

improve, the Head of the UHC fulfilled a collegiate procedure involving the discovery of the trusted support person's, the family's and the loved ones' opinions, required to stop the artificial hydration and feeding. Both parents of the patient, who had not been consulted surprisingly, referred the case to the Châlons-en-Champagne administrative court, which considered that the treatment could not be regarded as an 'unreasonable stubbornness', and therefore, that there was no obstacle requiring Vincent Lambert to be kept alive.⁶⁹ The Council of State was seized of the matter, as an appeal court, and ordered an expert's report on 14 February 2014.⁷⁰ Four months later, on 24 June, the administrative Supreme Court, sitting in full court, considered that stopping the artificial hydration and feeding was in accordance with the law and the provisions of the ECHR.⁷¹

At first sight, the Court was enforcing the Leonneti Act, which authorises doctors, when the patient is no longer in a condition to express his or her wishes, to limit or stop useless treatment, that is to say treatment that extends an artificial life, after complying with a collegiate procedure. First, the notion of 'treatment' can be discussed. Is artificial hydration and feeding a treatment? The Court responded positively but there is no consensus among all physicians. Indeed, does a treatment have to cure the person or could it be interpreted simply as a need for keeping the person's organs functioning?⁷² If artificial hydration and feeding could be considered as 'treatment', the will of the patient must be respected. But in this case, the patient's will was unknown. There was no health care directive. In such situations, doctors have to *interpret* the patient's wishes through witnesses' statements (trusted support person, the family and the loved ones). It must be noticed that, even in the absence of consensus between witnesses' statements, the Court favours the ones who thought that the patients did not want to be kept alive artificially. This is a limit of the Leonneti Act: how (when the patient cannot express his or her wishes) can the patient's will (or the patient's interest), the physician's power of decision and the family's opinion be combined? It would be better if the Court favoured the physician's power of decision, as is recommended by the French Academy of Medicine, respecting a collegiate procedure, to determine if there is, in the particular case, an 'unreasonable stubbornness'.

However, the ECtHR was seized of the matter on 24 June 2014. The Court will have to answer the next questions: is artificial hydration and feeding treatment? Does the Council of State's decision violate Art 2 ECHR, which guarantees the right to live? Can stopping hydration and feeding be regarded as torture or inhumane or degrading treatment (Art 3 ECHR)? And, finally, has Vincent Lambert's private life been violated by the French State (Art 8 ECHR)?

⁶⁹ Châlons-en-Champagne administrative court, 16 January 2014, n° 1400029.

⁷⁰ Council of State, 14 February 2014, n° 375081.

⁷¹ Council of State, 24 June 2014, n° 375081.

⁷² D Vigneau, 'L'affaire Vincent Lambert et le Conseil d'État', *Dalloz*, 2014, p 1856.

The ruling is expected very soon. Meanwhile, Mrs Claeys and Leonneti, members of Parliament, introduced a proposal to ‘create new rights for patients and persons in end-of-life situations’. For sure, the French law on end-of-life situations is about to change...⁷³

XII SURROGACY: CONDEMNATION OF FRANCE BY THE EUROPEAN COURT OF HUMAN RIGHTS – THE MENNESSON AND LABASSÉE JUDGMENTS⁷⁴⁷⁵

For the first time, the ECtHR has considered the matter of transnational surrogacy. The court analysed two similar cases involving French decisions, which denied effect to American civil status acts that indicated that surrogate children born in the USA were the legal children of their French intended parents.

The first applicants are husband and wife Dominique and Syvie Mennesson and their twin daughters Valentina and Fiorella Mennesson. The couple lived in Maisons-Alfort and their siblings were born in California in 2000. The second applicants are husband and wife Francis and Monique Labassée and their daughter Juliette Labassée. The couple lived in Toulouse and their daughter was born in Minnesota in 2001. Both couples searched for surrogacy treatment in the USA to achieve their dream family, as surrogacy arrangements are forbidden by the French Civil Code (Art 16-7). Each couple did the same: due to the wives’ infertility, embryos produced with the sperm of the respective husbands were implanted in another woman’s uterus. American judgments from the jurisdictions where the children were born respectively ruled that Mr and Mrs Mennesson were the twins’ parents and that Mr and Mrs Labassée were Juliette’s parents. Local authorities had established birth certificates showing these affiliations.

French authorities refused to enter the birth certificates in the French civil status register, as they considered them to be unlawful as the results of surrogacy arrangements. For the Mennessons the birth certificates were temporarily entered in the register on the instructions of the public prosecutor, who later brought proceedings against the couple and was successful in annulling the entry. The Labassées tried to follow up another path to have their daughter recognised in France. They got a document (‘acte de notoriété’) issued by a judge that attested the status of Juliette as their daughter. It is one of the means to establish filiation in French Law – along with biological filiation and

⁷³ See above Part XI.

⁷⁴ ECDH 26 May 2014, n° 65941/11 et n° 65192/11, *Dalloz* 2014, p 1797, note F Chénéde, p 1787, obs P Bonfils et A Gouttenoire, p 1806, note L d’Avout, chron p 1773, H Fulchiron et C Bidaud-Garon, *Ne punissez pas les enfants des fautes de leurs pères, commentaire prospectif des arrêts Labassée et Mennesson de la Cour EDH*.

⁷⁵ Marcos Vinícius Torres, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3, Assistant Professor at Universidade Federal do Rio de Janeiro.

adoption – based upon the ‘de facto’ enjoyment of the status of a son or daughter (‘possession d’état’). However, the prosecutor refused to enter it in the register of birth.

Both the Mennessons and the Labassées were unsuccessful at lower local jurisdictions and their claims were finally dismissed by the French Court of Cassation on 6 April 2011, which led them to take their matters to the ECtHR in that same year. Both couples complained that they were unable to obtain recognition in France of the parent–child relationships legally established abroad, a situation that – to the detriment of the children’s best interest – violated the rights to respect for private and family life of the applicants, according to Art 8 ECHR. Relying on Art 14 ECHR in conjunction with Art 8, the Mennessons also specifically alleged that the denial of recognition placed their daughters in a situation of discrimination in comparison with other children.

On 26 June 2014, the ECtHR rendered a decision on the subject. The Court acknowledged that a wide margin of appreciation had to be left to states in the field of surrogacy, due to the lack of consensus on it in Europe and to the ethical challenges related to it. On the other hand, the tribunal affirmed that this margin of appreciation should be diminished in relation to such a key aspect of individual’s identity as parentage. As a general view, for the Court the three children’s interests prevailed, as in conflicts between the interests of the state and those of the individuals directly involved, the latter should prevail when you have children directly concerned.

For both cases, the ECtHR considered that there was no violation of Art 8 concerning the respective parents’ right to respect for their family life. However, the Court found a violation of this same Art 8 concerning the right of the respective children for their private lives. The Court observed that, even though the parents’ private lives were affected by the lack of recognition of their parent–child relationship in France, this situation had not enabled them to live a normal family life in France. Since the early childhood of their children, they could bring their siblings from the USA to France and live in similar circumstances as other families did. When considering the violation to the right to private life of the three girls, the Court understood that the lack of recognition of their filiation in France was negative to their identity and that their succession rights were limited as well as their right to have French nationality, even though they were born from French biological fathers – which is normally one of the ways to the recognition of the French nationality. It is the refusal of recognition or establishment in France of children’s parentage regarding their biological father, even if the father was also an intended parent, which caused the condemnation of France.

One of the most controversial points of the decision was to question whether the prohibition of surrogacy arrangements in French Law would consist on a matter of international public policy, as French authorities insist that surrogacy arrangements endanger the protection of both the surrogate children and the

surrogate mother. The commodification of women's bodies has long been used as a reason to maintain this prohibition in France and in other countries.

The Court considered it not necessary to examine the Mennessons' complaint of the violation of Art 14, as it found a violation of Art 8 concerning the twins' interests. The Court also held that France was to pay €5,000 for each child in respect of non-pecuniary damage and a sum to the applicants (€15,000 to the Mennessons and €4,000 to the Labassées) in respect of costs and expenses.

XIII SURROGACY: HOW WOULD FRENCH LAW AND JURISPRUDENCE CONSIDER THE MENNESSON AND LABASSÉE JUDGMENTS?⁷⁶

The ECtHR's condemnation of France was unrelated to the prohibition of surrogacy contained in French law, or to the refusal to recognise intended parents. Indeed, the European Court criticised France for banning both the recognition of parentage and the possibility of establishing the same by resorting to methods provided by French law, when such intended parentage is coupled with a biological one. As Mr Mennesson and Mr Labassée were both biological and intended fathers, France should have allowed the recognition or establishment of a filial relationship linking them to their children, in France, regardless of the surrogacy situation.

While the French legislature does not always seem to be willing to intervene, the Court of Cassation had no choice as it was dealing with another surrogacy case involving French parents, who used a surrogate mother abroad. Two options exist if at least one of the intended parents has a biological relation: refusing to recognise the parentage as it has been established abroad and allowing its establishment *more gallico*, or recognising parentage as it exists abroad.

Like the decision of the *Sala de lo Civil of the Spanish Tribunal Supremo* of 2 February 2015 (confirming its judgment of 6 February 2014),⁷⁷ French judges could have decided to refuse recognition of such parentage as established abroad, allowing however parents to resort to establishing procedures provided by domestic law, so that the child enjoys French parentage. In the Spanish case, there were two men who had married in Spain and used a surrogate mother in California. They faced the refusal of the Spanish authorities to transcribe to the civil registry the Californian birth certificates of the twins born to the surrogate mother. The refusal was justified by the prohibition of surrogacy provided for in Spanish law. The *Spanish Tribunal Supremo* stated that, first, the child's parentage could be established with regard to his biological father (even if, until then, neither of the intended parents identified himself as the biological father)

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⁷⁷ On this decision, V H Fulchiron and C Guilarte Martín-Calero, *Dalloz*, 2015, p 626.

and, secondly, the relationship between the child and the other intended parent may be established by adoption, or in some cases by *posesión de estado civil*. Therefore, Spanish magistrates went beyond the minimum requirements of the European Court, as they not only allowed the establishment of biological parentage, as required by European judges, but also allowed the full integration of the child into his intended family. French magistrates have exactly the same opportunity as their Spanish counterparts: child recognition certificate, possession of status, adoption valid under both legal frameworks. Furthermore, they need not go as far as Spanish magistrates did. They could simply allow the establishment of parentage, both intended and biological. However, arguments relating to the deprivation of children's inheritance rights towards their intended parent, mentioned in the *Mennesson* and *Labassée* judgments, probably bode future condemnation of France for infringement of children's rights.

Based on a decision of the German *Bundesgerichtshof* of 10 December 2014,⁷⁸ the French Court of Cassation could conversely agree to recognise parentage as it exists abroad, ie with respect to both parents whatever their parentage – biological or intended. In the case brought before German judges, two men under a German registered partnership resorted to a surrogate mother in the United States. The German judges reviewed a Californian decision presenting both men as the child's fathers. The judges acknowledged the decision and agreed to give effect not only to the intended parentage coupled with a biological relationship (one of the men is the biological father of this child) but also to the intended parentage alone. Furthermore, the Californian birth certificate was transcribed and entered in the German civil status registry. If the French Court were to adopt such a position, it would also go beyond the current requirements of the European Court; it may nonetheless decide otherwise, considering the arguments set forth in the *Mennesson* and *Labassée* judgments (see above).

For now, it seems that the French Court of Cassation has understood the limits and dangers of brandishing the argument of fraud.⁷⁹ In its opinions of 22 September 2014,⁸⁰ the Court states that the adoption by the spouse of the mother of a child conceived abroad as part of a parental project through assisted reproductive procreation – which is unauthorised under French law, was valid since the legal requirements for adoption were met and it favoured the child's interest. To be sure, the context and especially the principles involved are the same as in the field of surrogacy; the reasoning in terms of fraud has nevertheless been dismissed, whereas it was used by certain trial courts. As for

⁷⁸ BGH, Decision of 10 December 2014, XII ZB 463/13. On this decision, see K Duden *International Surrogate Motherhood, Shifting the Focus to the Child* (Zeitschrift für Europäisches Privatrecht, Verlag CH Beck, Munich, March 2015).

⁷⁹ V C Bidaud-Garon 'Chronicle of French Family Law' in B Atkin (ed), *International Survey of Family Law 2014 Edition* (Jordan Publishing, Bristol, 2014), p 142.

⁸⁰ Opinion No G1470006 and Opinion No J1470007 of 22 September 2014, on which see J Hauser, RTD civ 2014, 872; C Neirinck, *Droit de la famille* 2014, comm 42.

the Council of State,⁸¹ it had to position itself on the legality of the so-called ‘Taubira’ circular,⁸² which had ordered the French authorities to issue a certificate of French nationality to children born abroad with at least one French parent, even upon surrogate contract suspicion, since the child’s parentage was proven by a foreign civil status document. In its decision of 12 December 2014,⁸³ the Council of State confirmed the legality of such a circular. It purposefully avoided positioning itself on the underlying issue, ie parentage established abroad. In fact, it was neither asked nor was competent to do so. Pending the decision of the Court of Cassation, which is expected in the summer of 2015, there is no telling what option will be favoured in the end; at any rate, there is a real chance for children born of a surrogacy abroad to see their parentage established or recognised, if nothing else for their biological parent. I am afraid, however, that intended parents will have to wait.

⁸¹ The Council of State is the highest French administrative court order.

⁸² Circ n° NOR JUSC1301528C of 25 January 2013.

⁸³ Council of State, 12 December 2014, *Association Juristes pour l’enfance et autres*, No 367324, 366989, 366710, 365779, 367317, 368861: H Fulchiron and C Bidaud-Garon, *La ‘circulaire Taubira’ validée* (Dalloz, Paris, 2015) p 357.

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INDIA

MARRIAGE AND DIVORCE – COMPLETE CONSTITUTIONAL JUSTICE

*Anil Malhotra and Ranjit Malhotra**

Résumé

Dans la société indienne l'institution du mariage est considérée bien plus comme un sacrement que comme un contrat et cela explique que toute réforme importante risque d'être en porte-à-faux avec le concept même du mariage hindou. Quelques récentes décisions indiquent clairement que la rupture irrémédiable du mariage ne devrait que rarement pouvoir être invoquée comme motif de divorce étant donné le silence de la loi sur ce point. Cependant, la Cour suprême détient le pouvoir constitutionnel de prononcer des divorces par consentement mutuel. Ce chapitre analyse le droit du divorce en Inde, incluant la question de la reconnaissance des divorces étrangers, dont certains sont précisément fondés sur le motif de la rupture irrémédiable du mariage. Une intervention du législateur est nécessaire, particulièrement en ce qui concerne les divorces prononcés à l'étranger

'Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law.'¹

I DIVORCE BY IRRETRIEVABLE BREAKDOWN OF MARRIAGE – A NON-STATUTORY GROUND

Keeping in mind that the institution of marriage in Indian society is largely still a sacrament and not a contract, especially under the Hindu Marriage Act, 1955 (hereinafter HMA, 1955), any major overhaul may be counter-productive to the very concept of a Hindu marriage. The existing three-tier divorce structure in India, largely applicable to all communities, ie fault grounds, artificial breakdown theory on non-resumption of cohabitation upon judicial separation or restitution of conjugal rights, and the mutual consent principle, provides the existing codified and statutory grounds for divorce in Indian courts. Some

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¹ Benjamin N Cardozo *The Nature of The Judicial Process* (Yale University Press, New Haven, 1921) at 129.

recent decisions give a clear indication that the ground of irretrievable breakdown of marriage should be rarely used, not being on the statute book. But then, to do complete justice to warring spouses, the Apex Court, using its extraordinary and frequent invocation of Art 142(1) of the Constitution of India (hereinafter Art 142), may be found to be helping families in burying the hatchet in passing decrees of divorce by mutual consent to harmoniously put matrimonial feuds to a final rest. Some recent decisions indicating such a precedent have come forth, but simultaneously, a note of caution is sounded in some other verdicts where the backdoor entry of irretrievable breakdown of marriage as an alleged ground for divorce to dissolve an inconvenient marriage is sought by praying that Art 142 be invoked. Denouncing such averments, the Apex Court has also held that irretrievable breakdown cannot be added as a ground for divorce on the statute book in exercise of the powers of the final Court under Art 142.

(a) Problems faced in domestic and cross-border marriages

There are four specific areas in this realm of divorce law which are of main concern both to domestic and non-resident Indians as also to their foreign lawyers, ie irretrievable breakdown of marriage, divorce by mutual consent, recognition of divorce decrees passed by foreign courts and inter-parental cross-border child custody conflicts. Validity of foreign divorce decrees is of immense concern to Indian spouses married to non-resident Indians (hereinafter NRIs), which is discussed in the subsequent portion of this chapter.

(b) Irretrievable breakdown of marriage

A marriage under the provisions of the Special Marriage Act, 1954 (hereinafter SMA, 1954) or the HMA, 1955 cannot be dissolved by a decree of divorce on the ground of irretrievable breakdown of marriage. It is not a ground of dissolution of marriage either in s 13 of the HMA, 1955 or s 27 of the SMA, 1954, respectively. Recent Supreme Court judgments are seriously addressing this issue, which has become very relevant because of changing social conditions especially in urban India and metropolitan cities. The irretrievable breakdown ground could be of immense help where either of the spouses is a non-resident Indian or a foreign national and the marriage has not worked out. Obviously, this will depend upon the facts and circumstances of each case. One has to tread with caution. This weapon in the armoury of divorce law, can work as a double-edged sword, facilitating the dumping of spouses from India married to NRIs. One has also to bear in mind that it is very difficult to access social welfare measures in India or find funding to finance litigation in foreign jurisdictions. Neither are state run pensions disbursed to unemployed or deserted spouses.

(c) **Precedents**

- (i) The Supreme Court of India has held in *Chetan Dass v Kamla Devi*² that is not appropriate to apply the irretrievable breakdown as a straight-jacket formula for the grant of relief of divorce. *Chetan Dass* is one of the leading decisions highlighting the legal position in Indian law that breakdown of marriage is not in itself a ground for divorce. It may be a governing factor to be borne in mind at the time of adjudication by the Court. From the catena of leading cases discussed on this issue, it emerges that the irretrievable breakdown principle is a cautious import of judge-made law into family law jurisprudence. But, the rider ‘in facts and circumstances of each case’, firmly continues to be in place.
- (ii) A few excerpts from the 71st Report of the Law Commission of India on the Hindu highlighted in a Supreme Court of India decision, *Ashok Hurra v Rupa Bipin Zaveri*.³ The relevant extracts of this Law Commission Report appear in para 23 at pp 1273–1274 of this judgment and are reproduced below:

‘Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, good ground of dissolving the marriage by granting a decree of divorce ...

Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as cruelty to the spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage ...

The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared.

After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides the fulfillment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with

² *Chetan Dass v Kamla Devi*, 2001 (4) SCC 250.

³ *Ashok Hurra v Rupa Bipin Zaveri*, AIR 1997 SC 1266.

bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances ...

Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage "breakdown" and if it continues for a fairly long period, it would indicate destruction of the essence of marriage "irretrievable breakdown".⁴

- (iii) The Supreme Court of India way back in 1985 in *Ms Jorden Diengdeh v SS Chopra*⁴ forcefully made a judicial recommendation for a complete reform of the law of marriage and also for introducing irretrievable breakdown of marriage as a ground for divorce. Justice O Chinnappa Reddy lamented:

'It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present find themselves in. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take. In the meanwhile, let notice go to the respondents.'⁵

- (iv) In *Bhagat v Bhagat*,⁵ the court held:

'Merely because there are allegations and counter-allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the Court finds it in the interest of both the parties.'

⁴ *Ms Jorden Diengdeh v SS Chopra*, 1985 (2) HLR 199 at penultimate para, p 207.

⁵ *Bhagat v Bhagat*, AIR 1994 SC 710 at [23], pp 720–721.

The Supreme Court of India while exercising its inherent powers under Art 142 in several cases has held that, where the marriage is dead and there is no chance of its retrieval, it is better to bring it to an end. This was also the mandate of law laid down in *Chanderkala Trivedi v Dr SP Trivedi*.⁶

- (v) A similar situation warranting exercise of the Apex Court's inherent powers arose in *Romesh Chander v Savitri*.⁷ In this case the husband and the wife had been litigating for 25 years. The court held:

'In this case the marriage is dead both emotionally and practically. Continuance of marital alliance for name-sake is prolonging the agony and affliction. It cannot be disputed that the husband has not been dutiful and conscious of his responsibilities either towards his wife or his son. He did not contribute any thing towards upbringing of the child. Yet the marriage being dead, the continuance of it would be cruelty, specially when the child born out of the wedlock of the appellant and the respondent as far back as 1968 having now grown and being in service. The appellant has expressed remorse for his conduct and is willing to compensate for his past mistakes by transferring the only house in his name in favour of his wife.

4. Considering the facts and circumstances of this case we, in exercise of power under article 142 of the Constitution of India, direct that the marriage between appellant and the respondent shall stand dissolved subject to the appellant transferring the house in the name of his wife. The house shall be transferred within four months from today. The dissolution shall come into effect from the date the house is transferred and possession is handed over to the respondent.'

- (vi) Similarly, in *Sneh Prabha v Ravinder Kumar*,⁸ the Apex Court while exercising its powers under Art 142, in an appeal against an order confirming the decree of restitution of conjugal rights, despite conciliation and much efforts by the Supreme Court itself, tersely held that divorce should be granted as the marriage of the parties had irretrievably broken down and there were no chances of the husband and wife living together. Hence, the Supreme Court granted the divorce to the parties in invoking its jurisdiction to do complete justice under Art 142.
- (vii) Furthermore, in *Chetan Dass v Kamla Devi*,⁹ the Supreme Court came down very heavily on an erring adulterous husband. In this case the husband wanted to dump his wife on the ground of desertion. The wife's contention of adultery and the illegitimate relationship of the husband with another woman stood proved before the trial court. The high court upheld these findings and held that, given the circumstances of the case, a decree of divorce on the ground of irretrievable breakdown of marriage could not be granted. The husband contended before the Supreme Court that the marriage had broken down irretrievably and no purpose would be

⁶ *Chanderkala Trivedi v Dr SP Trivedi*, 1993 (4) SCC 232.

⁷ *Romesh Chander v Savitri*, AIR 1995 SC 851 at [3] and [4], p 852.

⁸ *Sneh Prabha v Ravinder Kumar*, AIR 1995 SC 2170.

⁹ *Chetan Dass v Kamla Devi*, 2001 (4) SCC 250.

served by prolonging the agony of the parties. The wife was still ready to live with the husband provided he discontinued the adulterous relationship. The court held that the appellant husband alone was to be blamed for such an unhappy and unfortunate situation. Brijesh Kumar J said:¹⁰

‘19. In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile easily to be broken which may serve the purpose most welcome to the wrongdoer who, by heart, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point.’

Brijesh Kumar J also distinguished the three earlier Supreme Court cases cited by counsel for the appellant husband. The court was of the considered opinion that the facts of the case in *Chanderkala Trivedi (SMT) v Dr SP Trivedi*¹¹ were peculiar in nature. The court remarked that the factual position in that case was entirely different and hence it had no application to the present case.

Coming to the second case of *Romesh Chander v Savitri*,¹² the court observed that the order in this case was passed considering its facts and circumstances ‘in exercise of inherent powers of the Supreme Court under article 142 of the Constitution of India’.

The third case, *Saroj Rani v Sudarshan Kumar Chadha*,¹³ was also found to be inapplicable to the present case. There, the husband did not obey the decree of restitution of conjugal rights obtained by his wife to which he had initially not objected. But later on, he filed a petition for divorce under s 13(1A)(ii) of the HMA, 1955, on the ground that one year had passed from the date of decree of restitution of conjugal rights but no actual cohabitation had taken place between the parties. The wife raised a plea that the husband was taking advantage of his own wrong in terms of s 23(1)(a) of the HMA, 1955, as he had not resumed his matrimonial relationship even after the decree of restitution of conjugal rights was passed. The court held that the conduct of the

¹⁰ At para 19, pp 260–261.

¹¹ *Chanderkala Trivedi (SMT) v Dr SP Trivedi*, 1993 (4) SCC 232.

¹² *Romesh Chander v Savitri*, AIR 1995 SC 851.

¹³ *Saroj Rani v Sudarshan Kumar Chadha*, 1984 (4) SCC 90.

husband did not attract s 23(1)(a) of the HMA, 1955. The wife had also alleged maltreatment both by the husband as well as her in-laws. The court observed:¹⁴

‘Furthermore we reach this conclusion without any mental compunction because it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife, if such is the situation it is better to close the chapter.’

Hence, the observations in *Saroj Rani* were not accepted simpliciter as affording divorce on the ground of irretrievable breakdown in *Chetan Dass v Kamla Devi*.

(viii) In *Savitri Pandey v Prem Chandra Pandey*,¹⁵ the wife was initially granted divorce by the Family Judge. Cross appeals were filed by both the parties. The high court disposed of both the appeals by setting aside the decree and holding that the appellant wife herself was the guilty party and that she had been unable to prove the allegations of cruelty and desertion. Before the Supreme Court it was argued that the appellant wife had remarried after the decree of divorce was granted by the Family Judge and also a child was born from the subsequent remarriage; the marriage ought to be dissolved in the interest of justice. The court did not sympathise at all with her conduct. The appellant wife was disentitled from claiming divorce on the ground of desertion. The court held that granting divorce to her would result in allowing her to take advantage of her own wrong. The court came down with a heavy hand and held as follows:¹⁶

‘17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in *V. Bhagat v. D. Bhagat* held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.

18. As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under article 142 of the Constitution for dissolving the marriage.’

Hence, it is clear from the enunciation of law laid down by the Apex Court above that, under the guise of irretrievable breakdown of marriage, the Supreme Court cannot be asked to invoke its powers under Art 142 of the

¹⁴ At para 9.

¹⁵ *Savitri Pandey v Prem Chandra Pandey*, 2002 (2) SCC 73.

¹⁶ At paras 17–18, pp 84–85.

Constitution. Besides, the bar of s 23(1)(a) HMA, 1955 obstructs the grant of such relief. Moreover, in some cases, the policy of law does not seem to be to confer judicial recognition on the principle of irretrievable breakdown of marriage where the court is of the opinion that it is an abuse or misuse of the due process of law.

The Apex Court in this ruling of *Savitri Pandey v Prem Chandra Pandey* also distinguished the earlier cases from the facts of the case in hand. Counsel for the appellant cited the following authorities: *Anita Sabharwal v Anil Sabharwal*;¹⁷ *Shashi Garg v Arun Garg*, *Ashok Hurra v Rupa Bipin Zaveri*, and *Madhuri Mehta v Meet Verma*.¹⁸ The court opined:¹⁹

‘In all the cases relied upon by the appellant and referred to hereinabove, the marriage between the parties was dissolved by a decree of divorce by mutual consent in terms of application under section 13B of the Act. This Court while allowing the applications filed under section 13B took into consideration the circumstances of each case and granted the relief on the basis of compromise. Almost in all cases the other side was duly compensated by the grant of lump sum amount and permanent provision regarding maintenance.’

The earlier observations of the Apex Court in *Jorden Deingdeh v SS Chopra*²⁰ regarding complete reform of the law of marriage, to make a uniform law applicable to all people irrespective of religion or caste and for introduction of the irretrievable breakdown theory, also finds mention in Pandey’s judgment.²¹

Another very important issue that arises in this case is that the husband’s appeal against the divorce decree was instituted 4 months after the limitation period had expired. Meanwhile, during the pendency of the appeal in the Supreme Court, the wife solemnised a second marriage. The Apex Court declared the second marriage of the appellant wife to be invalid as the same was solemnised during the pendency of appeal. The facts and circumstances of the case are not clear as to whether the wife had received notice of the appeal before her remarriage. However, the issue that emanates is the time frame during which the parties need to keep a check on the appellate legal recourse. After the divorce decree is granted and the limitation stands expired, before they get remarried, would the parties be required to wait still further? The Apex Court in *Savitri Pandey*’s case has recommended to the Ministry of Law and Justice for appropriate changes in the legislation to increase the period of limitation from 30 days to 90 days since 30 days has been held to be insufficient and inadequate for filing the appeal.

¹⁷ *Sabharwal v Anil Sabharwal*, (1971) 1 SCC 490.

¹⁸ *Anita Sabharwal v Anil Sabharwal*, (1971) 1 SCC 490; *Shashi Garg v Arun Garg*, (1997) 7 SCC 565; *Ashok Hurra v Rupa Bipin Zaveri*, (1997) 4 SCC 226; and *Madhuri Mehta v Meet Verma*, (1997) 11 SCC 81.

¹⁹ At para 15; p 84.

²⁰ *Jorden Deingdeh v S.S. Chopra*, AIR 1985 SC 935.

²¹ *Savitri Pandey v Prem Chandra Pandey*, 2002 (2) SCC 73 at [16]; p 84.

- (ix) In *GVN Kameswara Rao v G Jabilli*,²² the Supreme Court came to the rescue of a highly educated couple who had been unsuccessfully litigating for the last 15 years. The court held that because of the non-cooperation and the hostile attitude of the respondent wife, the appellant husband had been subjected to a serious traumatic experience which could safely be termed as cruelty within the purview of s 13(1)(i-a) of the HMA, 1955. From the evidence on record, the court came to the conclusion that the relationship between the parties had irretrievably broken down. In this case, the main issue was that of mental cruelty inflicted upon the husband, while the court suo moto applied the breakdown theory in the facts and circumstances of the case.
- (x) *Parveen Mehta v Inderjit Mehta*²³ is another case of a high degree of cruelty inflicted upon the husband. In this case the parties had been living separately for the last 10 years. The marriage took place in the year 1986, while the divorce petition was filed in the year 1996. All frantic compromise efforts failed to calm down the appellant wife. There was a long period of separation between the husband and the wife. The court inferred from the circumstances of the case that the marriage had broken down irretrievably without any fault of the respondent husband. The court concluded that on this ground the decision of the high court in favour of the respondent for the dissolution of the marriage should not be disturbed. Also, a very high degree of cruelty had been inflicted upon the respondent husband by his wife.
- (xi) Another case where the Supreme Court refused to apply the irretrievable breakdown theory is *Vishnu Dutt Sharma v Manju Sharma*,²⁴ where the appellant husband was proved to have inflicted cruelty upon the respondent wife. The appeal was referred to the High Court and consequently to the Supreme Court, where it was dismissed. The High Court held that it would not be doing justice to the respondent if divorce were granted to the appellant despite his cruelty only on the ground of irretrievable breakdown. The Apex Court further rejected applying the irretrievable breakdown theory on the ground that s 13 does not provide for it and it is not the function of court to make or amend laws. The concluding paragraphs are:²⁵

‘9. In this connection it may be noted that in section 13 of the Hindu Marriage Act, 1955 (for short “the Act”) there are several grounds for granting divorce e.g. cruelty, adultery, desertion etc. but no such ground of irretrievable breakdown of the marriage has been mentioned for granting divorce. Section 13 of the Act reads as under:

²² *G.V.N. Kameswara Rao v G. Jabilli*, 2002 (2) SCC 296.

²³ *Parveen Mehta v Inderjit Mehta*, 2002 (5) SCC 706.

²⁴ *Vishnu Dutt Sharma v Manju Sharma*, AIR 2009 SC 2254.

²⁵ At paras 9-11.

13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

10. On a bare reading of section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to section 13 of the Act as that would be amending the Act, which is a function of the legislature.

11. Learned counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned counsel for the appellant.’

- (xii) In a more recent case *Smt Seema Kumari v Suniul Kumar Jha*,²⁶ the Family Court allowed a divorce filed by the respondent in the present case on the ground of irretrievable breakdown of marriage coupled with desertion. The appellant appealed against the order on the grounds that the Family Court had abruptly arrived at the conclusion of desertion by the appellant, without any evidence in its support, and also that irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act. On the basis of these, the Patna High Court in the appeal set aside the impugned order. It held that the power to grant divorce on the ground of irretrievable breakdown of marriage lies with the Supreme Court under Art 142 of the Constitution and the same power is not available to the High Court or the Family Court.
- (xiii) In *Hitesh Bhatnagar v Deepa Bhatnagar*,²⁷ when the Apex Court was examining a matrimonial dispute for divorce by mutual consent where the second motion was not made by both the parties, it was held that no Court can pass a decree in violation of s 13B of the HMA, 1955. The Apex Court also declined to use its power under Art 142 of the Constitution to hold that the marriage had broken down irretrievably and held that the Apex Court grants a decree of divorce only in those situations in which the Court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is beyond repair. The Court held that ‘even if the chances are infinitesimal for the marriage to survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably’.²⁸ Clearly, the Apex Court has propounded a view to rule out use of its powers when not called for.
- (xiv) In *Darshan Gupta v Radhika Gupta*,²⁹ the Apex Court was pleased to hold that the claim for divorce cannot be maintained under the HMA, 1955 and the Court declined to exercise its jurisdiction under Art 142 of the Constitution as entertaining the plea of irretrievable breakdown of marriage would not constitute and serve the ends of justice. The Apex Court dismissed the appeal of the husband and upheld the decisions declining divorce to him.
- (xv) In *U Sree v U Srinivas*,³⁰ the Apex Court affirmed the finding of the Family Court and the High Court relating to mental cruelty as the foundation for grant of divorce. Fixing the permanent alimony at Rs 50 lacs, the Apex Court affirmed the decree for dissolution of marriage on the ground of mental cruelty.
- (xvi) In *Kollam Chandra Sekhar v Kollam Padma Latha*,³¹ the Apex Court came to be conclusion that even if the wife did suffer from schizophrenia, the Court cannot grant the dissolution of marriage on the basis of one

²⁶ *Smt. Seema Kumari v Suniul Kumar Jha*, AIR 2014 Pat 44.

²⁷ *Hitesh Bhatnagar v Deepa Bhatnagar* 2011(3) SCC 234.

²⁸ At para 25.

²⁹ *Darshan Gupta v Radhika Gupta*, 2013 (9) SCC 1.

³⁰ *U Sree v U Srinivas*, 2013(2) SCC 114.

³¹ *Kollam Chandra Sekhar v Kollam Padma Latha*, 2014(1) SCC 225.

spouse's illness since mental disorder as alleged had not been proved. Accordingly, the judgment of the High Court in not granting a decree of divorce was upheld and the petition of the wife for grant of a decree for restitution of conjugal rights under s 9 of the HMA, 1955 was allowed.

- (xvii) However, in *Malathi Ravi v BV Ravi*,³² the Apex Court, noticing extreme incompatibility between the parties perpetuated by mental cruelty, was led to conclude that the marriage had become illusory and that the decree of divorce granted by the High Court deserved to be affirmed. The matter was sent to the mediation centre where parties entered into a memorandum of settlement by payment of Rs 3 lacs in name of the minor child of the parties.
- (xviii) Likewise, in *Vimi v Chopra v Vinod G Chopra*,³³ the husband and wife, who had been litigating for a long time and had arrived at a settlement, were permitted by the Supreme Court to be granted a decree of divorce under s 13B of HMA, 1955 by waiving the statutory period in order to do complete justice under Art 142 of the Constitution.
- (xix) From the above cases of *GVN Kameswara Rao*, *Parveen Mehta*, *U Sree v U Srinivas*, *Malathi Ravi v BV Ravi* and *Vimi V Chopra v Vinod G Chopra* it will be noticed that a high degree of proved inflicted mental cruelty among other attendant circumstances prompted the Apex Court to apply the irretrievable breakdown principle. These five judgments, in addition to other cited cases, canvass the fact that the breakdown principle is not applied simpliciter in a mechanical fashion. There is an extreme degree of reluctance on the part of the courts to apply the same. Chetan Dass, Hitesh Bhatnagar, Darshan Gupta, and Kollam Chandra, as discussed above, are glaring examples in this regard. Two different High Court decisions, ie *Yudhister Singh v Sarita*³⁴ and *Kakali Dass v Dr Asish Kumar*,³⁵ and a Supreme Court decision in *Sham Sunder v Sushma*³⁶ give a clear indication that the ground of irretrievable breakdown of marriage should be rarely used. What then is required to be done? The breakdown theory, which finds judicial recognition under s 13(1A) of HMA, 1955 as an additional ground for divorce on non-resumption of cohabitation after one year of the passing of the decree of judicial separation or restitution of conjugal rights, does not seem to serve the purpose any more in the current situation. A possible solution has to be found to resolve the predicament.

³² *Malathi Ravi v BV Ravi*, (2014) 7 SCC 640.

³³ *Vimi V Chopra v Vinod G Chopra*, 2014 (3) RCR (Civil) 959 (SC).

³⁴ *Yudhister Singh v Sarita*, HLR 2004 (1) 228.

³⁵ *Kakali Dass v Dr Asish Kumar*, HLR 2004 (1) 448.

³⁶ *Sham Sunder v Sushma*, AIR 2004 SC 5111.

(d) Validity of a foreign marriage divorce decree on grounds of irretrievable breakdown of marriage in a matrimonial proceeding in India

Another case relating to the applicability of the irretrievable breakdown theory while granting a decree for divorce is the case of *Rupak Rathi v Anita*.³⁷ Justice Rajiv Narain Raina of The Punjab and Haryana High Court, in an illuminating judgment in this case, extensively dealt with the jurisdiction of the foreign courts regarding the dissolution of a Hindu marriage. The facts of the case are that Rupak Rathi, appellant, instituted divorce proceedings against his wife, Anita Chaudhary, in UK on 17 March 2011. During the pendency of these proceedings, Anita Chaudhary instituted the proceedings for divorce in Panchkula on 17 May 2011 and the UK proceedings were acknowledged before the court in Panchkula. Both the proceedings ran parallel. Proceedings in the English Court were concluded absolutely on 31 January 2012 and the divorce was granted in favour of the husband on the ground of irretrievable breakdown of marriage. In response to the divorce petition by the wife at Panchkula, on 18 July 2012, the husband argued before the Matrimonial Court in Panchkula for the rejection of the divorce proceedings against him on the ground that the divorce decree of the English Court is binding on both the parties and hence, the divorce petition by the wife was barred on the principles of res judicata and estoppel. However, the wife contended that the English Courts had no jurisdiction to pass a decree on an unavailable ground of irretrievable breakdown of marriage under the Hindu Marriage Act and, since both the parties were domiciled in India, they were to be governed by the Hindu Law. The High Court finally held that the English court cannot grant such a divorce decree as irretrievable breakdown of marriage was not a ground of divorce in the Hindu Marriage Act itself, which governs the parties in the present case. The High Court accordingly held:³⁸

‘17. A close analysis of para. 20 leaves no manner of doubt that the major premise or what we may call the rule which is clearly statutory in nature with reference to both section 13, CPC and section 13, HMA, that if a foreign Court enters upon a matrimonial action brought by a Hindu husband against a Hindu wife married under the Hindu Law, then both the jurisdiction and grounds have deservedly to be in accordance with HMA. Here, the word jurisdiction refers to the right, power, as well as authority to interpret and implement the law, or simply put in a nut shell, the authority and power to decide a lis. Court jurisdictions are limited by physical boundaries as well as by subject matter. The original jurisdictional court in the present case by all means is the court of the District Judge exercising territorial jurisdiction in India and the grounds on which the action can be brought, must be one which are mentioned in section 13 of HMA. But that is not the end of the matter. There can be cases where parties confer jurisdiction on the foreign Court and the said Court will assume jurisdiction available to the Matrimonial Court in India but would remain confined to adjudicate the action in accordance with the matrimonial law of the parties i.e. HMA and the grounds available therein. The

³⁷ *Rupak Rathi v Anita Chaudhary*, 2014 (2) RCR (Civil) 697.

³⁸ *Rupak Rathi v Anita Chaudhary*, 2014 (2) RCR (Civil) 697 (emphasis added).

legal principle being that when a Hindu couple tied by the nuptial knot according to Hindu rites travel abroad with intention to settle down and reside there to set up matrimonial home, they carry their personal laws on their back, off loading it in a foreign court for adjudication in the event parties intend to litigate for dissolving the marriage, mutually or by contest on one or more of HMA recognized principles. A foreign Court can then grant a valid decree of dissolution of marriage but the adjudication must be upon one of the available grounds in the Indian law. Since *irretrievable breakdown* of marriage is not available in HMA, the twin test of forum jurisdiction and relief based grounds would remain unsatisfied and the foreign Court decree would not be binding in India nor recognized ...'

Thus, the court in *Rupak Rathi's* case upheld the order passed by the District Judge, Panchkula by which the Court at Panchkula had declined the application of the husband under Order VII, rule 11, CPC for accepting the decree of the English Court and praying for dismissing the divorce petition of the wife as not maintainable. This landmark view has brought explicit clarity and has given a clear precedent to be followed wherever foreign matrimonial decrees fall for interpretation before a Family Court before whom a matrimonial cause is pending and a foreign verdict is cited as a *fait accompli*. In this erudite judgment, Justice Rajiv Narain Raina has given explicit clarity to the proposition that a decree of divorce on the grounds of 'irretrievable breakdown of marriage' passed by a foreign jurisdiction would not find favour before a Court of competent jurisdiction under the HMA, 1955 before whom the parties are litigating in a matrimonial cause in the Indian jurisdiction.

(e) Recommendations of the Law Commission of India

The Law Commission of India in Report No 217, March 2009, on 'Irretrievable Breakdown of Marriage – Another Ground for Divorce' took notice of the 71st report of the Law Commission of India dated 7 April 1978 and upon taking due notice of the earlier recommendation, took suo motu notice on the subject to suggest that immediate action be taken to introduce an amendment in the HMA, 1955 and the SMA, 1954 for inclusion of 'irretrievable breakdown of marriage' as another ground for grant of divorce. The 217th report of the Law Commission relied upon the earlier 71st report and in para 1.5 stated as under:

'1.5 It is pertinent to notice that the Law Commission of India has already submitted a very comprehensive 71st Report on irretrievable breakdown of marriage as a ground of divorce. The matter had been taken up by the Commission as a result of a reference made by the Government of India. The Law Commission under the Chairmanship of Shri Justice H. R. Khanna presented its Report on April 7, 1978. The Report considered the suggestion and analyzed the same in extenso. Before embarking upon further action on the suggestion that irretrievable breakdown of marriage should be made as a ground for divorce, the Law Commission considered it appropriate to invite views on the matter by issuing a brief questionnaire. The Commission in its 71st Report have accepted in principle irretrievable breakdown of marriage as a ground of divorce and also examined the question as to how exactly to incorporate it into the Act and also further examined the question whether the introduction of such a ground should be coupled with

any safeguards. The Commission also in Chapter II of the said Report considered present law under the Hindu Marriage Act, merits and demerits of the theory of irretrievable breakdown of marriage in Chapter IV and retention of other grounds of divorce in Chapter V. In Chapter VI the Commission also considered the requirement of living apart and also suggested many safeguards like welfare of children, hardship and recommended amendments to Sections 21A, 23(1)(a) and also recommended insertion of new sections 13C, 13D and 13E.’

Accordingly, Dr Justice AR Lakshmanan, as Chairman heading the 18th Law Commission of India gave the following recommendations in the 217th report dated 30 March 2009 as follows:

‘3.1 It is, therefore, suggested that immediate action be taken to introduce an amendment in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 for inclusion of “irretrievable breakdown of marriage” as another ground for grant of divorce.

3.2 The amendment may also provide that the court before granting a decree for divorce on the ground that the marriage has irretrievably broken down should also examine whether adequate financial arrangements have been made for the parties and children.’

As a consequence of the above proposal of the Law Commission of India, ‘irretrievable breakdown of marriage’ was suggested to be added as a ground for divorce in HMA, 1955 and SMA, 1954. The Rajya Sabha on 26 August 2013 approved the Marriage Laws (Amendment) Bill, 2013, which allows both spouses to file for divorce on the ground of ‘irretrievable breakdown’ of marriage. Both parties have to live apart for at least 3 years before filing for such a petition. The Marriage Laws (Amendment) Bill seeks to empower the courts to decide the compensation amount from the husband’s inherited and inheritable property for the wife and children once the marriage legally ends. Also, the wife has the right to oppose the grant of a divorce on the ground that the dissolution could result in grave financial hardship. Provisions have been made to restrict grant of a decree of divorce on ground of ‘irretrievable breakdown’ of marriage if the court is satisfied that adequate provision for maintenance of children has not been made consistently with financial capacity of the parties to the marriage. The Bill proposes amendments to both the HMA, 1955 and SMA, 1954. These amendments include a property clause whereby 50 per cent of the husband’s property, both inherited and inheritable in the future, including any he has acquired after the marriage, may be ceded to his wife. The Irretrievable Breakdown of Marriage clause allows for speedier separation if the husband and wife have stayed apart for a period of 3 years or more on the grounds of unfulfillment or unhappiness. It also states that women can oppose divorce if she can prove grave financial hardships as a result of the divorce, while men cannot. It was mooted in the Rajya Sabha that the proposal was to make divorce friendly for women as it provides for the wife getting a share in the husband’s immovable property after ‘irretrievable breakdown’ of marriage. However, the Bill has not since been tabled in the Lok Sabha and the matter remains inconclusive.

(f) Article 142 – an alternative serving well

The trend of some recent judgments of the Apex Court clearly demonstrates that irretrievable breakdown of marriage itself directly needs to be brought on to the statute book as an additional independent ground for obtaining divorce. The proposed Marriage Laws (Amendment) Bill, 2013 also seeks to include 'irretrievable breakdown of marriage' as an additional ground for divorce. The authors differ with this proposal and have an alternative suggestion which is set down hereunder.

It is proposed that for a civilised parting of spouses before Indian Courts, only when both or either of the spouses are non-resident Hindus domiciled in a foreign jurisdiction and whose marriage has broken down does irretrievable breakdown need to be incorporated into the statute book as an additional ground for divorce, which should be hedged with protections and safeguards for the spouse at a disadvantage in a broken relationship. This will have an immediate three-fold benefit.

First, where parties, one or both, who reside abroad, have irreconcilable differences and want to part amicably, an option will be available to such Hindu spouses to legally and logically part in observance of the sanctity of their personal law, without resorting to a protracted time-consuming legal battle on trumped-up charges either in India or abroad at prohibitive legal costs. The minimum 6-month waiting after filing of a petition for divorce by mutual consent and one year prior period of living apart can thus be obviated.

Secondly, resort to divorces in foreign jurisdictions may reduce once a proper legal option of irretrievable breakdown is available on Indian soil to spouses of a dead marriage. Irretrievable breakdown can thus serve as an additional ground for divorce in the HMA, 1955 and SMA, 1954 only for non-resident spouses of Hindu religion to prevent hasty divorces abroad on unfriendly terms. However, to prevent misuse, sufficient statutory safeguards can be incorporated to arm the Indian judiciary to stall any abuse of the process of law.

Thirdly, inter-parental child custody conflicts across international borders can be avoided if suitable forums for redress are available in India and children will be saved the agony of living apart, deprived of the love and affection of joint rearing of both their parents.

This however should be limited only to cases where one or both parties of Hindu religion are non-resident Indians. Undoubtedly, it will have to be hedged about with all necessary safeguards and precautionary conditions to prevent hasty divorces and other abrupt attempts at misuse. But, all the same, the time has now come to make it available separately as a ground for divorce in Indian matrimonial law to discourage overseas litigation. This will greatly facilitate parties to settle amicably their matrimonial disputes on Indian soil and prevent them from entering into protracted litigation where allegations and insinuations are hurled freely for achieving a matrimonial victory. Such a legislative change

will thus bring relief not only to litigating spouses but also to members of extended families who are invariably involved in the litigation process as a common Indian practice.

Beyond the above, proposed limited change is recommended in NRI marriages only, ie where one or both parties is a non-resident Indian. Domestically, no change is advocated by the authors for in-country residents in India as the existing three-tier divorce structure meets the requirements sufficiently for local purposes. Accordingly, the authors have a different perspective. Keeping the Hindu ceremonial and sacramental concept of marriage intact must be adhered to at least domestically. Erosion of values in matrimonial life must be checked. Marriage in its traditional form must be protected. Hindu divorce law does not need an overhaul. It only needs some amendments. The Hindu institution of a family, a home and children of the marriage as they exist today under Hindu law needs protection. For domestic marriages within the country, the constitutional power of the Apex Court invoked under Art 142 (1) of the Constitution to do complete justice to litigating spouses to dissolve marriages, which have irretrievably broken down, under the banner and umbrella of mutual consent grounds, is serving the purpose well. The Apex Court within its discretion uses its jurisdiction to settle matters when necessary for total justice but refuses to do so when a spouse seeks an unfair advantage by seeking the court to invoke Art 142 of the Constitution.

II DIVORCE BY MUTUAL CONSENT – A GROUND FOR IRRETRIEVABLE BREAKDOWN UNDER ARTICLE 142

(a) Statutory requirements of mutual consent divorce

Section 13B of the HMA, 1955 came up for interpretation by the Bombay High Court in *Leela Mahadeo Joshi v Mahadeo Sitaram Joshi*.³⁹ The Court held that the three ingredients with regard to which the Court must satisfy itself before granting divorce by mutual consent are, first that the petition must be a joint petition presented by both the parties praying for a divorce by mutual consent. Secondly, they have been living separately for a period of one year or more prior to the presentation of the petition. Lastly, they have not been able to live together and have mutually agreed that the marriage should be dissolved. The safeguards as enumerated in s 23 of the HMA, 1955 must undoubtedly be borne in mind, namely that the consent of the parties has not been obtained by force, fraud or undue influence and this aspect must necessarily be ascertained by the trial Court.

Furthermore, the court held:⁴⁰

³⁹ *Leela Mahadeo Joshi v Mahadeo Sitaram Joshi*, AIR 1991 Bom 105.

⁴⁰ Paragraph 13, p 108.

‘It is material to note that section 13B, sub-section (2) makes it mandatory on the part of the Court to pass a decree once the above ingredients are satisfied and it is, therefore, not open to the Court to refuse to pass a decree in such circumstances. Such refusal would be contrary not only to the provisions of law but the very purpose of the amendment and would frustrate the basic objective of providing an honourable and effective dissolution of marriage in cases of matrimonial break-down without having to go through the exercise of an adversary litigation involving allegations against each other ...’

(b) Mere compromise not sufficient

Section 13B stipulates specific conditions and circumstances for the grant of divorce by mutual consent, only upon satisfaction of the court. In *Munesh v Anasuyamma*,⁴¹ the husband’s petition for divorce on the grounds of desertion was dismissed. This was on account of the failure of the husband to prove the desertion against the wife. The husband appealed against the decision. Pending the institution of the appeal, the husband recorded a compromise under Order XXIII, rule 3 of the Code of Civil Procedure, 1908, which was placed on record in the pending family appeal in the High Court. The compromise petition did not contain any averment or admission to show that the wife had deserted her husband without any justifiable cause. The court doubted the compromise petition. The petition only recited that the litigation had been continuing for more than 15 years, the marriage itself was dead, and both the parties were agreeable to judicial separation. The court frowned upon such an agreement. The court held that such an agreement is not a lawful agreement. It was further held that no decree for divorce can be granted on the basis of such a compromise. The court observed that such a compromise is against the scheme of the provisions of s 13 and s 13B of the HMA, 1955 and renders nugatory these provisions of the Act. According to the court, such a divorce petition should have been presented before the original competent court, ie the District Court or the Family Court.

(c) Supreme Court’s purported exercise of inherent powers under Article 142 of the Constitution to grant divorce by mutual consent

In *Shashi Garg v Arun Garg*,⁴² the Supreme Court in an application under s 25 of the Code of Civil Procedure (Power of the Supreme Court to transfer suits, etc from one jurisdiction to another) substantially altered the relief available to the parties. In this case, initially a petition for dissolution of the marriage had been filed by the respondent husband on the grounds of cruelty. The wife moved the Apex Court seeking to transfer the proceedings from the Court of the District Judge, Delhi to the Court of competent jurisdiction at Rewari, Haryana. Notice of the transfer petition was issued to the respondent husband. When the transfer petition came up for hearing, the parties settled outside the

⁴¹ *Munesh v Anasuyamma*, AIR 2001 Kant 355.

⁴² *Shashi Garg v Arun Garg*, 1997 (7) SCC 565.

court and filed a memorandum of agreement in the Supreme Court. In the light of the agreement, the Supreme Court took the matter on board. The apex Court scrutinised the agreement. The parties to the marriage prayed to the Court that their marriage be dissolved by mutual consent which was otherwise emotionally dead and for all other practical reasons. The Court concluded as follows in para 8 of the judgment at p 566:⁴³

‘The requirements of section 13B of the Act have been satisfied and there is no impediment in granting the decree for divorce by mutual consent by altering the relief in HMA Case No. 221 of 1996, as one available under section 13B of the Act with a view to do complete justice between the parties and avoid unnecessary further litigation. We are also satisfied that the interest of the minor daughter has been safe guarded ...’

In the ruling above, the Apex Court seems to have exercised its powers under Art 142 of the Constitution of India, without expressly referring to it. The Court was more than particular in protecting the pecuniary interest of the minor daughter. The use of the phrase ‘to do complete justice between the parties and avoid unnecessary further litigation’ is indicative of this fact. Under Art 142 of the Constitution, the Supreme Court in the exercise of its jurisdiction may pass any decree or order as is necessary for doing ‘complete justice’ in any matter pending before it. Section 25, CPC only empowered the Supreme Court to transfer the case from one Civil Court to another. Perhaps, in its wisdom, the Apex Court, to prevent any further ordeal to the parties of relegating them for further relief to another Court, took upon itself the task of doing substantial justice by there and then terminating a dead marriage, hence rendering substantial justice to all the parties to the litigation.

In *Madhuri Mehta v Meet Verma*,⁴⁴ during the course of the hearing of the transfer petition, the parties to the marriage made an application for dissolution of their marriage under s 13B of the HMA, 1955. The Court also conferred visitation rights on the husband to meet their only child from the marriage. The court noticed that the parties had been estranged and had been living apart since January 1996. The court entertained the joint plea of the parties to the marriage. The ruling concluded in no uncertain terms that divorce by mutual consent was being granted in exercise of powers under Art 142 of the Constitution of India, for which there is ample authority reflective from the past decisions of the Apex Court itself.

In a third transfer petition case, reported at the same time as Maduri Mehta’s case, the Apex Court gave a yet more liberal interpretation to the mutual consent provisions. This is the case of *Anita Sabharwal v Anil Sabharwal*.⁴⁵ In this case the respondent husband’s divorce petition was pending in the court of the Additional District Judge, Delhi. The wife moved the transfer petition seeking transfer of the said case to Mumbai. During the pendency of the

⁴³ Paragraph 8, p 566.

⁴⁴ *Madhuri Mehta v Meet Verma*, 1997 (11) SCC 81.

⁴⁵ *Anita Sabharwal v Anil Sabharwal*, 1997 (11) SCC 490.

transfer petition, the parties as well as the counsel put on the record of the court a compromise deed wherein they had agreed to get divorced by mutual consent. The Judges observed that the petition had not been filed under s 13B of the HMA, 1955 and that the statutory period of 6 months had not even commenced. The Apex Court summoned the trial court record and noticed that the parties had been married for 14 years. The court noticed that sadly enough, they had spent the prime of their life in acrimony and litigation. The court held that it was time that their mutuality bore some fruit in putting them apart. The court concluded in this short but liberal judgment as follows:⁴⁶

‘We, therefore, in the spirit of section 13B of the Act, and in view of the fact that all hopes to unite them together have gone, hereby grant to the parties divorce by a decree of dissolution by mutual consent to end their prolonged unhappiness. Ordered accordingly. The transfer petition stands disposed of.’

The remarkable feature of this judgment is that the court was not bogged down by the technicalities of law while interpreting s 13B of the HMA, 1955. Also, the Court adequately satisfied itself as to the financial arrangements for the education of the children. The estranged father tendered in Court a sum of seven lacs by way of bank drafts. He was also given visitation rights to visit his children. The decision of the Court to do substantial justice to the parties was unfettered. The spouses parted amicably. Due provision was made for the future and welfare of the children’s rights. Hence, the Court rendered complete justice to the parties.

(d) Merely living separately is no ground for section 13B petition

Mere agreement of the parties to live separately, and the fact of living separately, is not a ground for granting divorce under s 13B of the HMA, 1955. A decree for divorce can be granted only when all of the statutory conditions mentioned in the HMA, 1955 for the grant of relief are found to exist and not merely on the ground that the parties had agreed to the grant of such a decree. This was the mandate of law laid down in *Surinder Kaur v Amarjit Singh* and *Apurba Mohan Ghosh v Manashi Ghosh*.⁴⁷

The Delhi High Court, in the case of *Gaurav Kapoor v Komal Babbar*,⁴⁸ reiterated the explanation of the term ‘living separately’ under s 13B, given by the Apex Court in the case of *Smt Sureshta Devi v Om Prakash*, and held as follows:

‘6 ... The similar question came up before the Apex Court in the case of *Smt. Sureshta Devi v. Om Prakash*, (1991) 2 SCC 25. In paragraph 9 of the said judgment, it was observed:

⁴⁶ At p 491.

⁴⁷ *Surinder Kaur v Amarjit Singh*, 1986 (2) HLR 120, and *Apurba Mohan Ghosh v Manashi Ghosh*, 1989 (1) HLR 247.

⁴⁸ *Gaurav Kapoor v Komal Babbar*, 2014 (206) DLT 637 at para 6.

“9. The ‘living separately’ for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression ‘living separately’ connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they ‘have not been able to live together’ seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.”

Hence, besides living separately, the Court clarified the requirements of not having been able to live together and mutual agreement to dissolve the marriage, as the three necessary and mandatory ingredients of a mutual consent divorce petition under s 13B of the HMA, 1955 which cannot be relaxed or waived.

(e) Mutual consent should continue until the divorce decree is sought

There has been conflict of law situation as to whether consent of both the parties to the marriage should continue up to the date of the final decree. This issue was resolved by the Supreme Court of India in 1992 but the correctness of this decision has been doubted by the Apex Court itself in the year 1997. The law at this moment in time appears to be that mutual consent of both the parties should continue until the decree is passed by the court. The law on this issue is analysed briefly hereunder.

The Punjab and Haryana High Court in *Harcharan Kaur v Nachhatar Singh*,⁴⁹ held that either party to the marriage is at liberty to revoke his or her consent any time before the petition is finally disposed of:

‘In our view, unless the parties to the petition under section 13B of the Act, who have mutually consented to have the marriage dissolved, continued to signify their mutual consent for the dissolution of the marriage right up to the date of the decree, the marriage cannot be dissolved under sub-section (2) of section 13B of the Act merely on the basis that six months earlier the parties had together presented the petition for dissolution of marriage by mutual consent. Either of the parties to the petition under section 13B, that is, husband or wife, is at liberty to revoke its consent any time before the petition is finally disposed of; and if the other party is still keen to have the marriage dissolved, the other provisions of the Hindu Marriage Act are still available for the grant of necessary relief if a case is made out for the same. The object of section 13B is to provide an additional speedy remedy to the husband and wife to have the marriage dissolved if even after

⁴⁹ *Harcharan Kaur v Nachhatar Singh*, AIR 1988 P&CH 27 at para 11, p 30.

sufficient efflux of time both of them find, that it is not possible for them to continue as husband and wife any further. Obviously, if both the parties agree, the decree of divorce can be granted by mutual consent under section 13B and if one of them fails to agree and does not want to oblige the other party by extending the requisite consent to the divorce, decree of divorce cannot be passed under section 13B of the Act. For that, other provisions of the Act would have to be resorted to.'

The Delhi High Court, in a contradictory view to the decision of the Punjab and Haryana High Court, in *Chander Kanta v Hans Kumar*⁵⁰ held that a petition presented under s 13B of HMA, 1955 cannot be withdrawn by one party unilaterally. Of course, if the court is satisfied that the consent was not a free consent and it was the result of force, fraud or undue influence, then it is a different situation because the court in such a case is empowered to refuse to grant the decree of divorce. The Kerala High Court, like the Punjab and Haryana High Court, in *KI Mohanan v Jeejabai*⁵¹ held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the Court passes a final decree for divorce.

In *Sureshta Devi v Om Prakash*,⁵² the Apex Court had the occasion to deal in detail with the conflicting views of different High Courts on the question of withdrawal of consent by either party to the marriage before the passing of the divorce decree. The law laid down in this ruling was that a party to a s 13B petition for divorce by mutual consent can unilaterally withdraw the consent. It is not irrevocable. Mutual consent must continue until the time a final divorce decree is passed. Therefore, if in the interregnum period of 6 to 18 months' waiting the mutual consent is withdrawn, no divorce by mutual consent can be granted. The Apex Court upheld the interpretation given by the High Courts of Kerala, Punjab and Haryana and Rajasthan and overruled the views of the High Courts of Bombay, Delhi and Madhya Pradesh as not laying down good law. The court, while supporting the above views, held:⁵³

'13. From the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the section which prevents such course. The section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent,

⁵⁰ *Chander Kanta v Hans Kumar*, AIR 1989 Del 73.

⁵¹ *K.I. Mohanan v Jeejabai*, AIR 1988 Ker 28.

⁵² *Sureshta Devi v Om Prakash*, AIR 1992 SC 1904.

⁵³ At para 13, pp 1907–1908.

the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of section 13B is clear on this point. It provides that ‘on the motion of both the parties ... if the petition is not withdrawn in the meantime, the Court shall ... pass a decree of divorce ...’ What is significant in this provision is that there should also be mutual consent when they move the Court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the Court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.’

The court also relied on Halsbury’s Laws by stating: ‘The consent must continue to decree nisi and must be valid subsisting consent when the case is heard.’⁵⁴ The Supreme Court in Ashok Hurra’s case⁵⁵ has doubted the correctness of the above decision. It has been held that for mutual consent to continue until the divorce decree is passed after a passage of 6 to 18 months appears to be too wide and does not logically accord with s 13B(2) of the HMA, 1955. The Supreme Court in this later decision has held that the observations made in Sureshta Devi’s case, to the effect that mutual consent should continue until the divorce decree is passed, even if the petition is not withdrawn by either of the parties within the period of 18 months, appears to be too wide and is not in consonance with s 13B(2) of the HMA, 1955. The court felt that this issue would require reconsideration in an appropriate case. The Judges did not deliberate further on this issue. Since in this case the wife had withdrawn her consent for divorce before the passing of the final decree and the Supreme Court felt that the marriage was dead and that it warranted the exercise of jurisdiction under Art 142 of the Constitution to grant a decree of divorce by mutual consent under s 13B of the Act, the Supreme Court dissolved the marriage between the parties in order to meet the ends of justice. The Court held that realities on the ground cannot deter it from taking a total and broad view of the situation when dealing with adjustment of human relationships. Subject to the financial settlement between the parties, the Court dissolved the marriage by mutual consent under s 13B, HMA. This judgment seems to be an eye-opener where the Court brushed aside the technical interpretation of continuing consent until the passing of the final decree, and in rendering complete substantial justice between parties clearly differed from the earlier view of the Supreme Court. The judgment is thus indeed salutary in nature.

Furthermore, once any party has withdrawn consent for a petition under s 13B, it is not the duty of the court to look into the bona fides or reasonableness of withdrawal of consent. Once consent is withdrawn, the only option available to the Court is to close the matter at that stage and dismiss the petition without

⁵⁴ At para 14, p 1908. See *Halsbury’s Laws of England*, (4th Edn, Vol. 13, Butterworths, London, 1973), para 645; *Rayden on Divorce* (12th Edn., Vol. 1, Butterworths, London, 1974) p. 291; and *Beales v Beales* [1972] 2 All ER 667.

⁵⁵ *Ashok Hurra* (AIR 1997 SC 1266).

going into the merits or demerits of the matter. This has been held in a judgment in *Rajesh R Nair v Meera Babu*.⁵⁶ A similar view has been settled by the Apex Court in *Hitesh Bhatnagar v Deepa Bhatnagar*,⁵⁷ clearly holding that if a second motion is not made in a petition for divorce by mutual consent, no Court can pass a decree of divorce by mutual consent. Article 142 is thus a panacea for all ills for dissolving a bad marriage to do complete justice to the spouses, children and extended families who are enveloped in the relationship.

(f) Six months statutory waiver period – Article 142 to the rescue

The tenor of several High Court decisions lays down that the statutory requirement of the waiting period of 6 to 18 months after filing the mutual consent divorce petition can be waived in instances where the parties have been litigating for a long time or where the marriage has lasted for a sufficient period of time and the spouses have been living apart. The period of 6 to 18 months is given in divorce by mutual consent so as to give time and opportunities to the parties to reflect on their move and seek advice from relations and friends if there is any hope of reconciliation between the parties.

The Punjab and Haryana High Court in *Mohinder Pal Kaur v Gurmit Singh*,⁵⁸ held that the 6-month waiting period under s 13B of the HMA, 1955 can be reduced in cases where the divorce petition is already pending on some other fault ground for more than 6 months and the reconciliation efforts have been unsuccessful. The court also added a rider that this period cannot be curtailed altogether in freshly instituted petitions.

The same court in *Vinod Kumar v Kamlesh*⁵⁹ has held that the statutory period of 6 months as provided under s 13B(2) of the HMA, 1955 can be waived if the marriage has broken down completely and the parties are living separately. This Punjab and Haryana High Court ruling places reliance on an earlier Andhra Pradesh High Court decision in *Re Grandhi Venkata Chitti Abbai*.⁶⁰ In that case, criminal proceedings and maintenance proceedings were already pending. On the intervention of village elders and friends the parties agreed to obtain a divorce by consent. Under the terms of the compromise the maintenance settled was payable to the wife only after the divorce. She, therefore, filed an application before the senior sub-judge for preponement of the divorce. The same was rejected, hence the appeal was instituted in the High Court. The court held that there was no possibility of revival of marriage in this case. The court held as follows:⁶¹

⁵⁶ *Rajesh R. Nair v Meera Babu*, 2014 (1) HLR 263.

⁵⁷ *Hitesh Bhatnagar v Deepa Bhatnagar* 2011 (5) SCC 234 .

⁵⁸ *Mohinder Pal Kaur v Gurmit Singh*, 2002 (1) HLR 537.

⁵⁹ *Vinod Kumar v Kamlesh*, 2002 (1) HLR 270.

⁶⁰ *Re Grandhi Venkata Chitti Abbai*, AIR 1999 AP 91.

⁶¹ At para 5, p 92.

‘When once such a situation is ruled out having liberalised the process of divorce by mutual consent which was not there prior to the amendment it will not serve any purpose in directing the parties to continue the agony for six more months. Hence, in a case of this nature, I feel that the statutory period of six months prescribed under the statute for taking divorce by mutual consent can be waived and the parties can be given liberty to part their company without waiting for the statutory period.’

Likewise in *Paresh Shah v Vyjayanthimala*,⁶² in a case pertaining to a well-educated couple, where the marriage had lasted for several years, the court granted a divorce decree by consent. The judgment takes cognisance of the agony of the parties in such a situation:⁶³

‘From the above compromise memos, filed by both the parties, it is clear that both are educated and in a position to understand the concept of marriage and their responsibility towards each of them as husband and wife. But their feelings, mal-adjustment and temperament, made their lives miserable and to pull on as husband and wife an impossibility. For them, divorce is a blessing than to continue as husband and wife in miserable circumstances ...’

In *Bijal Chandreshbbhai Bhatt v Chandreshbbhai Sahdevbhai Bhatt*,⁶⁴ the parties to the marriage had irreconcilable differences which also culminated in criminal litigation between them. The parties were not at all willing to reunite. The court, while dispensing with the requirement of a 6-month waiting period, highlighted the need to shorten litigation in such matters.

In one of the recent case of *Devinder Singh Narula v Meenakshi Nangia*,⁶⁵ the Apex Court granted divorce, after 4 months of cooling period, to the parties who had been living separately for more than one year by invoking the powers of the Supreme Court under Art 142 of the Constitution of India. In this case, the Apex Court held:

‘13. In the above circumstances, in our view, this is one of those cases where we may invoke and exercise the powers vested in the Supreme Court under article 142 of the Constitution. The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than one year, we see no reason to continue the agony of the parties for another two months.’

In conclusion it can be inferred that only the Supreme Court can exercise its discretion to waive the statutory 6 to 18 months’ waiting period in suitable cases as an exception wherever the need is felt to do so in exercise of its powers under Art142 of the Constitution of India for doing complete justice to parties in any cause or matter pending before it. This power is not vested with the High

⁶² *Paresh Shah v Vyjayanthimala*, AIR 1999 AP 186.

⁶³ *Paresh Shah v Vyjayanthimala*, AIR 1999 AP 186 at para 4, p 188.

⁶⁴ *Bijal Chandreshbbhai Bhatt v Chandreshbbhai Sahdevbhai Bhatt*, AIR 1999 Guj 203.

⁶⁵ *Devinder Singh Narula v Meenakshi Nangia*, 2013 (3) DMC (SC).

Courts or any other court. Therefore, as a normal rule, the statutory 6 to 18 months' waiting period has to be adhered to necessarily. This time gap is a safeguard which prevents hasty divorces and helps parties to think over and decide on their intentions to divorce by mutual consent.

III GUIDELINES LAID DOWN BY THE SUPREME COURT OF INDIA ON RECOGNITION OF FOREIGN MATRIMONIAL JUDGMENTS – PRECEDENTS AND PERSPECTIVES

(a) Landmark Supreme Court judgment

Section 13 of the Code of Civil Procedure 1908 (hereinafter CPC) is the general provision of law relating to conclusiveness of judgments by foreign courts. There is no separate provision of law prescribed in the HMA, 1955 or SMA, 1954 relating to recognition of foreign matrimonial judgments. Hence, the general provisions of law laid down in s 13 of the CPC are also applicable to matrimonial matters decided by foreign courts.

The Supreme Court of India in 1991 laid down comprehensive fresh guidelines to recognise foreign matrimonial judgments by the Courts in India. The Apex Court in *Y Narasimha Rao v Y Venkata Lakshmi*⁶⁶ made it clear that Indian courts would not recognise a foreign judgment if it has been obtained by fraud which need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts. The ruling declared a divorce decree passed by a US court as 'unenforceable'.

In this case a decree for dissolution of marriage had been passed by the Circuit Court of St Louis County Missouri, USA. Three important factors were noteworthy in the case. In the first instance, the Court assumed jurisdiction over the matter on the ground that the first appellant had been a resident of the State of Missouri for 90 days preceding the commencement of the action and hence the petition could be filed in that Court. Secondly, the decree had been passed on the only ground of irretrievable breakdown of marriage. Thirdly, the respondent wife had not submitted to the jurisdiction of the Court. The Supreme Court of India observed from the record, that the wife had filed two replies of the same date. Both were identical in nature except that one of the replies began with an additional averment as follows:⁶⁷

‘without prejudice to the contention that this respondent is not submitting to the jurisdiction of this Hon’ble court, this respondent submits as follows ...’

The wife raised several objections in her defence along with other issues. She stated that they both were Hindus, were governed by Hindu law and got

⁶⁶ *Y. Narasimha Rao v Y. Venkata Lakshmi*, JT 1991 (3) SC 33.

⁶⁷ At para 5, p 37.

married at Tirupati in India under Hindu law. She further contended that she was an Indian citizen and was not governed by the laws in force in the State of Missouri. Hence, the foreign court had no jurisdiction to entertain the petition.

The Supreme Court held that, in terms of s 19 of the HMA, 1955 (s 19 lays down the Court to which the divorce petition shall be presented), the Circuit Court of St Louis County, Missouri had no jurisdiction to entertain the petition, in terms of which admittedly the parties were not married. Secondly, irretrievable breakdown of marriage is not one of the grounds recognised by the HMA, 1955 for dissolution of the marriage. Hence, the decree of divorce passed by the foreign court was on a ground which was not available under the HMA, 1955.

The Court interpreted s 13 of the CPC with special reference to the validity of foreign divorce decrees. Section 13 of the CPC states that a foreign judgment is not conclusive as to any matter directly adjudicated upon between the parties if:

- (a) it has not been pronounced by a Court of competent jurisdiction;
- (b) it has not been given on the merits of the case;
- (c) it is founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
- (d) the proceedings are opposed to natural justice;
- (e) it is obtained by fraud;
- (f) it sustains a claim founded on a breach of any law in force in India.’

Justice PB Sawant analysed and consolidated the reasons for framing the guidelines in terms of s 13 of the CPC:⁶⁸

‘11. The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules have also been evolved by judicial decisions ...

13. We cannot also lose sight of the fact that today more than ever in the past, the need for definitive rules for recognition of foreign judgments in personal and family matters, and particularly in matrimonial disputes has surged to the surface. Many a man and woman of this land with different personal laws have migrated and are migrating to different countries either to make their permanent abode there or for temporary residence. Likewise there is also immigration of the nationals of other countries. The advancement in communication and transportation has also made it easier for individuals to hop from one country to another. It is also not unusual to come across cases where citizens of this country have been contracting marriages either in this country or abroad with nationals of the other countries or among themselves, or having married here, either both or one of them migrate to other countries. There are also cases where parties having married here have been either domiciled or residing separately in different foreign countries. This migration, temporary or permanent, has also been giving rise to various kinds of matrimonial disputes destroying in its turn the family and its

⁶⁸ At paras 11 and 13, pp 39 and 40.

peace. A large number of foreign decrees in matrimonial matters is becoming the order of the day. A time has, therefore, come to ensure certainty in the recognition of the foreign judgments in these matters ...'

The Apex Court laid down the following broad principles in the interpretation of s 13 of the CPC, with special emphasis on foreign matrimonial judgments.

- (i) Clause (a) of s 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. The court was of the view that this clause should be interpreted to mean that only such a court will be a court of competent jurisdiction, which the HMA, 1955 or the law under which the parties are married, recognises as a court of competent jurisdiction to entertain the matrimonial dispute.
- (ii) Clause (b) of s 13 states that if a foreign judgment has not been given on the merits of the case, the courts in this country will not recognise such a judgment. This clause should be interpreted to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself or herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court, should not be considered as a decision on the merits of the case.
- (iii) The marriages which take place in India can only be under either the customary or the statutory law in force in India. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and not any other law. When a foreign judgment is founded on a jurisdiction or on a ground not recognised by such law, it is a judgment which is in defiance of the law in India. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in India.
- (iv) Section 13(d) of the CPC makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained are opposed to natural justice. The court held that, in the realm of family law such as matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. Therefore, it is necessary for the court to ascertain whether the respondent was in a position to represent himself or herself and effectively contest the said proceedings.
- (v) Section 13(e) of the CPC stipulates that the courts in India will not recognise a foreign judgment, which is prima facie obtained by fraudulent means. The court here placed reliance on its earlier decision in *Satya v Teja*

Singh.⁶⁹ In this case it was held that the fraud need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts.

The Apex Court ruled that the jurisdiction assumed by the foreign court as well as the grounds on which the relief was granted must be in accordance with the matrimonial law under which the parties were married.⁷⁰ The court also elaborated upon the exceptions to this rule, which are as follows:

- (a) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married;
- (b) where the respondent voluntarily and effectively submits to the jurisdiction of the forum and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;
- (c) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

Therefore, the Indian Apex Court has given clear guidelines in accordance with the general law of the land for enforcement of foreign matrimonial judgments in India to prevent erring spouses from taking advantage of liberal matrimonial laws of foreign jurisdiction which permit quick divorce on easier grounds not available in the Indian Jurisdiction. The necessity to do so arose on account of a large number of foreign divorce decrees, mostly obtained in default, being sought to be enforced on Indian soil and which gave no choice to a helpless spouse invariably deserted and pitted on Indian land much against his or her wishes.

(b) Authoritative High Court verdict

In the case of *Rupak Rathi v Anita Chaudhary*,⁷¹ in a vibrant interpretation given by Justice Rajiv Naraiyan Raina, the judgment gives a verdict with respect to applicability and interpretation of the exception in para 20 of *Y Narasimha Rao* (above)⁷² and interpretation of Order VII, rule 11 of the CPC in the following terms:

‘In exceptions (i) and (ii) the words “grounds” or “ground” have been used in the rule and also in exceptions (i) and (ii) but not in exception (iii). The word, “relief” has been used in the rule and in exceptions (i) and (iii) but not in exception (ii). The first exception talks of “forum” where the respondent is domiciled or

⁶⁹ *Satya v Teja Singh*, 1975 (2) SCR 197.

⁷⁰ *Y Narasimha Rao v Y Venkata Lakshmi*, JT 1991 (3) SC 3, at para 20, p 43.

⁷¹ *Rupak Rathi v Anita Chaudhary*, 2014 (2) RCR (Civil) 697 at para 18.

⁷² *Y Narasimha Rao v Y Venkata Lakshmi*, 1991 (3) SCC 451.

habitually and permanently resides and this is clarified by the conjunction “and” to mean that the “relief” is granted on a ground available under HMA. Exception (iii) applies in cases which are not contested and are based on consent. It follows that when “contest” and “consent/s” are referable to grounds available under HMA, only then can relief flow. This is for the reason that there is no estoppel against the statute. What is meant by consent to the grant of relief even though the English Court’s jurisdiction is contrary to HMA is the moot point presenting some difficulty. The rule in para. 20 confers and recognizes jurisdiction by assumption conferred on a foreign Court to act in accordance with the mandate of Indian matrimonial law. The Supreme Court chose not to use the word “grounds” in exception (iii) and this is how some ambiguity is felt after the heated debate on the interpretation of exception (iii) vehemently argued by the respective counsel and the learned amicus from many angles and prisms or points of view. It is, however, well settled that the words used in a judgment cannot be read as one would read words used by the legislature in enactments which latter have to be given their ordinary and plain meaning. In cases of ambiguity in the statutory rule and of the words used by the Parliament, then the court can step in to harmonize the provisions in a way which is in consonance with the objects and reasons for which the Act was passed and to further the intention of the law. There is a difference between the words “relief” and “jurisdiction” of the “forum” in exception (iii). Even in the rule, the forum has no jurisdiction but is assumed to have one when it acts on a principle permitted by section 13, HMA to be the grounds for dissolution of marriage by a decree of divorce. It is for this reason the Supreme Court used the word “may” when it observed while carving out the three exceptions that the “exceptions to this rule may be as follows”. To my mind, if any other interpretation is placed on the word “relief” in exception (iii), it may result in grant of an illegal decree of dissolution of marriage made available to a party on the ground of irretrievable breakdown of marriage which is an impermissible ground of divorce not so far heralded into the Hindu law of marriage.

Exception (iii) is consent based for relief to the respondent but not to the petitioner in forum conveniens; “although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties”. When the Supreme Court carved out this last exception it avoided introducing the word “grounds”. If it were employed, the meaning then would have admitted no further debate and full effect would have to be given to the declaration under article 141 of the Constitution of India and for this Court to act in aid. However, since an exception cannot be seen to obliterate the rule itself or to rewrite it, then what the Supreme Court, in my humble view, in fact meant was a consent based decree obtained on foreign soil on HMA grounds and not otherwise. Therefore, HMA law would have to be read into exception (iii) to align it with the rule and not create a new rule since then it would not qualify as an exception to a rule. Reading the exception in isolation, will, in my considered view, be in violation of the rule itself. Thus, in cases of contested and consented decrees both would suffer HMA standards, failing which, the foreign court will be overstepping Parliamentary mandates in India and the decrees so obtained cannot be recognized in India unless falling in exceptions (i) and (ii). This is more so, as I see, when exception (i) talks neither of contest nor consent. Otherwise, there would hardly be any visible distinction between exception (i) and exception (iii) because even in exception (i) the assumed jurisdiction of the foreign court was not in accordance with the provisions of the matrimonial law of the parties or the relief granted was not in accordance with the matrimonial law under which the parties are married. This would be the “just and

equitable” rule to follow for the protection of women who are the most vulnerable sections of society as observed in para 21 of *Y. Narasimha Rao* itself. Besides, consent to a foreign decree not questioned or litigated in court by parties makes no lis and remains good till it lasts. However, this is not a matter of law but of personal choice where the arms of law may not reach. But consent itself is a question of evidence if the mode and manner in which it was given is taken to a court of law for determination.’

Further, the High Court laid down seven guidelines for the Matrimonial Courts functioning under its jurisdiction for dealing with applications under Order VII, rule 11 of the CPC in the context of HMA, 1955 and s 13 of the CPC. These are as follows:⁷³

- (i) If the spouse aggrieved by the foreign matrimonial decree has not submitted to the jurisdiction of the foreign court or consented to the passing of the foreign Court judgment, it ought not to be recognised being unenforceable under section 13, CPC. This position of law ought to be applied to the facts of the individual case.
- (ii) There may be occasions that a spouse relying upon the judgment of a foreign matrimonial court, upon receipt of a summon or notice from a court of competent jurisdiction under the HMA, may not choose to file a written statement in response to a petition seeking a matrimonial cause under HMA in Punjab, Haryana or Chandigarh. Instead, the contesting spouse may prefer to move an application under Order VII, rule 11, CPC seeking to rely upon or invoke the provisions of section 13, CPC. Thus, it may be contended before the court of competent jurisdiction under the HMA that since the matrimonial action between the parties has already been decided and concluded by a Court in the foreign jurisdiction, the adjudication in the matter in issue between the same spouses based on the same matrimonial cause of action is barred by the principle of *res judicata* and spouses are estopped in law from agitating the same again.
- (iii) It is respectfully contended that wherever both or any spouse arrayed in a matrimonial cause in a matrimonial action under HMA contest, dispute, question or oppose any above such application under Order VII, rule 11, CPC involving interpretation of the principles laid down under section 13, CPC thereby necessitating requirement of detailed pleadings and evidence of spouses, no summary decision may seem possible to decide the matter in the preliminary stage.
- (iv) In the above situation, there may also be circumstances involving application of issues of domicile as also applicability of sections 1 and 2 of the HMA regarding extra territorial application of the provisions of HMA. Determination of these issues may also require parties to put their pleadings and testimony as well on the record of the Court of competent jurisdiction under the HMA.
- (v) The application of the provisions of the CPC finding mention under section 21, HMA, the Court of Competent jurisdiction under the HMA in Punjab, Haryana or Chandigarh may then be guided by the procedural law of pleadings contained in the Orders and Rules of the CPC and Punjab & Haryana High Court amendments, if any, for further proceedings in the matter. Accordingly, filing of a written statement, counter claim, rejoinder

⁷³ *Rupak Rath v Anita Chaudhary*, 2014 (2) RCR (Civil) 697 at para 24.

and/or other pleadings may be necessitated for having the factual matrix on record leading to the settlement of issues under Order XIV, CPC which can only be framed upon allegations made by parties to be read along with the contents of documents produced by spouses. Hence, this procedure may be necessary to be adopted to decide upon the warring claims of spouses relying on averments in support or against the judgment of the foreign matrimonial court between the parties.

- (vi) Based on the above procedural requirements, the Court of competent jurisdiction under the HMA may then examine the process, pleadings, grounds and other details in the passing of the judgment/decreed of the matrimonial court of foreign jurisdiction to test it on the anvil of section 13, CPC and based on the principles laid down by the Apex Court in *Y. Narasimha Rao v. Y. Venkata Lakshmi*, 1991 (3) SCC 451 and exception (iii) as understood in the present opinion. Hence, in the event of a contest, dispute, opposition to the applicability of the foreign matrimonial judgment in the Indian jurisdiction, a summary disposal may not be possible. To do complete justice to both the spouses and to ensure that prejudice has not been caused to either of them as also that issues of maintenance, settlement of matrimonial property, child custody etc. arising in India have been completely settled between spouses based on provisions of HMA, the Court of competent jurisdiction under the HMA may examine the matter on the lines suggested above.
- (vii) Thereafter, if the issue relating to the jurisdiction of Competent Court under the HMA as also any bar to the matrimonial cause created by any existing law appears to be established, the matrimonial court in Punjab, Haryana or Chandigarh may upon the facts and circumstances of the case take an appropriate decision under Order XIV, rule 2, CPC whether it needs to pronounce judgment on all issues or decide the issue of jurisdiction or maintainability as a preliminary issue. In such circumstances, the Competent Court under the HMA may after forming an opinion take an appropriate decision on the facts of the case as to whether the issue of jurisdiction or maintainability is to be decided as a preliminary issue or pronounce judgment together on all the issues. Accordingly, based on the individual facts and circumstances, the Court ought to take a decision whether to decide the preliminary issue of jurisdiction or maintainability or postpone the settlement of other issues after such preliminary issues has been determined.⁷

(c) **Recommendatory Supreme Court view**

*Smt Neeraja Saraph v Jayant V Saraph*⁷⁴ is another case of wife dumping by a foreign husband. The Apex Court rightly came down heavily on the erring husband by upholding an interim order for compensation payable to the helpless wife. The facts of this case are as follows. The appellant was a post-graduate daughter of a senior Air Force Officer. She was serving as a teacher and drawing a salary of Rs 3,000. She was married to respondent number 1, a doctor in computer sciences who was employed in the USA. The marriage took place at the behest of her father-in-law who approached through a common family friend. The marriage was performed on 6 August 1989 and the appellant was taken on a honeymoon to Goa for a few days. Respondent

⁷⁴ *Smt Neeraja Saraph v Jayant V Saraph*, JT 1994 (6) SC 488.

number 1 returned to the USA on 24 August 1989, wrote letters to the appellant on 15 September, 20 October and 14 November 1989 persuading her to give up her job and suggesting the various avenues for her career in the US. The appellant was lured, she tried to obtain a visa and ultimately resigned from her job in November 1989. But from December things started getting cold. Ultimately, in June 1990 the respondent's brother came to Delhi and handed over a petition for annulment of marriage presented in an American Court and the father-in-law had sent a sentimental letter owning moral responsibility only. The wife filed a suit in India for damages against the husband and the father-in-law for ruining her life in forma pauperis. The suit was decreed ex parte for Rs 22 lacs. The court held:⁷⁵

‘Various submissions have been advanced on behalf of the father-in-law to support the order of the High Court including his helplessness financially. Is it a case of any sympathy for the father-in-law at this stage? In our opinion not. True the decree is ex-parte. Yet it is a money decree. However, no opinion is expressed on this aspect as the appeal is pending in the High Court. But the order of the High Court is modified by directing that the execution of the decree shall remain stayed if the respondents deposit a sum of Rs. 3,00,000 [sic] including Rs. 1,00,000 [sic] directed by the High Court within a period of two months from today, with the Registrar of the High court ...

5. Why the facts of this case have been narrated in brief with little background is to impress upon readers the need and necessity for appropriate steps to be taken in this direction to safeguard the interest of women. Although it is a problem of private International Law and is not easy to be resolved, with change in social structure and rise of marriages with NRI, the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament under section (1) in pursuance of which the Government of the United Kingdom issued the Reciprocal Enforcement of Judgments (India) Order, 1958. Apart from it there are other enactments such as the Indian and Colonial Divorce Jurisdiction Act, 1940 which safeguard the interest so far as the United Kingdom is concerned. But the rule of domicile replacing the nationality rule in most of the countries, for assumption of jurisdiction and granting relief in matrimonial matters, has resulted in conflict of laws. This domicile rule is not necessary to be discussed. But feasibility of legislation safeguarding the interests of women may be examined by incorporating such provisions as the following—

- (1) no marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;
- (2) provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.
- (3) the decree granted by Indian courts may be made executable in foreign courts both on the principle of comity and by entering into reciprocal agreements like section 44A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court.’

⁷⁵ At paras 4 and 5, pp 490 and 491.

(d) Necessity for a codified law

It will be noticed that the proposed guidelines in the above Supreme Court and High Court rulings are meaningful and, if implemented, can mitigate the plight of wives dumped in India by foreign husbands. Although the Apex Court has clearly stated that there is need for suitable legislation on the subject, until now no comprehensive Indian law has been enacted to protect the rights of deserted and abandoned spouses in India. In essence, therefore, judicial verdicts of the Courts of Law are the only available law in India to come to the rescue of helpless Indian spouses who protest against the uncontested foreign divorce decrees invariably obtained in default by spouses from overseas jurisdictions. Some codified laws on the subject are undoubtedly now an absolute necessity in India to cope with the need for interpretation and enforcement of foreign matrimonial judgments of overseas courts. Until then, Art 142 does the rescue for complete justice.

IV SUPREME COURT OF INDIA'S RECENT INTERPRETATION OF THE RIGHT TO MARRY

In a first judgment of its kind on the right of a patient suffering from contagious venereal disease to marry, the Supreme Court of India ruled that, so long as the person is not cured of the disease or impotency, his right to marry cannot be enforced through a court of law. The judgment is reported as *Mr 'X' v Hospital 'Z'*.⁷⁶ The Supreme Court firmly held that, if the man's marriage has been cancelled due to his being an AIDS patient, his right to marry will remain a 'suspended right'. Furthermore, he is not entitled to claim any compensation from the hospital which has disclosed his medical condition to the would-be bride's family.

The judgment came in the wake of a doctor's petition seeking compensation from Apollo Hospital in Chennai. The hospital had detected that he was an HIV-positive patient. This fact was also disclosed to his would-be bride's family. The marriage was called off immediately. The doctor contended that the hospital had violated medical ethics by disclosing his medical condition to the bride's family. This led to his social ostracisation.

The issue in the above-mentioned case went a step further. A subsequent petition was filed in the Supreme Court of India, seeking clarification of the above-mentioned judgment to facilitate marriage of an HIV-positive person after 'full, free and informed consent is taken for the marriage'.⁷⁷

The same Supreme Court Bench comprising Justice BN Kirpal and Justice S Saghir Ahmad, which had handed down the earlier judgment, issued notices in

⁷⁶ *Mr 'X' v Hospital 'Z'*, 1998 (8) SCC 296.

⁷⁷ 'SC seeks opinion on AIDS patients' right to marry', *The Times of India*, New Delhi, 8 February 2000.

the subsequent petition to the Union of India and the Medical Council of India to ascertain their views. The second petition on this subject was filed by Sahara, a centre for residential care and rehabilitation of HIV-positive persons under the AIDS care project and is discussed below.

The original judgment in *X v Hospital Z* again came up for reinterpretation and reconsideration before a different bench of the Supreme Court of India. The subsequent rollover judgment is reported as *Mr 'X' v Hospital 'Z'*.⁷⁸ The author of the subsequent judgment, Justice Rajendra Babu, is clearly in disagreement with the findings given in the earlier judgment in 1998. The court explained the reasons for reopening of the case as follows:⁷⁹

'3. A special leave petition was filed before this court. This court made an order on 21 September, 1998 (1998 (8) SCC 296 dismissing the said petition. However, in the course of the order several findings have been given, particularly those relating to "suspend right to marry". In that proceeding, this court heard only the appellant and there was no issue of notice to any other person nor had this court occasion to hear any of the persons representing the HIV or AIDS infected persons or their rights, much less any of the non-government organisations which are doing work in the field were heard. In those circumstances, a writ petition was filed under article 32 of the Constitution before this court for setting aside the said judgment. However, in the proceedings dated 7 February, 2000 it was noted that prayer was deleted and the other prayer which indirectly concerned the correctness of the judgment already passed was also deleted. However, the petition was ordered to be treated as an application for clarification or directions in the case already decided by this court ...'

Accordingly, the court directed that the fresh writ petition filed under Art 32 of the Constitution of India be registered separately as an interlocutory application for clarification/directions in the earlier original judgment. Notices were also issued to the National Aids Control Organisation, Union of India, Indian Medical Association and the Medical Council of India. The Supreme Court clarified the law as follows:⁸⁰

'4. By an order dated 2 September, 2001, it has been further directed that the IAs should be listed before a three-Judge Bench.

5. In IA No. 2 of 1999 filed by the impleaded petitioner, the petitioner has raised the question whether a person suffering from HIV(+) contracting marriage with a willing partner after disclosing the factum of disease to that partner will be committing an offence within the meaning of sections 269 and 270, IPC. In substance, the petitioner wants the court to clarify that there is no bar for the marriage, if the healthy spouse consents to marry in spite of being made aware of the fact that the other spouse is suffering from the said disease.

6. The various organisations to which the notice was issued have also entered their appearance before this court and filed a plethora of material giving their respective

⁷⁸ *Mr 'X' v Hospital 'Z'*, 2003 (1) SCC 500.

⁷⁹ At para 3, p 502.

⁸⁰ *Mr 'X' v Hospital 'Z'*, 2003 (1) SCC 500 at paras 4–7, p 503.

stands. The practical difficulties in ensuring disclosure to the person proposed to be married or in monitoring such cases are pointed out. It is not necessary to examine these matters in any detail inasmuch as in our view this court has rested its decision on the facts of the case that it was open to the hospital or the doctor concerned to reveal such information to persons related to the girl whom he intended to marry and she had a right to know about the HIV-positive status of the appellant. If that was so, there was no need for this court to go further and declare in general as to what rights and obligations arise in such context as to right to privacy or confidentiality or whether such persons are entitled to be married or not or in the event such persons marry they would commit an offence under law or whether such right is suspended during the period of illness. Therefore, all those observations made by this court in the aforesaid matter were unnecessary, particularly when there was no consideration of the matter after notice to all the parties concerned.

7. In that view of the matter, we hold that the observations made by this court, except to the extent of holding as stated earlier that the appellant's right was not affected in any manner in revealing his HIV-positive status to the relatives of his fiancée, are uncalled for. We dispose of these applications with these observations.'

Analysing the above two judgments, it seems that the subsequent judgment in 2003 takes away what the earlier judgment in 1998 gave. In the 1998 decision, the Supreme Court, while laying down that the infringement of the suspended right to marry cannot be legally compensated by damages either in torts or common law, expounded the rights of persons suffering from a communicable disease like AIDS. The latter judgment by the Supreme Court in 2003, instead of further delving into the concepts, cut short the matter by stating that even the earlier observations of the court were unnecessary, particularly when there was no consideration of the matter. Thus, the rights of persons suffering from diseases like AIDS or who are HIV-positive, which could have been further gone into, were abruptly cut short. There is no specific legislation in India which takes care of rights of such persons. Therefore, in some appropriate case, the judiciary itself will be faced with the task of interpreting the rights of such persons by expounding the benefit of existing legislation. Whether the rights will be extended or curtailed remains to be seen. But certainly, the Supreme Court which lays down the law of the land under Art 141 of the Constitution, and which can under Art 142 of the Constitution pass such orders as are necessary for doing complete justice in any cause or matter pending before it, may have to address the above issue sooner or later given the gravity of the matter. Avoiding answering the questions may not serve the purpose. Thus, it may be argued that the earlier judgment in 1998 was better law. It would have been immensely helpful had the subsequent judgment in 2003 laid down some sort of criteria regarding obligations, duties and liabilities of HIV or AIDS-affected persons embarking upon matrimony, both in the event of wilful and non-wilful disclosure, which may have shed some more light on the subject.

V SETTLEMENT SANS DIVORCE-POST NUPTIAL AGREEMENTS

(a) Unique position

In an inimitable decision rendered on 15 July 2013, in *Pamela Sharda v Rama Sharda in Special Leave to Appeal (Civil)*,⁸¹ the Supreme Court, accepting a tripartite settlement deed executed between the wife, husband and his mother through mediation, permitted parties to part ways upon a one-time payment of Rs 45 lacs to the wife with the condition that both would not seek divorce on any ground. The couple, married for 30 years, agreed to withdraw all their pending litigation and the wife agreed not to cause any disturbance or invade the privacy of her husband and his 83-year-old mother living in their household property. The sum of Rs 45 lacs paid in full and final settlement to the wife was towards all her financial claims. Both parties, living separately since 2009, agreed that they would have nothing to do with each other's lives and would not undergo any divorce proceedings. The wife would also not claim restitution of conjugal rights or rights of residence in the household. However, in the event of remarriage of the husband, the agreement would stand terminated and the wife would be entitled to revive her claim maintenance or alimony for the present and future, since the sum of Rs 45 lacs would not be considered as an amount towards dissolution of marriage and payment of permanent alimony. The Apex Court accepting the settlement deed and the undertakings of the parties, disposed of the matter and permitted parties to file the same before all Courts where litigation was pending with liberty to invoke the provisions of the Contempt of Courts Act, 1971 upon breach, if any.

(b) Position of the law

Under Hindu family laws where marriage is considered a sacrament and not a contract, pre-nuptial agreements do not find any recognition under existing matrimonial legislation or under other civil codified laws. Hence, pre-marital settlements between Hindus are alien to the present legal system. Regardless, if there be any pre-nuptial settlement, it would be tested like any other contract for its validity. Essentially, it should not be opposed to public policy, must not violate principles of natural justice, must not be fraudulent, and must recognise rights of both the parties as also should be executed freely, voluntarily, without coercion and upon full disclosure of all relevant facts. As, traditionally, break-ups are not discussed before marriages, there seems to be no reported decision testing the validity of a pre-nuptial termination agreement.

(c) Changing social milieu

In a fast-evolving society of urban set-ups and escalating cross-border matrimonial unions, divorces settled through mutual consent petitions to avoid

⁸¹ *Pamela Sharda v Rama Sharda* No 11714/2012.

ugly, protracted and harmful litigation are being increasingly resorted to through the process of alternative dispute resolution and mediation centres now available in all Courts in India. Furthermore, invoking of punitive criminal proceedings against immediate family members and parents of spouses upon death of a matrimonial relationship often results in the entire family being implicated on trumped up charges as retribution to settle scores. Easy outlets to do so under the Indian Penal Code and the Domestic Violence Act often result in harassment to parties, even though they may have no role attributed to them. Likewise, adequate protection and financial support to an abandoned spouse needs to be secured in advance to avoid flights of fancy, leaving a hapless partner with nothing to survive on, if a marriage goes sour. Securing protection for children from inter-parental child removal is another dimension of breaking marriages when abduction of children is resorted to by parents to settle egos. Such facets of life of new generations makes the mind ponder to evolve solutions which as of now do not exist in the statute book but are now necessitated with the advent of time.

(d) Existing law

As of now, mutual consent is the most resorted to method for divorce if parties are principally in agreement on the terms and conditions of termination of marriage which in itself reflects acceptable breakdown of marriage. However, Parliament is looking at defining and bringing in irretrievable breakdown of marriage as an additional ground for divorce, though the process of legislation may be time consuming. Although irretrievable breakdown of marriage is not recognised as a ground of divorce under existing matrimonial laws, the Apex Court, in exercise of its vast powers under Art 142 of the Constitution of India, may pass such decree or make such order as it is necessary for doing complete justice in any cause or matter pending before it. Hence, in a prolonged messy litigation, the Apex Court may bury the hatchet in the facts and circumstances of a case under its inherent jurisdiction. The Apex Court of India in two decisions, ie *BS Joshi v State of Haryana* and *GV Rao v LHV Prasad*,⁸² has very eloquently emphasised the need to encourage court settlements in matrimonial disputes. The Court concluded ‘that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their “young” days in chasing their “cases” in different courts’.⁸³ Therefore, there is far greater emphasis in the Indian context to settle post-marriage matrimonial disputes in the event of divorce oriented litigation, rather than focusing on pre-nuptial agreements. Law thus looks at the cure and not the remedy to prevent the problems.

⁸² *BS Joshi v State of Haryana*, (2003) 4 SCC 675 and *GV Rao v LHV Prasad*, (2000) 3 SCC 693.

⁸³ *GV Rao v LHV Prasad*, (2000) 3 SCC 693.

(e) New perspective

The Apex Court Judgment of 15 July 2013 in *Pamela Sharda v Rama Sharda* (above) opens a new window. It is in this breath that the need for pre-nuptial agreements needs a fresh thought with a new outlook. It comes at a time when surrogacy agreements are entered upon freely and have become acceptable in society. Thus, if the concept of a pre-marital settlement finds judicial acceptance and ultimate legislative sanction, matrimonial terms can be settled in advance optionally and alternatively to those who wish to do so. By no means would this be mandatory and offend those who do not wish to think of marital breakups before marriage by considering it as inauspicious or uneventful. Without disturbing sentiments, emotions and feelings of traditional mindsets, drawing up of pre-marriage agreements can be thought of where double income independent spouses are comfortable in such mutual understandings. Protection of spouses and avoidance of inter-parental child removal are immediate benefits of it. Beneficiaries would include a large segment of the NRI population who either marry foreign spouses or relocate to overseas jurisdictions and need written understandings for mutual protection and easy implementation by courts in alien jurisdictions. Clash of parallel matrimonial disputes in Indian and foreign courts can easily be avoided by it.

(f) Conclusions

Equally, the law does not forbid spouses from agreeing as to how they should live and conduct themselves as husband and wife, when they would consummate their marriage and how they would conduct themselves towards each other. It is equally important that due respect should be given for adult autonomy, subject to proper safeguards, which could be tested by judicial discretion, when the need arises. The fact remains that any matrimonial agreement made between husband and wife should not be illegal, immoral or opposed to public policy. The overhanging safeguard of the pre-marital settlement being adopted as a fair, free and just settlement will always be omnipotent. By no means should it be used as an instrument of oppression to take away rights of spouses which are guaranteed under existing laws, meant to secure relief. The need for evolving a jurisprudence to develop a positive thought process for creating such friendly methods would require an educative process to familiarise the advantages of such a concept while also clearly identifying its negative traits. The chaff has to be separated from the grain to enjoy the dough which has to be kneaded and blended over a period of time to be consumed to become acceptable as a welcome change. The traditional and sacramental notion of marriage must be gently flavoured with a commercially sounding phrase of pre-nuptial agreements, which is not to be viewed as an announcement of a break-up of a marriage, even before it is solemnised. The path has to be trodden carefully and slowly while administering the change. Changing times require that amicable settlements be arrived at by dispute resolution which can be aided and assisted if the parameters are penned down in advance. Exercising its jurisdiction, the Supreme Court by using the long arm

of Art 142 can do complete justice in any matrimonial cause or litigation before it, as may be necessary on the facts and in the interests of justice. Law is an instrument of justice. At all times it may not be possible to do complete justice according to law. It is then that Art 142 can be invoked by the final Court to do total, wholesome and absolute justice which will serve the practical ends, more so in matrimonial matters where human relationships, families and children are involved. Intricacies and technicalities of law may require resolution by relaxing the existing statutory mandates. Relief culled out under Art 142 may at times be beyond the four corners of law. This is the beauty of the power, prerogative and authority vested in the Apex Court in whom wisdom, expertise and finality is attributed by the Constitution. Justice weaved with the yarn of Art 142 clothes the resolution of matrimonial disputes. The framers of the Constitution did well in vesting this exemplary power serving the ends of justice. A vibrant Indian Apex judiciary does extremely well in utilising this extra ordinary jurisdiction when called for. It has no substitute, cannot be eroded or limited by statute and is an ultimate jurisdiction.

IRELAND

TEETERING ON THE BRINK OF MEANINGFUL CHANGE?

*Maebh Harding**

Résumé

2015 doit être considéré comme un tournant significatif dans le développement du droit de la famille en Irlande. Le *Children Act and Family Relationship Act 2015* est entré en vigueur suite à la signature du Président le 6 avril 2015. Cette loi vient réformer la nature des droits et responsabilités parentaux au niveau législatif et, en définitive, met en exergue le besoin d'une réglementation en matière de procréation assistée. Un référendum constitutionnel pour autoriser le mariage entre personnes de même sexe a eu lieu le 22 mai 2015. Toutefois, l'adhésion traditionnelle du système irlandais à la structure conservatrice de la famille mariée, issue des années 1930, doit être nuancé. Il n'existe pas de protection constitutionnelle efficace des droits de l'enfant, ce qui signifie que tous les tests législatifs relatifs à l'intérêt supérieur de l'enfant sont faussés par les intérêts des parents mariés. Les enfants issus de parents mariés et confiés aux soins de l'Etat ne peuvent pas être adoptés. La « maternité de substitution » (GPA) n'est toujours pas réglementée. Tandis que le système chancelle sur la mise en place d'un changement significatif, la protection constitutionnelle de la famille mariée constitue un obstacle important à la réforme.

I INTRODUCTION

2015 has the potential to be remembered as a watershed year in the development of family law in Ireland. The Children and Family Relationships Act 2015 was signed into force by the President on 6 April 2015. This Act is a significant step forward in the modernisation of Irish family law. It reforms the nature of parental rights and responsibilities at a legislative level and finally addresses the need for some regulation of assisted reproduction. A constitutional referendum to allow for the provision of same-sex marriage took place on 22 May 2015. This is an exciting time as the Irish legal system finally grapples with the fundamental questions of what parenthood, marriage and the family should mean in the 21st century.

However, the claim that the Irish system has finally addressed its traditional 1930s adherence to the conservative marital family structure must be qualified.

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In 2015, Ireland still has no meaningful constitutional protection of children's rights which means that all legislative best interest tests are skewed toward the interests of married parents. Marital children in state care remain unadoptable. Surrogacy remains unregulated as the traditional definition of the constitutionally protected status of 'mother' continues to be debated. While the system is teetering on the brink of meaningful change, the constitutional protection of the marital family remains an effective roadblock to timely meaningful reform in spite of political will and legislative action.

This piece will examine the new Children and Family Relationship Act 2015 ('the 2015 Act') and the proposed amendment to the Irish Constitution to allow same-sex marriage. It is argued that the recent legal challenges to the as yet unratified children's rights constitutional amendment which was approved by the people in 2012¹ compromised the ability of this legislation to implement a child-centred modernisation of Irish family law. While the 2015 Act contains several pragmatic attempts to work around the problems caused by Art 42.5 it falls short of full commitment to the best interests of children and diversity of family forms. The success of recent legal challenges in delaying the implementation of the children's rights amendment and the effect of this delay on further modernisation of Irish Law poses questions about the appropriate regulatory level on which to approach controversial family law reforms. Should the Irish Government opt for constitutional referendums to ensure that such reforms have the backing of the people or would a legislative approach running the risk of constitutional challenge in the Irish courts be a more pragmatic option?

II THE LASTING CONSTITUTIONAL PRIMACY OF THE MARITAL FAMILY

Irish law retains an express constitutional preference for the marital family. Article 41² of the Irish Constitution protects the institution of marriage and establishes that the marital family is the fundamental unit group of Irish society possessing inalienable and imprescriptible rights superior to all positive law. Article 42 guarantees the rights and duties of marital parents to provide for the religious and moral, intellectual, physical and social education of their children.³ It also limits the circumstances in which the State can intervene into the marital family unit to safeguard children.⁴

¹ Thirty-first Amendment of the Constitution (Children) Bill 2012.

² Article 41.1.1: 'The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.' Article 41.1.2: 'The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.' Article 41.3.3.1: 'The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.'

³ Article 42.1: 'The State acknowledges that the primary and natural educator of the child is the

Articles 41 and 42 do not give any tangible preferential benefit to adults in a marital relationship. Legislation that discriminates against the marital family has been the subject of successful constitutional challenge in the Irish courts and struck down as violating the constitutional protection of the marital family⁵ but the favourable treatment of marital families as compared to other family forms is not mandated by the Constitution. The courts have established that the institutional protection of marriage is subject to the common good,⁶ and other constitutional rights can affect the constitutional protection of marriage such as those under Art 40.3.1.⁷ So, for example, preferential taxation of single parent families was justified and the constitutionality of such legislation upheld.⁸

Rights can be accorded to other family forms by statute alone without fear of constitutional challenge unless such legislation can be perceived as undermining or attacking the marital family. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 created the institution of civil partnership and provides statutory protection for cohabitants. However, a family unit that is not founded upon a marital union cannot be recognised as the fundamental unit of Irish society possessing constitutional rights and enjoying a protected status.⁹

Article 42 gives extensive autonomy to married parents to make decisions for their children. The state cannot interfere with the integrity of the marital family unless parents fail in their duties towards the child.¹⁰ The autonomy of married parents is also given heavy weight under the statutory welfare test in both public and private child law cases through a constitutional presumption that it is generally in the best interests of children to remain in the marital family.¹¹

Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.’

⁴ Article 42.5: ‘In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.’

⁵ *Murphy v Attorney General* [1982] IR 241; *Muckley v Ireland* [1985] IR 472; *Hyland v Minister for Social Welfare* [1989] IR 624.

⁶ *TF v Ireland* [1995] 1 IR 321, [1995] 2 ILRM 321 (IESC).

⁷ *O’Shea v Ireland* [2007] 2 IR 313 (IEHC).

⁸ *MhicMathúna v Ireland* [1989] IR 504 (IEHC), 511–512.

⁹ *State (Nicholaou) v An Bord Uchtála* [1966] IR 567, 622. See further M Harding ‘A Softening of the Marital Paradigm?’ in B Atkin (ed) *International Survey of Family Law 2012 Edition* (Jordans Publishing, Bristol, 2012) 151–168.

¹⁰ Article 42.5. In practice this has been proved very difficult and adversely affected the welfare of marital children. See M Harding, ‘Constitutional Recognition of Children’s rights and paramountcy of welfare’ in B Atkin (ed) *International Survey of Family Law 2013 Edition* (Jordan Publishing, Bristol, 2013) 175–194.

¹¹ *Z v Y, X* Unreported HC judgment of Laffoy J, 23 May 2008; *N v HSE and others* [2006] 4 IR 374; IESC 60, [104]. *Western Health Board and An Bord Uchtála*, unreported SC judgment of Hamilton CJ, 10 November 1995; *Southern Health Board v An Bord Uchtála* [2000] 1 IR 165; *Northern Area Health Board v An Bord Uchtála* [2002] 4 IR 252.

In 2012, the Irish people approved an amendment to the Irish constitution to change Art 42 and expressly protect the rights of children.¹² The amendment, when ratified, will allow marital children to be voluntarily placed for adoption¹³ and also allow the state to intervene into the family, whether marital or non-marital, where the safety or welfare of children is prejudicially affected.¹⁴ This new test will allow greater emphasis on the effects of parental neglect rather than abandonment of parental rights and duties and allow for a more robust approach to child protection.¹⁵

The amendment will insert three general statements into the Irish constitution designed to render Irish law more child-centred in approach. The rights of all children will be expressly recognised at constitutional level and the state obliged to recognise and protect them as far as practicable.¹⁶ The rule that children's best interests are paramount will be given constitutional imprimatur as the appropriate legislative test in all child law disputes.¹⁷ Legislative provisions to ascertain the views of children and give them due weight in light of the age and maturity of the child will also be constitutionally mandated.¹⁸

Three years later, the amendment has not yet been ratified due to a prolonged challenge regarding the conduct of the 2012 referendum. In 2012, the Supreme Court held that the Irish Government had not impartially explained the referendum to the public. Instead the Irish Minister for Children had spent public funds on materials that promoted a yes vote and misrepresented the effect of the referendum.¹⁹ The referendum went ahead 2 days after this ruling. The constitutional legitimacy of the approved amendment was then challenged

¹² Thirty-First Amendment of the Constitution (Children) Bill 2012.

¹³ Article 42A.3.

¹⁴ Article 42A.2.1: 'In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child'. 2: 'Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.'

¹⁵ Geoffrey Shannon, 'Editorial' (2012) 15 IJFL 85–86.

¹⁶ Article 42A.1: 'The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.'

¹⁷ Article 42A.4.1: 'Provision shall be made by law that in the resolution of all proceedings— (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.'

¹⁸ Article 42A.4.2: 'Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.'

¹⁹ *Mark McCrystal v The Minister for Children and Youth Affairs, The Government of Ireland, Ireland and the Attorney General* [2012] IESC 53, [67]–[69]. D O'Connell, 'Ireland: children's rights now protected in Constitution, constitutional amendment subject to legal challenge' [2013] Public Law 423–424.

in the High Court in 2013.²⁰ McDermott J held that the petitioner, Joanna Jordan, had not shown that the unconstitutional actions of the Government had materially affected the outcome of the referendum which was passed by 58 per cent of the voting electorate. The case was appealed to the Supreme Court who gave judgment on 24 April 2015 unanimously refusing to order a re-running of the referendum.²¹ At the time of writing, the children's rights amendment had not yet been ratified but this should now take place shortly. The Children and Family Relationships Act 2015 was drafted in a climate where the status of children's rights remained constitutionally uncertain. The original Art 42.5 remained the basis for taking children into care and a positive failure on the part of the parents needed to be established.²²

III THE CHILDREN AND FAMILY RELATIONSHIPS ACT 2015

The Children and Family Relationships Act²³ makes a number of long-awaited changes to the regulation of assisted reproduction, the law relating to guardianship of children and custody and access and also a number of changes to adoption legislation. However, the legislation falls short of dealing with the issue of surrogacy. The commitment to the paramountcy of the best interests of the child in the legislation must be interpreted so as to be compatible with the soon to be amended, terms of Art 42.5 of the Constitution.

(a) From welfare test to best interests test

The welfare test which requires the court to have regard to the welfare of the child as the first and paramount consideration has long been part of Irish law.²⁴ The 2015 Act amends the wording of this test requiring the court to regard the 'best interests of the child as the paramount consideration'.²⁵

Section 63 of the 2015 Act inserts a number of new factors and principles which must be considered, if relevant, when the court is deciding what course of action is in the best interests of the child.²⁶ A number of these factors are expressly child-centred. The court must consider: the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing,²⁷ the

²⁰ *In the matter of the Referendum on the proposal for the Amendment of the Constitution contained in the Thirty First Amendment of the Constitution (Children) Bill 2012* [2013] IEHC 458.

²¹ *Re Referendum Act and Jordan and Youth Affairs & Ors* [2015] IESC 33.

²² *FH, GH and IH v Judge Kevin Staunton and the Health Service Executive* [2013] IEHC 533.

²³ Act No 9 of 2015.

²⁴ This test was found in the unamended s 3 of the Guardianship of Infants Act 1964.

²⁵ Section 45 of the 2015 Act.

²⁶ Section 31(1) of the new Part V inserted into the Guardianship of Infants Act 1964 by the 2015 Act.

²⁷ Section 31(2)(a) Guardianship of Infants Act 1964 as amended.

views of the child,²⁸ the physical, psychological and emotional needs of the child, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;²⁹ the history of the child's upbringing and care,³⁰ the child's religious, spiritual, cultural and linguistic upbringing and needs,³¹ the child's social, intellectual and educational upbringing and needs,³² the child's age and any special characteristics,³³ any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and, the protection of the child's safety and psychological well-being.³⁴

The checklist of factors also includes a number of factors promoting adult agreement including the desirability of the parents or guardians of the child agreeing to such proposals and cooperating with each other in relation to them;³⁵ the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent,³⁶ and the capacity of each adult applicant to care for the child, communicate and cooperate on issues relating to the child and to exercise the relevant powers, responsibilities and entitlements³⁷ to which the application relates.

A list of the different factors to be considered is to be welcomed as promoting a pragmatic, child-focused approach to ascertaining best interests in each case. The overarching change in terminology from welfare to best interests also promotes an image of children as active rights bearers. However, without the ratification of the children's rights referendum the best interests test was likely to suffer the same skewing towards adult interests as the former welfare test. The courts are still obligated to uphold the constitutionally protected rights of the parent. The incursion of the Art 42.5 test into all decisions relating to parental autonomy rendered the best interests of a child a secondary concern in both private and public law cases relating to marital children. In order to interpret the best interests test in accordance with the old wording of Art 42.5 the court was required to presume that it was in the best interests of a marital child to be raised in the marital family. It is hoped that the new express constitutional protection for children's rights will allow a purely child-focused best interests test to be used.

²⁸ Ibid (b).

²⁹ Ibid (c).

³⁰ Ibid (d).

³¹ Ibid (e).

³² Ibid (f).

³³ Ibid (g).

³⁴ Ibid (h).

³⁵ Ibid (i).

³⁶ Ibid (j).

³⁷ Ibid (k).

(b) Assisted reproduction

Ireland has lagged behind the rest of Western Europe in its failure to legislate for the advent of assisted reproductive services, regularly carried out in Ireland. Although calls for regulation have been part of parliamentary debates since the 1980s³⁸ and a Commission on Assisted Human Reproduction was established in the early 1990s and reported in 2005,³⁹ Parts 2 and 3 of the Children and Family Relationships Act 2015 are the first legislative measures to attribute legal parenthood following assisted reproduction.⁴⁰ The provisions apply to donor-assisted human reproductive procedures carried out in the Irish state with the objective of implantation of an embryo in the womb of a woman.⁴¹ In all other cases the legal parents of children are determined by common law presumptions, as expressed in the Status of Children Act 1987,⁴² or established by genetic testing where challenged.⁴³

The 2015 Act provides that the legal parents of any child born as result of donor-assisted reproductive services are the mother, defined as the woman who gives birth to the child,⁴⁴ and the mother's husband, civil partner or cohabitant where the husband, civil partner or cohabitant has given the requisite consent.⁴⁵ The provisions allow legal parenthood to be based entirely on adult intent for the first time in Irish law. There is no need for a genetic link between the child and either of the legal parents. Both the gestational mother and her partner are deemed parents because of their intent to become parents.

The 2015 Act lays down the rigorous consent requirements for intending parents. Such individuals must be over 21 and give informed consent in writing witnessed by a person authorised by the donor-assisted reproductive facility in which the treatment takes place.⁴⁶ Where inadequate consent is given by a person who could otherwise be considered as the child's second parent, the mother alone is the parent of the child, not the sperm or egg donor.⁴⁷

³⁸ Collins, *Dáil Eireann Debate*, 14 October 1987, vol 374, cols 248–52.

³⁹ *Report of the Commission on Assisted Human Reproduction* (2005) available online at www.lenus.ie/hse/bitstream/10147/46684/1/1740.pdf.

⁴⁰ See M Harding 'Ireland' in K Trimmings and P Beaumont *International Surrogacy Arrangements* (Hart, Oxford, 2013) 219–230.

⁴¹ Section 4 of the 2015 Act.

⁴² Sections 35, 38 and 46 of the Status of Children Act 1987.

⁴³ *JPD v MG* [1991] 1 IR 47, 52–53; *FP v SP and the Attorney General*, unreported judgment Smith J, HC 31 July 1999; *Z v X, Y and an t-Ard Chláraitheoir*, unreported judgment Laffoy J, IEHC, 23 May 2008.

⁴⁴ Section 4 of the 2015 Act.

⁴⁵ *Ibid* s 5(1).

⁴⁶ *Ibid* ss 9–13.

⁴⁷ *Ibid* s 5(2) and (5)–(6).

The 2015 Act also requires proper consent for gamete donation. Donors must be over 18, fully informed that they will not be the parent of any child born and give consent in writing witnessed by a person authorised by the donor-assisted reproduction facility.⁴⁸

Part 3 of the 2015 Act imposes a number of requirements on providers of donor-assisted reproductive services to collect and maintain information about gamete donors⁴⁹ and to ensure that appropriate consents have been given. Section 33 provides for a National Donor-Conceived Person Register. Non-identifying data may be accessed by the parent of the child or the child themselves when they reach the age of 18.⁵⁰ The identification of the donor may be attained by the child unless the relevant donor can give sufficient reasons why the information should not be released.⁵¹ The identity of the child may be released to a donor only with the consent of a child who has reached 18.⁵² The information provisions of the Act prioritise the child's right to know their origins over the rights of the gamete donor to learn the identity of their progeny but the Act falls short of requiring donor-conceived children to be informed that they are donor-conceived.

The provisions of the 2015 Act are limited to cases where artificial reproductive services take place in a clinic setting and an unknown donor is used. They do not apply to known donor situations where conception takes place outside a donor assisted reproductive services facility and the consents required by Part 2 of the 2015 Act are not in place. In such cases of informal known donor insemination, the genetic father will be recognised as the child's legal father.⁵³

Section 20 of the 2015 Act deals with reproductive services carried out outside Ireland. Section 20 expressly limits its application to clinical situations where the person who performed the procedure was authorised to do so under the law of the place where the procedure was performed. This section allows the woman giving birth to the child and another 'intending parent' to be considered as parents of the child, but only where the donor was unknown to either person and was not an intending parent of the child. In such a situation, the parents may apply to the District Court for a declaration of parentage upon return to Ireland. This provision allows a woman who has given birth after assisted reproductive services carried out abroad to have her partner who may have no genetic link to the child recognised as the child's second legal parent.

Surrogacy, whether carried out in Ireland or overseas, falls outside the 2015 Act and there is no possibility for a non-gestational parent to be recognised as the child's 'mother'. The issue of maternity following surrogacy was considered by

⁴⁸ Ibid ss 6–8.

⁴⁹ Ibid s 24.

⁵⁰ Ibid s 34.

⁵¹ Ibid s 35.

⁵² Ibid s 36.

⁵³ *McD v L* [2009] IESC 81.

the Irish Supreme Court in 2014. In *MR and DR*⁵⁴ a surrogate mother gave birth to twins following treatment in an Irish fertility clinic. The genetic parents of the twins were an Irish married couple. The wife could not become pregnant and so her sister agreed to act as a surrogate mother. After the twins were born, the genetic parents sought to have their names recorded on the child's birth certificate. The Chief Registrar for Births Marriage and Deaths refused on the basis that the Irish registration system recorded the gestational mother as a child's legal parent under Irish law. Although many Irish cases refer to the rights of the 'natural mother', there was no Irish case establishing whether the 'natural mother' is the gestational mother or the genetic mother and the matter remained unresolved.⁵⁵

In *MR and DR*, the Chief Justice, Susan Denham,⁵⁶ focused her judgment on the narrow issue of birth registration under the Civil Registration Act 2004. She held that no legal rule that the gestational mother was the legal parent existed in Irish law. All Irish legislation, including the Civil Registration Act, was based on the reality before the development of surrogacy that the gestational mother was always the child's genetic mother. No piece of Irish legislation had addressed the reality of surrogacy and it was impossible for the Supreme Court to rule on this issue in the absence of appropriate legislation. The view that it was not the proper role of the Irish Supreme Court to determine legal parenthood in the absence of legislation was echoed in a separate judgment by Hardiman J,⁵⁷ while MacMenamin J urged the Irish legislature to address the issue.⁵⁸

The dissenting judge, Clarke J, held that the courts had an important if limited role in the evolution of Irish law. He held that the legal definition of 'mother' applied equally to gestational and genetic mothers and that registration of the birth of the twins should be registered in such a way that the recognition of both women was recognised.⁵⁹

The Irish Government had initially planned to legislate for surrogacy under the Children and Family Relationships Bill 2015. The initial general scheme of the Bill published in February 2014 proposed that an application could be made to court for a declaration that the surrogate mother of a child was not the legal parent and legal parenthood could instead be assigned by the court to the

⁵⁴ *MR and DR v An t-Ard-Chláraitheoir & ors* [2014] IESC 60.

⁵⁵ In *G v An Bord Uchtala* [1980] 1 IR 32-101, 97-98, Kenny J notes the ambiguous nature of the term 'natural mother'. Some support in favour of the gestational mother may be found in s 19 of the Civil Registration Act 2004, which makes a person who witnessed a birth a qualified informant who can register the birth. In contrast, ss 35 and 38 of the Status of Children Act 1987 supported the idea that the genetic mother could apply for a declaration of parenthood and that genetic evidence is relevant when the court makes a declaration of maternity.

⁵⁶ *MR and DR v An t-Ard-Chláraitheoir & ors* [2014] IESC 60, [27]-[38].

⁵⁷ *Ibid* [8]-[21].

⁵⁸ *Ibid* [69].

⁵⁹ *Ibid* [10.1]-[10.5].

genetic parents of the child.⁶⁰ However, in September 2014 the Irish Government abandoned its plans to legislate for parenthood after surrogacy pending the determination of the Supreme Court ruling in *MR*. The Supreme Court has passed the buck straight back to the legislature but no action was taken in the 2015 Act.

The ongoing failure of Irish law to legislate for the consequences of surrogacy creates particular problems when Irish parents travel overseas to make use of surrogacy services in countries like Ukraine or the USA. As Irish law currently stands, the surrogate mother is recognised in Irish law as legal mother of the child. While changes to the law of guardianship in the 2015 Act examined below mean that it is now easier for two intentional parents, living in Ireland, to care for the child without the status of legal parent or any input from the surrogate mother, difficulties may be encountered in getting the child back to Ireland. Children born outside of Ireland have no right to Irish nationality unless their genetic father or legal mother is an Irish citizen.⁶¹ Where the child's link to Irish citizenship lies only through their genetic mother this can cause difficulties in returning the child to Ireland or indeed any other country which requires an EU passport, and risks leaving children parentless and stateless.⁶²

The lack of action of the Irish Supreme Court in creating a modern definition of motherhood for an era of assisted reproduction is regrettable particularly with the associated failure to provide for such cases in the 2015 Act. The limited approach to the regulation of assisted reproduction found in the 2015 Act is incomplete, failing to deal with surrogacy or, for example, issues relating to posthumous reproduction.⁶³ The Irish Minister for Health, Leo Varadkar has been authorised to prepare more thorough legislation on assisted reproduction including surrogacy. The Department of Health is now drafting a general scheme of a Bill which will go out for public consultation. However, it is unlikely that such legislation will be in place before the planned General Election in 2016 so its timely enactment is rather uncertain.⁶⁴

⁶⁰ The general scheme of the bill is available at www.justice.ie/en/JELR/General%20Scheme%20of%20a%20Children%20and%20Family%20Relationships%20Bill.pdf/Files/General%20Scheme%20of%20a%20Children%20and%20Family%20Relationships%20Bill.pdf.

⁶¹ Department of Justice, 'Citizenship, Parentage, Guardianship and Travel Document issues in Relation to Children born as a result of Surrogacy Arrangements entered into outside the State' (21 February 2012) available at www.justice.ie/en/JELR/Pages/PR12000035.

⁶² In 2011 the Irish Department of Foreign Affairs refused to issue passports for babies born in the Ukraine through surrogacy arrangements with Irish intentional parents. Gilmore, *Dáil Éireann Debate*, 13 July 2011, vol 738, col 491 and Gilmore, *Dáil Éireann Debates*, 21 July 2011, vol 739, col 53.

⁶³ Laura Croke, 'Protection of Children Born Through Assisted Human Reproduction Under the Children and Family Relationships Bill' (2015) 18 *IJFL* 14–20.

⁶⁴ Department of Health 'Press Release: Govt to legislate for Assisted Human Reproduction and Associated Research' (25 February 2015) available at <http://health.gov.ie/blog/press-release/govt-to-legislate-for-assisted-human-reproduction-associated-research>.

(c) Guardianship, custody and access

Guardianship entitles parents to custody and also includes broader decision-making powers as part of the right to determine how a child should be brought up. Prior to the 2015 Act, the class of individuals who could apply for guardianship was very limited. Both marital parents and unmarried mothers were granted automatic guardianship.⁶⁵ A child's father who was not married to the mother could only become a child's guardian where both parents had made a declaration agreeing to the appointment of the father as guardian of the child⁶⁶ or the father had made a successful application to court to be appointed as the child's guardian.⁶⁷ Non-parents could generally only be appointed as testamentary guardians by the child's parents or by the court where the child had no surviving guardian or the testamentary guardian appointed was unable to fulfil his or her duties.⁶⁸ The difficulties in appointing a non-parent as a guardian under this regime are highlighted in *MR v SB*⁶⁹ where a mother had left her children in Ireland and moved to the UK. The mother's ex-partner had cared full time for the children for 2 years. Decisions relating to schooling, medical treatment and passport applications could not be authorised under the Guardianship of Infants Act 1964 and the ex-partner applied to court for authorisation under inherent jurisdiction. The court found that the mother had abandoned her children to the custody of the ex-partner. Under s 16 of the Guardianship of Infants 1964 the court was not required to return the children to a parent in such circumstance unless the parent has satisfied the court that he or she is a fit person to have custody of the infant. The court appointed the ex-partner as the children's guardian on the basis that he was sole person with custody in the jurisdiction and noted that the exceptional circumstances of the case merited such an order.

Under the statutory scheme of the Guardianship of Infants Act 1964, the status of guardian was essential in order to have a long-term role in the child's day-to-day life. Only guardians and unmarried fathers could apply to court for custody of a child.⁷⁰ Relatives of the child and individuals who acted *in loco parentis* to the child could only apply for orders for access regardless of the extent of their role in the child's life.⁷¹ However, in exceptional circumstances, such as in *MR v SB* the court could refuse to enforce the custody rights of a parent against the non-parent granting the non-parent *de facto* custody rights.⁷²

The combined effect of the rules of the Guardianship of Infants Act meant that only legal parents could become guardians and only guardians could apply for

⁶⁵ Section 6 of the Guardianship of Infants Act 1964.

⁶⁶ Section 2(4) of the Guardianship of Infants Act 1964 as inserted by the Children Act 1997.

⁶⁷ Section 6A of the Guardianship of Infants Act 1964 as inserted by the Children Act 1997.

⁶⁸ Section 8 of the Guardianship of Infants Act 1964.

⁶⁹ *MR v SB* [2013] IEHC 647.

⁷⁰ Section 11 of the Guardianship of Infants Act 1964.

⁷¹ Section 11B of the Guardianship of Infants Act 1964 as inserted by the Children Act 1997. See, eg, *FN and EB v CO HO and EK* [2004] 4 IR 311.

⁷² *MR v SB* [2013] IEHC 647 [19].

custody except in exceptional circumstances. These rules were designed for a traditional two-parent family and made life very difficult for long-term carers of children such as step-parents, civil partners, kinship carers or former cohabitants who were not legal parents and so not entitled to apply for legal guardianship. Another problem with this outdated structure affected Irish couples who engaged in overseas surrogacy agreements. As the automatic guardianship of legal mothers could not be removed without an adoption order, the intentional parents came back to the country to find that their surrogate was considered in Irish law to be the child's legal mother. As she was an automatic guardian, her permission was required for passport applications and other major decisions throughout the child's life such as consent to medical treatment.

In 2010, the Law Reform Commission Report on Legal Aspects of Family Relationships⁷³ made a number of recommendations to extend guardianship rights to put the non-marital father on the same footing as the mother's husband⁷⁴ and to reflect the reality that in some circumstances a child could have more than two adults fulfilling parental roles.⁷⁵ The 2015 Act follows many of these recommendations and makes three important changes to guardianship. The Act extends the class of people entitled to automatic guardianship, allows non-parents to apply for guardianship and allows non-guardians to apply for custody in certain circumstances. These changes will no doubt make life easier for non-parent carers of children and give some legal protection to more diverse family formations without having to rely on inherent jurisdiction.

The 2015 Act extends automatic guardianship to fathers who are not married to the child's mother where the father and mother of the child have been cohabitants for 12 consecutive months which includes a period of 3 months after the birth of the child during which the family have lived under the same roof.⁷⁶ This provision, together with the recently enacted Civil Registration (Amendment) Act 2014, which requires the father's identity to be registered on a birth certificate unless compelling reasons for withholding the information exist,⁷⁷ gives stronger rights to fathers who are not married to the mothers of their children.

The 2015 Act inserts a new s 6B into the Guardianship of Infants Act 1964 which ensures parity of treatment for non-genetic parents recognised in law as legal parents under s 5 of the 2015 Act.⁷⁸ It is provided that all married parents who are recognised in law as legal parents will have automatic guardianship. This includes parents who have no genetic link to their children who have been

⁷³ Law Reform Commission, *Report on Legal Aspects of Family Relationships* (LRC 101 – 2010).

⁷⁴ *Ibid* [2.08] and [2.26].

⁷⁵ *Ibid* [3.20].

⁷⁶ Section 4A of the Guardianship of Infant Act as inserted by s 43 of the 2015 Act.

⁷⁷ Section 22 of the Civil Registration Act 2004 as amended.

⁷⁸ Examined above.

conceived through donor-assisted reproduction.⁷⁹ Same-sex parents automatically acquire guardianship where they are in a civil partnership with the mother.⁸⁰ A mother's cohabitant who is recognised as the parent of the child following donor-assisted reproductive services acquires guardianship automatically where they have cohabited with the mother for not less than 12 months including 3 months after the birth of the child⁸¹ or otherwise by statutory declaration or application to court.⁸²

A new s 6C⁸³ will allow the court to appoint a non-parent as guardian in certain circumstances. Eligibility for guardianship is limited to step-parents or persons who have cohabited with the child's parent for over 3 years or to individuals who have provided for the child's day-to-day care for more than 12 months where the child has no parent or guardian willing or able to exercise the rights and responsibility of guardianship.⁸⁴

The guardianship rights of legal parents are protected even where the court appoints a non-parent guardian. For example, the parents of the child will be informed of any application by another person for guardianship and the appointment of a new guardian cannot be made without the consent of each existing guardian or where the court has dispensed with the need for consent on the grounds that it is unreasonably withheld and the order is in the best interests of the child.⁸⁵

When deciding whether or not to appoint a guardian under s 6C the court shall have regard to the best interests of the child,⁸⁶ must ensure that the child has the opportunity to make his or her views known and have regard to those views. The court must also have regard to the degree to which the number of potential guardians are involved in the upbringing of the child.⁸⁷ Where a new guardian is appointed they will share rights and responsibilities with existing guardians⁸⁸ who will not lose guardianship rights. The powers of the new court-appointed guardian may be limited in scope by the order itself.⁸⁹

Section 6C(11) spells out the rights and responsibilities of an appointed guardian providing a comprehensive statutory definition of the modern understanding of guardianship the meaning of which has previously been gleaned from case law:

(a) to decide on the child's place of residence;

⁷⁹ Section 6B(1) of the Guardianship of Infants Act 1964 as amended.

⁸⁰ Section 6B(2)(a) of the Guardianship of Infants Act 1964 as amended.

⁸¹ Section 6B(3) of the Guardianship of Infants Act 1964 as amended.

⁸² Section 6B(4) of the Guardianship of Infants Act 1964 as amended.

⁸³ As inserted by s 49 of the 2015 Act.

⁸⁴ Section 6C(2) of the Guardianship of Infants Act 1964 as amended.

⁸⁵ Section 6C(2) and (6)–(7) of the Guardianship of Infants Act 1964 as amended.

⁸⁶ Section 3 of the Guardianship of Infants Act 1964 as amended.

⁸⁷ Section 6C(2), (8) of the Guardianship of Infants Act 1964 as amended.

⁸⁸ Section 6C(5) of the Guardianship of Infants Act 1964 as amended.

⁸⁹ Section 6C(9) of the Guardianship of Infants Act 1964 as amended.

- (b) to make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing;
- (c) to decide with whom the child is to live;
- (d) to consent to medical, dental and other health related treatment for the child, in respect of which a guardian's consent is required;
- ...
- (f) to place the child for adoption, and consent to the adoption of the child, under the Adoption Act 2010.'

The new s 6C is a very important reform which will allow step-parents and other kinship carers to be appointed guardians in addition to parents. It will go some way to providing a solution for children who are in the long-term care of non-parent carers including children who are the product of international surrogacy agreements and children for whom adoption is not possible. The 2015 Act also makes some pragmatic changes to allow major decisions to be made by agreement of two guardians only. For example, passports can be issued where two guardians consent.⁹⁰

Section 57 of the 2015 Act allows for non-guardians to apply to court for custody of children for the first time. A new s 11E is inserted into the Guardianship of Infants Act 1964 which allows for relatives, step-parents and cohabitants who have lived with the child's parent for at least 3 years to apply for custody of a child if they had shared responsibility for the child's day-to-day care for more than 2 years or where they have provided day-to-day care for more than 12 months in a situation where the guardian or parent has been unwilling or unable to do so. Again the guardianship rights of parents are protected by the need for each existing guardian to consent to the making of such an order or where the court is satisfied that it is in the best interests of the child to dispense with consent.

The new s 6C in conjunction with the new s 11E should provide much greater stability for children in the care of non-parents. However, the willingness of the court to dispense with the consent of parents and their interpretation of the appropriate test for doing so following the ratification of the children's rights amendment will be areas to watch.

(d) Adoption

Part 11 of the 2015 Act makes a number of important changes to adoption law in Ireland.⁹¹ Eligibility for joint adoption has been extended to allow civil partners or cohabiting couples who have lived together for 3 years to jointly adopt⁹² – an option previously only open to married couples.⁹³ The Act also

⁹⁰ Section 100 of the 2015 Act amends s 14 of the Passports Act 2008.

⁹¹ Adoption in Ireland is now governed by the Adoptions Acts 2010 to 2015.

⁹² Section 33 of the Adoption Act 2010 as amended by s 114 of the 2015 Act.

⁹³ For criticism of the previous position see Lydia Bracken, 'Is There a Case for Same-sex Adoption in Ireland?' (2013) 16 *IJFL* 79–88.

provides that where civil partners or cohabiting couples⁹⁴ jointly adopt they will be the guardians of the child jointly.⁹⁵

The 2015 Act does not permit step-parent adoption without the need for a birth parent to adopt their own child. However, the extension of guardianship to step-parents will allow a step-parent who is caring for a child decision-making rights and responsibilities through guardianship without obscuring biological truth and legal ties to the other parent's extended family.

The Act also allows children born to a female same-sex couple through donor conceived human reproduction to be placed for adoption.⁹⁶ There is no further change to the categories of children who are eligible for adoption. Under Irish law as it stands, only non-marital children may be voluntarily placed for adoption. Orphan children and non-marital children may be adopted by adoption order made by the Adoption Authority.⁹⁷ Marital children may be adopted only in exceptional circumstances where their parents have failed in their duties towards them within the meaning of Art 42.5 of the Constitution. It falls to the High Court to authorise involuntary adoptions and under the current legislation it must be shown that the parents of the child have for physical or moral reasons failed in their duty towards the child for 12 months and that the failure is likely to continue without interruption until the child reaches 18.⁹⁸ Moreover it must be shown that the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise with respect to the child.⁹⁹

In the absence of the implementation of the children's rights referendum, the changes made by the 2015 Act will make little difference to Irish domestic adoption rates or adoptions from foster care. In 2013, 116 domestic adoption orders were granted in Ireland, 86 were made in step-family adoptions¹⁰⁰ and just 17 from foster care.¹⁰¹ There are currently 6,500 children in foster care in Ireland, 2,000 of whom could potentially be eligible for adoption when the children's rights referendum is formally ratified.¹⁰²

⁹⁴ Section 2 (limited to adults who are cohabitants of each other and who have been living together as cohabitants for a continuous period of not less than 3 years).

⁹⁵ Section 47 amending s 6 of the Guardianship of Infants Act 1964.

⁹⁶ Sections 97–99 of the 2015 Act.

⁹⁷ Section 23 of the Adoption Act 2010.

⁹⁸ Section 54 of the Adoption Act 2010.

⁹⁹ For an example of the restrictive interpretation of these provisions see: *N v The Health Service Executive and Others* [2006] IESC 60.

¹⁰⁰ The Adoption Authority of Ireland, *Annual Report 2013*, 10 available at http://aai.gov.ie/attachments/article/32/Annual_Report_2013.pdf.

¹⁰¹ Carl O'Brien, 'Reforms may make 2,000 children eligible for adoption' *Irish Times*, 27 November 2014.

¹⁰² *Ibid.*

The general scheme of the Adoption (Amendment) Bill 2012, drafted to make changes to legislation following the referendum,¹⁰³ allows for a more flexible adoption regime. Section 54 of the Adoption Act 2010 would allow involuntary adoptions to be authorised by the High Court where the parents failed in their duties ‘to such an extent that the safety or welfare of the child is likely to be prejudicially affected’ and the failure has lasted for a continuous period of 36 months. The requirement for parental failure to continue until the child is 18 years will be removed. The change of emphasis from parental failure to the effect on the safety or welfare of children renders the law more child-focused. Section 54 as amended would require the court to ensure that the best interests of the child were paramount in resolving applications for involuntary adoption with mere regard to constitutional rights.¹⁰⁴ The scheme also allows for the adoption of marital children. This legislation would make it much easier to adopt children who have been in ‘long-term’ foster care for 3 years. It is hoped that the Government will take swift action to develop this legislation following the ratification of the children’s rights amendment.

(e) The same-sex marriage referendum

On 22 May the Irish people were asked to vote on the Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015. This amendment adds a subsection to Art 41 of the Irish Constitution as follows:

‘Marriage may be contracted in accordance with law by two persons without distinction as to their sex.’

Irish law currently allows same-sex couples to enter into civil partnerships¹⁰⁵ which carry some but not all of the rights and obligations of marriage.¹⁰⁶ For example, civil partners are not considered a family for the purposes of the Irish Constitution and civil partnerships are more easily dissolved than marriages. If ratified, the constitutional amendment will allow married same-sex couples to be recognised as constitutional families and to enjoy identical treatment to that of married couples. However, the proposed Marriage Bill 2015 which will implement the changes in legislation contains a conscience clause which means that religious solemnisers will not be obliged to perform same-sex marriages although it will be left open to them to celebrate such marriages if they wish to do so.¹⁰⁷

¹⁰³ Available at www.dcy.gov.ie/documents/publications/GeneralSchemeAdoptionBill19thSept12.pdf.

¹⁰⁴ Ibid, Head 12.

¹⁰⁵ The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

¹⁰⁶ For a thorough analysis of the differences see Marriage Equality *Missing Pieces: A comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland 2011* available at www.marriageequality.ie/download/pdf/missing_pieces.pdf.

¹⁰⁷ Head 7; the general scheme of the bill is available at www.justice.ie/en/JELR/General%20Scheme%20of%20the%20Marriage%20Bill%202015.pdf/Files/General%20Scheme%20of%20the%20Marriage%20Bill%202015.pdf.

The necessity of a constitutional referendum to allow same-sex marriage is questionable. The Irish constitution does not lay down the criteria for entry into marriage. This is left to legislation. Moreover the Irish Supreme Court has never actually addressed the question of whether Art 41 precludes the introduction of same-sex marriage by legislation.

The Irish constitution protects both the institution of marriage itself¹⁰⁸ and the right to marry as part of the unenumerated rights doctrine.¹⁰⁹ In *Zappone v Revenue Commissioners*¹¹⁰ the Irish High Court found that the exclusion of same-sex couples from marriage was justified, as protecting the traditional understanding of the institution of marriage.¹¹¹ The applicants in this case, Gilligan and Zappone were refused an appeal to the Supreme Court in October 2011 due to changes in the Irish marriage registration and the introduction of the Civil Partnership Act. They launched a new challenge in 2012, challenging the new legislation which has not yet reached court.¹¹²

However, changing the constitution to allow for same-sex marriage was within the terms of reference of the more general Constitutional Convention¹¹³ which took place in 2013-2014.¹¹⁴ By opting for a constitutional referendum rather than making changes by statute the Irish Government avoids the risk that legislation providing for same-sex marriage will be subjected to constitutional challenge. The choice to put the matter to the people also allows the Irish people to make a statement about marriage equality.

IV CONCLUSION

The Children and Family Relationships Act 2015 makes the first truly comprehensive changes to the Guardianship of Infants Act 1964, the structure of which has been in place for over 50 years. The protection of the marital family at constitutional level is often put forward as the reason why Irish law clings to conservatism and is slow to change. However, the reluctant progress of Irish family law modernisation is more attributable to political fear of the potential effect of Arts 41 and 42 rather than authoritative rulings from the Irish Supreme Court. It seems that Irish Government policy is that it is safest for changes to family law to have the direct approval of the people even though this is much longer and more difficult process.¹¹⁵ This is in spite of the positively

¹⁰⁸ Article 41.

¹⁰⁹ Unenumerated rights are personal rights stemming from Art 40.3.1.

¹¹⁰ *Zappone & Anor v Revenue Commissioners & Ors* [2006] IEHC 404 (HC).

¹¹¹ *Zappone & Anor v Revenue Commissioners & Ors* [2006] IEHC 404, [129].

¹¹² B Tobin 'Same-Sex marriage in Ireland: the Rocky Road to Recognition' (2012) 15 IJFL 102.

¹¹³ See the Joint Resolution of the Houses of the Oireachtas of July 2012.

¹¹⁴ *Third Report of the Convention on the Constitution: Amending the Constitution to provide for same-sex marriage* (2013) available at www.constitution.ie/Meetings.aspx.

¹¹⁵ A similar approach can be seen in the government approach to the legality of abortions in the case fatal of fetal abnormalities. See M Harding, 'Irish Abortion Law: Legislating to Stand Still' in B Atkin (ed) *International Survey of Family Law 2014 Edition* (Jordan Publishing, Bristol, 2014) 201-225.

deferential approach to the legislature recently shown by the new Irish Supreme Court bench in *MR and DR v An t-Ard-Chláráitheoir & ors*¹¹⁶ and the potential for legal challenges to the legitimacy of the result of referendums as demonstrated by the children's rights referendum litigation.

Some of the changes made by the 2015 Act to acknowledge a diversity of family forms were aimed at defusing same-sex adoption and parenthood as a live issues in the same-sex marriage referendum. Many of those opposed to same-sex marriage have claimed that its introduction will deny a child his or her right to a mother and father, expressing their opposition to same-sex marriage as a child welfare issue.¹¹⁷ O'Mahony argues that the link between the Act and the same-sex marriage referendum is more political than legal and in reality child welfare continues to be a central focus of the no campaign's arguments.¹¹⁸

Claims that the Child and Family Relationship Act 2015 is unconstitutional as violating the protection given to the marital family under Art 41 have already been made.¹¹⁹ However, it is quite clear from existing case law on the interpretation of Art 41 that it has never required the state to take active steps to give preferential treatment to the marital family but merely permits preferential treatment and prevents such positive discrimination being struck down as contradictory to the constitutional guarantee of equal treatment.

The decision to regulate family law issues at a constitutional level where it is not technically necessary to do so is problematic. Amendments put to the people cannot contain the detail and flexibility of legislation. Rules that become part of the constitution are very difficult to change as they require not only a change in the will of the people but also the political will to call a referendum on the problematic issue. Ireland maintains a constitutional protection of the right to life of the unborn child inserted into the Constitution in 1983,¹²⁰ and the requirements for divorce were fixed at constitutional level in 1995 as requiring 4 years of living apart.¹²¹ The children rights amendment attempted to deal with issues of workability and future flexibility by requiring legislation to contain the best interests' principle and a commitment to the voice of the child but this type of regulatory compromise could have the added effect of rigidising legislative provisions.

¹¹⁶ Above n 54.

¹¹⁷ See, eg, Breda O'Brien 'Love is not enough when it comes to children's rights' *Irish Times*, 23 January 2015. For a thorough examination and refutation of this argument see B Tobin "First comes love, then comes marriage ..."—Allaying Reservations Surrounding Marriage Equality and Same-sex Parenting in Ireland' (2015) 18 *IJFL* 9–13.

¹¹⁸ C O'Mahony 'The Constitutionality of the Children and Family Relationships Bill' (2015) 18 *IJFL* 3–8.

¹¹⁹ . Breda O'Brien 'Love is not enough when it comes to children's rights' *Irish Times*, 23 January 2015.

¹²⁰ Eight Amendment of the Constitution Act 1983.

¹²¹ Fifteenth Amendment of the Constitution Act 1995.

The recent Supreme Court decision of *Re Referendum Act and Jordan and Youth Affairs & Ors*¹²² will go some way to prevent groundless attempts to delay progressive reforms to family law by constitutional referendum. In the leading judgment, O'Donnell J laid down a new test for constitutional challenge of a referendum, requiring applicants to show that it is reasonably possible that the irregularity or interference identified affected the result to the extent that a reasonable person could be in doubt about and no longer trust the provisional outcome.¹²³ Highlighting how unsatisfactory it was that for 2 years the Irish people have not had the benefit of a constitutional change that they had agreed to, he expressed hope that the new test would limit the number of challenges that might be taken in the future.¹²⁴

With the enactment of the Children and Family Relationships Act and the long-awaited ratification of the children's rights referendum, 2015 will be remembered as the year when Irish family law gave express recognition to the rights of children and finally put in place functional, child-focused legislation to protect children within their families, however non-traditional their family set up. There is now no constitutional impediment to meaningful adoption reform so the way is clear to reform the adoption and care system to ensure that children who cannot be cared for by their parents find stable new homes and can be placed with adoptive families where appropriate. The Irish people will approve the same-sex marriage constitutional amendment by referendum in May, embracing marriage equality and further eroding the remaining constitutional roadblocks to a modern inclusive and equal family justice system.

¹²² [2015] IESC 33.

¹²³ Ibid [7].

¹²⁴ Ibid [90].

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JAPAN

WEDNESDAY'S CHILD OR FRIDAY'S CHILD? RECENT DEVELOPMENTS IN CHILDREN LAW IN 2014

*Satoshi Minamikata**

Résumé

L'objet de ce texte est d'illustrer brièvement les développements du droit relatifs aux enfants (aux mineurs) dans le courant de l'année 2014. Dans de nombreux pays, la protection des enfants qui sont impliqués dans des conflits familiaux, particulièrement des conflits parentaux, représente un défi important pour les juristes et pour les autres professionnels engagés dans la défense du meilleur intérêt des enfants. On a pu observer plusieurs évolutions du droit de l'enfance en 2014 et nous en avons retenu deux dans le cadre de cette présentation: l'adoption de nouvelles lois sur la *Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants* et les décisions de la Cour suprême en matière d'établissement de la filiation paternelle.

I INTRODUCTION

The aim of this chapter is to briefly illustrate developments in law relating to children (minors) in 2014. In many countries, the protection of children involved in family disputes, in particular parental conflict, is a major issue for lawyers and other professionals who are charged with promoting the interests of children. New developments in child-related law were observed in 2014 and two major developments are selected for discussion in this chapter: the implementation of new Acts on the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter cited as 'the Convention') and decisions by the Supreme Court relating to establishment of the father and child relationship.

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II NEW ENACTMENT OF THE ACT RELATING TO THE CONVENTION

The Convention on the Civil Aspects of International Child Abduction Act 2014 (hereinafter cited as ‘the Implementation Act’) was enacted on 1 April 2014, by which a parent from whom a child has been removed is eligible to commence the procedure for return of a child against a taking parent in cases of the international abduction of a child. By 2014, the Japanese Government had not taken positive action on the Convention – which was ratified by the Parliament in 1980 – on the pretext of a lack of relevant domestic laws. The government eventually enacted a couple of Acts relating to the Convention in 2014 in the face of criticism from the international community. Critical statements from countries such as the United States condemning the Japanese Government’s lack of attention to administrative matters surrounding abduction cases actually played significant roles in accelerating the enactment of the domestic Acts in 2014. However, it should be noted that some critical statements appear to be based on the lack of precise understandings of the legal system in Japan. For instance, in Japan the term ‘abduction’ may be interpreted differently than in the United States because of differences in custody systems. In Japan, no joint custody scheme exists with only a sole parental rights and duties scheme¹ being available for divorced parents; yet in the United States the joint custody scheme is in general available to both during separation and following the parents’ divorce. Accordingly, a matter of ‘abduction’ by a parent with parental rights and duties will not arise in Japan since such a parent is eligible to take a child from the parent who has no parental rights and duties subject to the Japanese Civil Code. ‘Abduction’ may happen in two situations: a parent with no parental rights and duties takes a child from the other parent after divorce, and either parent takes a child without any agreement during the time of separation. On the other hand, in the United States both parents can exercise their custodial status under the joint-custody scheme following divorce (some exceptions exist) and ‘abduction’ is likely to take place among disputing parents. In addition, court practices led foreign parents to cast blame upon the Japanese legal procedure claiming that the courts were prejudiced towards foreign parties in deciding contact and custody matters. Simplistic conclusions should be avoided when discussing current practices, but it could be suggested that courts make decisions in child-related bi-cultural disputes by resorting to the conventional steps applied to cases involving only Japanese parents. For instance, a court makes a decision by primarily considering the best interests of the child and by taking account of all the circumstances, including objective factors such as living conditions and subjective matters like the emotional relationship between child and parent.

Information on the procedural details of returning a child is available on the website of the Ministry of Foreign Affairs² and in essence the procedures are

¹ The sole parental rights and duties scheme is now criticised by some academics and practising lawyers asserting that the scheme does not work sufficiently to protect children’s interests.

² See www.mofa.go.jp/fp/hr_ha/page22e_000274.html.

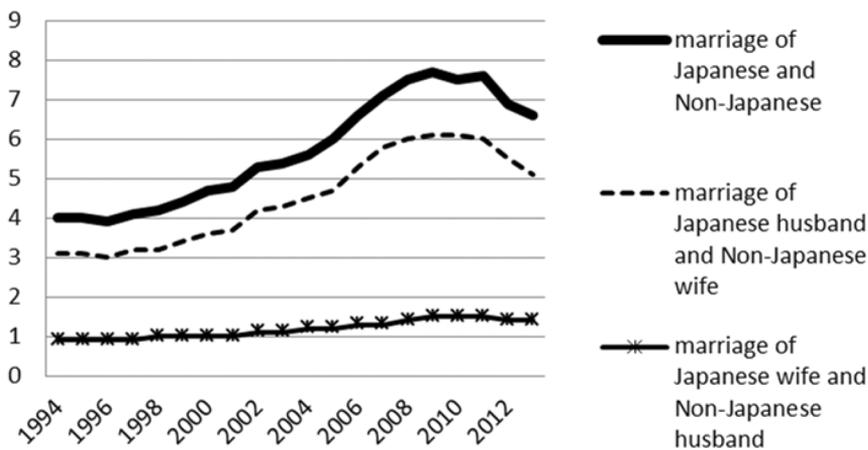
similar to those of other countries that have ratified the Convention. According to the procedures, a parent from whom the child was removed is eligible to make an application for return of a child to the Ministry of Foreign Affairs – the central authority – in both incoming and outgoing cases. The parent is also able to apply to the central authority for support for assuring an opportunity of contact with the child or for the assistance of mediation in order to solve their dispute over abduction. The government now has the authority of intervention in cases of trans-boundary child removal through civil and criminal law for the purpose of achieving appropriate resolution in the interest of the child and disputing parents.

In an outgoing case, for instance, when a parent intends to claim return of an abducted child or to have contact with the child, he or she can make an application to the Ministry of Foreign Affairs – the central authority in Japan – or can apply directly to the central authority where the abducted child is staying for the purpose of returning the child or having contact with the child. The same procedure will be applied to an incoming case. The parties should use a mediation service at the first instance to resolve either the issue of return of a child or that of contact, and they can bring the case to the courts – the Tokyo or Osaka family courts that have jurisdiction over the Convention dispute – if they fail to finalise the case through mediation. The court will issue a court order after it examines a report submitted by a family court investigation officer (similar to probation officer or CAFCASS officer in the UK) on an application by the parent from whom the child has been removed.

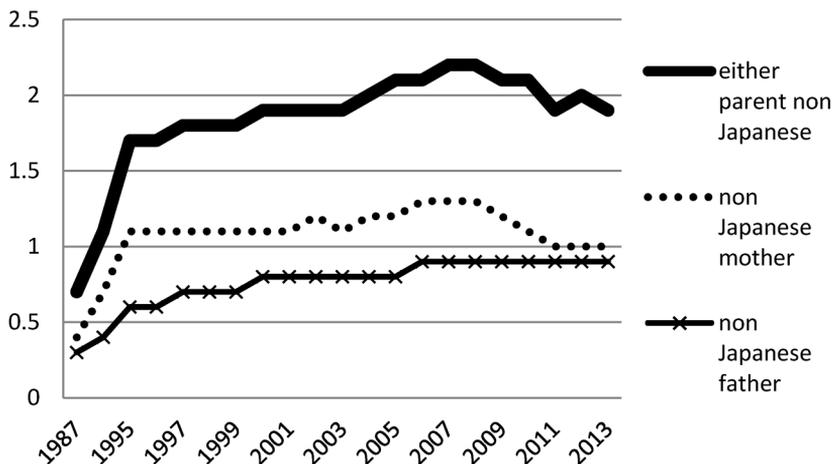
If a parent considers making an application for a remedy, the Ministry of Foreign Affairs, the courts and bar association now provide relevant information, subject to the application fee, a list of practising lawyers with special knowledge in Convention disputes and with special legal training course for practising lawyers. From April to December 2014, 29 applications were reported as ‘return of a child’ cases and 64 applications as ‘contact cases’, including incoming and outgoing cases, and two cases were settled in court – both these cases were between Japanese parents, one with a father living in Sri Lanka and the other with a mother in England.³ Since commencement of the Implementation Act, concerns have been raised about the increase of Convention cases, which may become a heavy burden on court staff. A gradual increase in marriage between Japanese and non-Japanese (bi-cultural marriage) has led to an increase in children born to such a couple. It is difficult to predict whether divorce in such bi-cultural cases will increase, but the fact that divorce amongst this group rose from 4 per cent to 6 per cent out of all divorce cases between 1990 and 2013 implies that the number of abduction cases may be affected by such increase in the future (see Figure 1 and 2).

³ Nikkei New Paper 24 December 2014. No law reports were available at the time of writing (1 February 2015).

% per all divorce **divorce of Japanese and non Japanese spouse**
1994-2013 (vital statistics)



% per all birth **Birth rate by Japanese and non Japanese parent**
1987-2013 (vital statistics)



III TWO SUPREME COURT DECISIONS RELATING TO THE FATHER AND CHILD RELATIONSHIP

Judging from recent precedents, it seems that the court’s interpretation became unsettled with respect to issues such as the rights of an illegitimate child and establishing a father–child relationship. Before entering into the main discussion, it may be useful to outline an overview of the law relating to the establishment of the parent (especially the father) and child relationship.

(a) Two categories of child

(i) Legitimate child

If a child meets the conditions stipulated in s 772⁴ at the time of birth, the child shall be treated as a legitimate child unless and until a husband of the child's mother learns of the birth of the child and rejects the legitimate father-child relationship within a year from the date when he learns of the birth by s 777.⁵ Accordingly, the legitimate father-child relationship may never be challenged by any person including a husband after a one-year lapse of time.

(ii) Illegitimate child

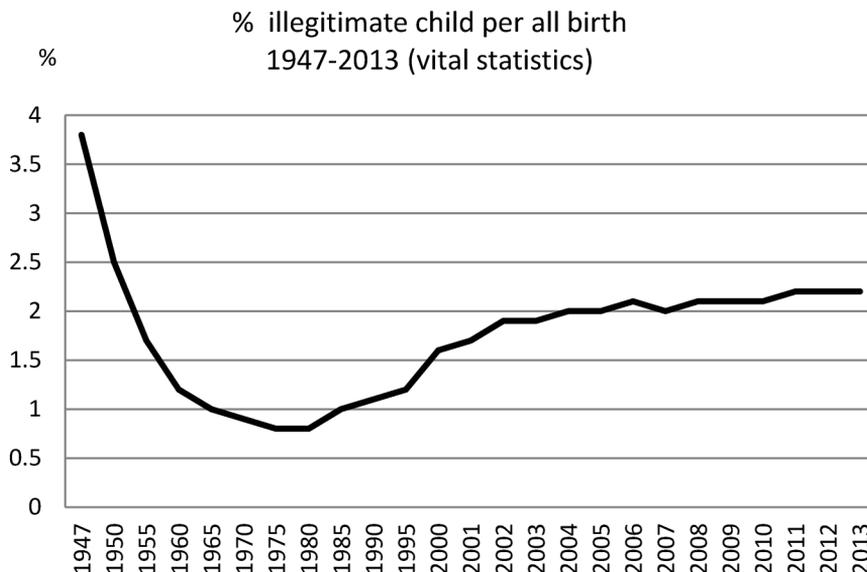
In the case of an illegitimate child (see chart 3), the mother-child relationship shall be interpreted as established by the fact of birth while the father-child relationship shall be established either on the basis of a subjective factor (intention of the 'father') and an objective factor (blood relationship) under the current Civil Code. The genuine intention of the father is regarded as crucial in the case of voluntary acknowledgement of paternity while objective evidence such as blood relationship proved by a DNA test is necessary in the case of acknowledgement by court order. If a man wants to establish a father-child relationship with a child despite there being no blood relation between them, he is eligible to submit a notice of acknowledgement of paternity to the family registration office without consent from the child unless the child is over the age of majority or a child is an unborn baby (in this case consent from a mother is required⁶). In this respect, the father-child relationship depends on the intention of a 'father'. However, the child can later challenge the existence of an illegitimate father-child relationship by making an application to a family court to claim the acknowledgement of paternity to be void.

When a man refuses to acknowledge paternity voluntarily, a child can make an application to a family court for acknowledgement of paternity by court decree. The court shall decide whether paternity exists on the basis of evidence such as blood test or other objective factors. In this respect, the father-child relationship shall be confirmed based on the factual evidence. In short, the nature of the child and parent relationship, such as legitimate and illegitimate, shall be decided on two principles, namely the objective factor principle and the subjective factor principle. As a result, there is a possibility that the two different principles may bring about confusing effects which are against the best interests of a child.

⁴ Section 772(1): A child conceived by a wife during marriage shall be presumed to be a child of her husband. (2) A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage.

⁵ Section 777: A husband shall bring an action to rebut the presumption of the child in wedlock within one year of knowing of the child's birth.

⁶ Section 782: A father or mother may not acknowledge his or her adult child without that adult child's consent and s 783(1): A father may also acknowledge his unborn child. In this case, the mother's consent shall be obtained.



(b) Major developments prior to 2014

In 2013, the Supreme Court made landmark decisions relating to the status of a child, in particular an illegitimate child.⁷ In the case of succession, the share of the illegitimate child became equal to that of a legitimate child,⁸ and a child born to a wife by artificial insemination (AID) was regarded as a legitimate child of her husband who married after changing his sex registration from female to male on the grounds of being transgender, as long as the requirements in s 772 were satisfied.⁹ These decisions played significant roles in improving the legal status of an illegitimate child who was long discriminated against in the former case and was likely to be in a vulnerable situation in the latter. The Supreme Court, however, took a different view towards an illegitimate child in a case¹⁰ where the official description of the child’s status – illegitimate – in the Family Registration Book became an issue. In this case, an illegitimate child claimed that the usage of a term different from that for other children is likely to cause discrimination against an illegitimate child in the day-to-day life of contemporary Japanese society; it would therefore violate the equality provision of the Constitution. According to the decision, the status of a child being legitimate or not must be stated in the Family Registration Book which is basically open to the public and the term of ‘illegitimate’ merely describes the fact that a child is born to parents who are not married and is not related to

⁷ See Yungwhan Kim ‘Two Landmark Decision of the Supreme Court: One Too Late; the Other Still Early’ in Bill Atkin (ed), *The International Survey of Family Law 2014 Edition* (Jordan Publishing, Bristol, 2014) pp 255–253.

⁸ SK (Supreme Court Order) 4 September 2013 Saibanshojiho 1587-1.

⁹ SK 10 December 2013 Saibanshojiho 1593-4.

¹⁰ SD (Supreme Court Decision) 26 September 2013 Saibanshojiho 1588-2.

discrimination against an illegitimate child. In this respect, the usage of ‘illegitimate’ child in the Family Registration Book is not unconstitutional.

(c) Two cases in 2014

In 2014, the Supreme Court made two decisions relating to acknowledgement of paternity and confirmation of the legitimate parent–child relationship, which attracted controversy among lawyers concerned with the interests of minors.

In the first case,¹¹ a man voluntarily acknowledged paternity before marrying the mother of the child with knowledge of no blood relationship between the child and himself, and later disputed the validity of the acknowledgement of paternity when applying for divorce. In this case, one of the main issues was whether a ‘father’ is entitled to dispute the validity of a voluntary acknowledgement knowing that the child was not his own at the time of acknowledgement. In s 785 of the Civil Code,¹² a father or mother who has voluntarily given an acknowledgement of paternity/maternity may not rescind that acknowledgement and in s 786¹³ a child or any other interested person may assert opposing facts against an acknowledgement. In this case, the ‘father’ claimed that he should be interpreted as coming within the phrase ‘any other interested person’ even though he knew that he was not the father of that child at the time of acknowledgement and that he could thus rescind the acknowledgement of paternity. If such a claim were accepted by a court, the child would lose the rights of a child, such as maintenance and succession against the ‘father’ with whom the child had a legally established father–child relationship by acknowledgement and would be likely to stand in a disadvantaged position due to losing a father.¹⁴

The majority of Supreme Court justices granted an appeal by the ‘father’, stating that an acknowledgement of paternity would be void if a blood relationship between a child and a person does not exist. The ‘father’ in this case was interpreted to fall within the phrase ‘any other interested person’ and he was entitled to assert the acknowledgement to be void even if he knew of the existence of no blood relationship between the child and himself at the time of acknowledgement. One justice, however, expressed a dissenting opinion stating that the ‘father’ should not be allowed to challenge the validity of the acknowledgement as long as, first, he made it voluntarily with knowledge of no blood relationship between the child and himself at the time of

¹¹ SD 14 January 2014 Saibanshojiho 1595-1.

¹² Section 785: A father or a mother who has acknowledged affiliation may not rescind that acknowledgement.

¹³ Section 786: A child or any other interested person may assert opposing facts against an acknowledgement.

¹⁴ Such interpretation brings advantages as well as disadvantages. On one hand, a child will lose a father by acknowledgement but on the other hand the child is eligible to claim acknowledgement of paternity against a man with whom he or she really does have a blood relationship.

acknowledgement, and, secondly, neither the child nor another interested person had challenged the validity of the acknowledgement.

Judging from this case, the Supreme Court seems to hold the view that a legal relationship between father and child should be decided on the basis of the fact that the blood relationship between them exists rather than the father having acknowledged paternity voluntarily. A similar case in the Supreme Court was reported on 28 March 2014.¹⁵ In this case a father voluntarily acknowledged paternity knowing that there was no blood relationship between a child of his wife and himself at the time of acknowledgement, but claimed that he should be treated as ‘any other interested person’ in s 786 and that the acknowledgement should be void because of the lack of a blood relationship between the child and himself. In this case, the Supreme Court appears to have arrived at a slightly different interpretation. It maintained the same rule that a father is entitled to rescind a voluntary acknowledgement of paternity as long as no blood relationship between the child and himself exists, notwithstanding the fact that he knew of no blood relationship at the time of acknowledgement and understood the voluntary acknowledgement of paternity was a measure of establishing a father and child relationship based on the existence of a blood relationship. However, the Supreme Court made an additional statement that a father’s claim to annul a voluntary acknowledgement of paternity might be dismissed as an abuse of rights by considering all the circumstances of the case if necessary.

In the second case,¹⁶ a couple were married in 1999 and the wife had an affair with a man around 2008. The couple had a child in 2009 but the husband took no action to dispute paternity at the time of birth despite knowing that the baby was not his. As a consequence, the child was registered as a legitimate child of the husband (s 772). They then divorced in 2010 and the wife held parental rights and duties after divorce and started to cohabit with the man who was the father by blood. As a representative of the child, the mother filed a petition confirming non-existence of the legitimate father and child relationship by submitting DNA evidence supporting her claim for the purpose of establishing the father and child relationship by blood between a father and the child. To achieve this purpose, it needed to be declared by a court that there was no legitimate father and child relationship between the legal father and the child. Under the Civil Code, only a husband of the mother of a child is entitled to annul the legitimate relationship within one year after the date of birth (ss 774, 775 and 777).¹⁷ Consequently, a child or other person cannot challenge the legitimate father and child relationship either when one year has passed after the date of the child’s birth or once a husband recognises the child as his own

¹⁵ SD 28 March 2014 Saibanshojiho 1601-1.

¹⁶ SD (Supreme Court Decision) 17 July 2014 Saibanshojiho 1608-1.

¹⁷ Section 774: Under the circumstances described in section 772, a husband may rebut the presumption of the child in wedlock. Section 775: The father’s right to rebut the presumption of child in wedlock under section 774 shall be exercised by an action of denial of child in wedlock against the child or a mother who has parental authority. If there is no mother who has parental authority, the family court shall appoint a special representative.

(s 776).¹⁸ In this case, the mother of the child took a measure subject to s 2(2) of the Personal Affairs Litigation Act claiming that the court should confirm the lack of a legitimate father and child relationship since there was no blood relationship between them based on the result of a DNA test refuting such relationship scientifically.

The majority interpreted the scheme of presumption of legitimacy in such a way that the scheme with its one-year short limitation (s 777) would be beneficial for a child since the legitimate relationship can be promptly confirmed after the birth of a child. They then declared that a child was not entitled to challenge, under s 2(2) of the Personal Affairs Litigation Act, the presumption of legitimate father and child relationship once it was confirmed after one year from the date when the father knew of the birth of the child. The facts that the negative DNA test proved the legitimate father and child relationship did not exist and that the mother did not live with the legal father and continued to take care of the child after divorce were regarded irrelevant in this case. In addition, they stated that the law accepts that such a situation as the legal father and child relationship is not the same as a biological relationship under the Civil Code.¹⁹ The majority concluded that the presumption of legitimacy should be effective in the abovementioned situation for this case, and the application under s 2(2) of the Personal Affairs Litigation Act should not be granted in order to maintain the stable legal relationship between a father and a legitimate child, once confirmed. One judge in the majority group made an additional statement that he acknowledged the crucial role of prompt confirmation of the legitimate relationship between a father and child in order to protect the interests of child, but that he also understood that the regulation pertaining to a parent and child relationship was a public matter. Therefore, Parliament should discuss whether to revise the current law by considering the view of citizens, the rapid developments of medical technology – including DNA testing – and other laws relating to parent and child relationships such as adoption if necessary. It is, however, noted that the Supreme Court made it clear that there are two exceptional cases where ss 772 and 777 should not be applied and an ‘any interested person’ is eligible to challenge the legitimate father and child relationship under the Personal Affairs Litigation Act: first, when a child is born within the days stipulated in s 772(2); and secondly, it

¹⁸ Section 776: If a husband recognizes that a child is his child in wedlock after the birth of the child, he shall lose his right to rebut the presumption of legitimacy. For details about the legal status of a legitimate child, see paras 242ff in chapter 4 (filiation) of Part II Family Law, *The International Encyclopaedia of Laws: Family and Succession Law #74 [Japan]* (Kluwer Law International, The Netherlands, 2015 (e-version)).

¹⁹ It will be the case that the illegitimate father and child relationship will be legally established if a man can voluntarily acknowledge paternity of an illegitimate child even knowing that there is no blood relationship between them subject to provisions stipulating that a father or a mother may acknowledge the child out of wedlock (s 779) and that acknowledgement shall be made through notification pursuant to the provisions of the Family Registration Act (s 781(1)). In this respect, the blood relationship between father and child is not a decisive factor in establishing or confirming a father and child relationship under the Civil Code.

would clearly be difficult for a wife of the husband to conceive a child even if the child is born 200 days after the date of marriage and within 300 days after the date of divorce.

On the other hand, a dissenting judge stated that a child should be eligible to challenge the presumption of paternity once confirmed due to a lapse of the one-year limitation if in addition to a scientific test result, such as a DNA test, it was proved that no blood relationship between a father and child was revealed after the breakdown of the marriage between the legal father and mother and the paternity of the child was subsequently likely to be acknowledged by the blood father. He asserted that a crucial point in this case was to decide who the father of a child was in such a situation from the viewpoint of protecting the interests of the child. In this case, a father by blood lived with and took care of the child while the legal father had no possibility of caring for the child. He described that such relationships between the parties as unnatural and was concerned that such relationships might bring about unnecessary disputes among the child and other relatives of the legal father in the future (for instance, at the time of succession of the legal father). He supported the application by the child.

In two cases, the Supreme Court appears to hold inconsistent views on how to examine paternity disputes – the objective and subjective principles.²⁰

IV CONCLUSION

Developments in the law relating to children in 2014 show that an important step was made in tackling disputes across borders by establishing a scheme that aimed at providing remedies for the parties involved in a child abduction case. In this respect, legal protection will be available for children whose parents dispute the treatment of children and for a parent claiming (or refusing) the return of an abducted child in cross-border settings. Such protection procedures will make a great contribution to settling abduction disputes as an *ex post facto* remedy. It is observed in many cases that abduction happened mainly due to the fact that the parents failed to reach agreement or make appropriate agreements on child-related issues such as contact and maintenance. In this respect, the lawyers came to focus on the type of approach that should be adopted in order to encourage and support parents in reaching agreement on child-related matters in order to prevent unnecessary abduction disputes. In this connection, matters of abduction and other disputes should be understood not only as a case of a cross-border marital dispute but also a case of an ordinary domestic marital dispute.

As for the rules relating to the father and child relationship, the Supreme Court firmly maintains the general principle that the best interests of the child should

²⁰ It should be noted that decisions may be influenced by the nature or details of the facts or interpretation of the facts in each case and two different principles were applied in each case.

be respected and achieved in resolving a dispute; but it seems to be uncertain if it will take the stance of giving the blood relationship priority, of respecting the intention of the parties, or of maintaining the stability of the current legal scheme. Meanwhile, it could be said that the Supreme Court understands that the provisions relating to parent and child relationships in the Civil Code are behind the times due to rapid developments in medical technology which were not expected at the time of enactment of the Civil Code more than 100 years ago. The Supreme Court indicated in a couple of decisions that Parliament should enact new laws to meet the demands of the times in order to achieve a fair result for all parties.

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KOREA

RECENT DEVELOPMENTS IN KOREAN FAMILY LAW: DIVORCE, ADOPTION, PARENTAL RESPONSIBILITY, AND FAMILIAL SUPPORT

*Dongjin Lee**

Résumé

Le droit de la famille coréen a connu d'importants changements au cours des dernières décennies. Dans ce texte nous faisons état des plus récents développements, qui vont du divorce à l'adoption en passant par l'autorité parentale et le soutien alimentaire. Ces changements sont essentiellement caractérisés par une libéralisation accrue du mariage et du divorce, un renforcement de l'intervention de l'État dans les relations entre parents et enfants et une recherche d'un équilibre entre soutien privé et aide publique.

I INTRODUCTION

Korean family law has experienced significant changes over the past two decades, and it continues to undergo regular changes. In fact, it has been one of the most rapidly changing areas of Korean law. New legislation, amendments of existing legislation, adjudications of the Korean Constitutional Court, and overruling of the existing case law by the Korean Supreme Court have all contributed to these changes. The most important changes are as follows:

- A ban on the marriage between parties with a common surname from a common geographical origin [Dongseongdongbon–geumhon] was lifted: Constitutional Court's decision on 16 July 1997,¹ and the following abridgement of art 809(1) of the Korean Civil Code [Minbeop] in 2005.
- The limitation period for the action to rebut the presumption of paternity was lengthened from 'one year from the day on which the husband becomes aware of the child's birth' to 'two years from the day on which the husband or the wife becomes aware of the cause of the action':

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¹ Constitutional Court, 95Heonga6~13 (S Kor). Jinsu Yune, 'Recent Decisions of the Korean Constitutional Court on Family Law', *Journal of Korean Law*, Vol 1, No 1, 145 ff (2001).

Constitutional Court's decision on 27 August 1996,² and the following amendment of art 847(1) of the Civil Code in 2005.

- A full adoption process was introduced in addition to the existing simple adoption process: arts 908–2 to 908–8 of the revised Civil Code of 2005.³
- A family court's decision is now required even for the simple adoption of a minor: art 867 of the revised Civil Code of 2012.⁴
- The Hague Convention on the Civil Aspects of International Child Abduction 1980 was entered and effectuated from 1 March 2013.⁵
- The guardianship law was fully reorganised: arts 928 to 959–20 of the revised Civil Code of 2011, and the abridgement of arts 960 to 973 of the Civil Code.⁶
- A waiting period was introduced into the consensual divorce process, and an agreement between divorcing parents concerning the custody of their minor children is now required for the certification of their intent to get divorced under the consensual divorce process: arts 836–2 and 837–2 of the revised Civil Code of 2007.⁷
- A protocol of the child support agreement made and certified in the consensual divorce process is now considered ipso jure as a title (writ) of execution, and the enforcement of the child support is reinforced by newly introduced remedies such as a report order, direct payment order, security deposit order, and other mechanisms: art 836–2 of the revised Civil Code of 2009, and arts 48–2, 63–2, 63–3, and 67–2 of the revised Korean Family Procedure Act [Gasasongbeop] of 2009.⁸
- A non-binding child support calculation schedule was introduced into the family courts: for example, the Seoul Family Court's announcement on 31 May 2012.

Most of the abovementioned changes have already been introduced or analysed by other papers written in English.⁹ In this chapter, more recent developments in Korean family law will be provided. These cover divorce, adoption, parental authority, and familial support. Entering the Hague Child Abduction Convention and the reorganisation of guardianship law, though representing more recent developments, are excluded, and the amendment of adoption law, though very recent and important, is also excluded. These topics have already

² Constitutional Court, 96Heonga22, 97Heonga2·3·9, 96Heonba81, 98Heonba24·25 (S Kor). Jinsu Yune, *ibid* at 136 ff.

³ Jinsu Yune, 'The Reform of Adoption Law in Korea' in Bill Atkin (ed) *International Survey of Family Law 2013 Edition* (Jordan Publishing, Bristol, 2013) 364 ff.

⁴ *Ibid* at 368 ff.

⁵ Kwang Hyun Suk, 'Korea's Accession to the Hague Child Abduction Convention', *Family Law Quarterly*, Vol 48, No 2, 267 ff (2014).

⁶ Cheol Ung Je, 'Korean guardianship', in A Kimberley Dayton (ed) *Comparative Perspectives on Adult Guardianship* (Carolina Academic Press, Durham, NC, 2014), 191 ff.

⁷ Jinsu Yune, 'The Reform of the Consensual Divorce Process and the Child Support Enforcement System in Korea', *Journal of Korean Law*, Vol 11, No 2, 248 ff (2012).

⁸ *Ibid* at 253 ff.

⁹ See, for example, Jinsu Yune, above nn 1, 3 and 7, Kwang Hyun Suk, above n 5, and Cheol Ung Je, above n 6.

been introduced in some detail in other papers written in English and cannot be addressed in further depth in this paper due to length limitations. Furthermore, those reforms that are still pending – the ratification and effectuation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993, signed by the Minister of Foreign Affairs in 2013, and the full revision of the Family Procedure Act, just drafted by the responsible committee in the Department of Justice – will also be omitted. This chapter primarily intends to update the previous national reports for the purpose of presenting the current state of Korean family law.

II DIVORCE

(a) Developments towards no-fault divorce system

(i) *The rule against the responsible party's divorce claim*

Korean family law has three modes of divorce: consensual divorce (art 834 of the Civil Code and following articles), judicial divorce (art 840 of the Civil Code and following articles), and divorce by mediation (art 50 of the Family Procedure Act). Most divorced couples get divorced by consent, and a significant part of the remaining couples by mediation. The judicial divorce regime is, however, still the most important, because negotiations between divorcing parties might well reflect the expected result in the judicial divorce process.

According to art 840 of the Civil Code, there exist six grounds for judicial divorce in Korean divorce law: (1) the spouse's act of infidelity to the plaintiff, (2) the spouse's malicious desertion of the plaintiff, (3) the spouse or his or her parent's severe maltreatment of the plaintiff, (4) the spouse's maltreatment of the plaintiff's parent, (5) the spouse missing for more than 3 years, and (6) other serious issues making it difficult to continue the marriage. Grounds 1 to 4 can be classified as fault-based divorce grounds, though parts of grounds 3 and 4 show relics of the nearly abandoned extended family model. Ground 5 is a no-fault divorce situation, but it has minimal practical importance. Ground 6 could have functioned as a general provision of no-fault divorce. Actually, no evidence exists to indicate that the Civil Code adopted this provision to allow only fault-based divorce.¹⁰ The Supreme Court, however, had interpreted the judicial divorce provision as a weak version of the fault-based divorce system, by establishing a rule that a divorce decree would not be granted for the party responsible for the breakup of the marriage ('the rule against the responsible party's divorce claim').¹¹ It has been explained by the doctrine of estoppel (art 2

¹⁰ It might be exactly the contrary. Article 840 of the Civil Code was modelled for the revised Japanese Civil Code of 1946, and the legislators are said to have intended a no-fault divorce law by the equivalent provision of ground 6 of art 840 of the Civil Code. See Simazu and Abe (eds) 22 Japanese Civil Code Annotated, the Revised edition, 348–351 (2008, Tokyo: Yuhikaku Publishing Co Ltd).

¹¹ Supreme Court [S Ct], 65Mu37, 21 September 1965 (S Kor); Supreme Court [S Ct], 70Mu41, 23 March 1971 (S Kor); Supreme Court [S Ct], 82Mu57, 22 March 1983 (S Kor). As a result,

of the Civil Code). This limitation or defence has been loosened incrementally, of course: even the spouse responsible for the breakup can also file for divorce and be granted a divorce decree, (1) when it is obvious that the defendant also wants to get divorced (note that it is not sufficient that he or she does not want or try to restore the marital relationship) but does not agree to do so only in order to torture the plaintiff who desires divorce more; (2) when the plaintiff's fault is no more significant than the defendant's; or (3) when the transgression the plaintiff made has no causal relationship with the breakup.¹² While the combination of all of these rules does not produce intolerable results in most cases, it can and sometimes does cause problems, at least in one situation: when the plaintiff is responsible for the breakup and has none of the abovementioned exceptions, but both the plaintiff and the defendant have lived without any material or immaterial relationship with each other since they had broken up decades before. Under the current case law, the plaintiff cannot obtain a divorce decree in this situation,¹³ which can cause an intolerable lack of resolution for the plaintiff.

The Supreme Court seems to be seeking a solution to further loosen this limitation. In a recent decision on 24 December 2009,¹⁴ the Supreme Court set aside the appellate court's decision that had refused to grant a divorce decree for the plaintiff. In that case, the plaintiff had left her husband 11 years ago voluntarily and without any good reason, so that she was responsible for the breakup. She has cohabited with another man and gave birth to a girl with a congenital malformation of the feet. Now she wants to get divorced, perhaps because a remarriage with her cohabitant is necessary or very beneficial for their daughter to be provided with parental and medical care. The defendant-husband does not agree. He is willing to restore their marital relationship, mainly because their children, not knowing that their mother had come to have another daughter during her cohabitation, desire this reunion eagerly. The reasons that the Supreme Court provided are as follows: the marriage between the plaintiff and the defendant has been irreparably broken up; there exists an urgent necessity to provide the plaintiff's daughter with medical and parental care; not only the plaintiff but also the defendant were responsible for the breakup, and the plaintiff's culpability has been significantly diminished with the continuation of their separation; and a social as well as legal judgment of the plaintiff's behaviour should also reflect her current situation. Accordingly, the Supreme Court concludes, it is not plausible to decide the case by the gravity of both parties' faults in the breakup.

both parties can file for divorce when the marriage is irretrievably ended but neither is responsible for it. Some legal academicians in Korea and Japan, focusing on the feature that the defendant's fault is not required to file for divorce, have called it a limited no-fault divorce system.

¹² Supreme Court [S Ct], 86Mu28, 14 April 1987 (S Kor); Supreme Court [S Ct], 87Mu9, 25 April 1988 (S Kor); Supreme Court [S Ct], 93Mu317, 25 February 1994 (S Kor).

¹³ Supreme Court [S Ct], 84Mu90, 11 December 1984 (S Kor); Supreme Court [S Ct], 85Mu20, 23 July 1985 (S Kor); Supreme Court [S Ct], 85Mu79, 25 February 1986 (S Kor); Supreme Court [S Ct], 2004Mu1033, 24 September 2004 (S Kor).

¹⁴ Supreme Court [S Ct], 2009Mu2130 (S Kor).

Certainly, the Supreme Court did not discard the rule against the responsible party's divorce claim in this decision. The fact that the Supreme Court says that the plaintiff's culpability has been significantly diminished with the continuation of the separation (as a result, her fault cannot be said to be more significant than the defendant's any longer) shows that the Supreme Court still presupposes this rule. This reasoning, however, is far from persuasive. Culpability is a normative judgment of a certain behaviour already made. One cannot blame a status. Thus, culpability, once established, cannot change or be diminished as time passes. If we reinterpret this decision by excluding the reasoning regarding the diminishing culpability, its meaning is straightforward: when the separation lasts for a long period, which can also be interpreted as an indication of the irretrievability of the marriage, the rule against the responsible party's divorce claim does not apply, and either party can file for divorce. This is an advance toward a no-fault divorce system.

Undeniably, this advance has not yet been fully accomplished. Until now, the Supreme Court's decisions following this line have been few. The Supreme Court ruled against the responsible plaintiff in a decision rendered one year after the abovementioned decision had been made, even though the parties' separation had started more than 5 years ago,¹⁵ and reconfirmed in a very recent decision that the rule against the responsible party's divorce claim still holds true.¹⁶ The fact that there was an urgent necessity to provide the plaintiff's daughter with medical and parental care might have played a decisive role in the decision on 24 December 2009,¹⁷ which makes this case an exception. The Supreme Court's hesitation might be explained in terms of the fact that Korean family law allows consensual divorce, as the possibility of consensual divorce can weaken the social pressure toward a no-fault divorce system significantly. This hesitation or lag, however, will not last for long. In a decision on 24 June 2010, the Supreme Court again granted a divorce decree to the responsible party, referring to the decision on 24 December 2009.¹⁸ In this case, the separation period amounted to 46 years. There existed, however, no other cause making it intolerable for the plaintiff to continue this marriage than that their marriage had been already fully broken up, and he had formed and lived with new families for decades. Of course, the decision points out the defendant's parents-in-law, the plaintiff's parents, whom the deserted wife might have become attached to, were already deceased. But why is this fact so important? Once the Supreme Court applies the exception even to this case, it will be very difficult to remain at this stage for long, and the next step will be a partial or total abolition of the rule against the responsible party's divorce claim.

¹⁵ Supreme Court [S Ct], 2009Mu844, 9 December 2010 (S Kor).

¹⁶ Supreme Court [S Ct], 2010Mu4095, 28 November 2013 (S Kor).

¹⁷ Sunhyung Kwon, 'When the Responsible Spouse's Divorce Claim Allowed [Yuchaegbaeuja-*ui* Ihoncheonggukwoni Injeongdoeneun Kyeongu]', Supreme Court Cases Annotated [Daebeobwonpanlyehaeseol], Vol 85, 703 ff. (2011) (S Kor), which is written based on the report of the research judge for the Supreme Court [S Ct], 2009Mu844, see n 15.

¹⁸ Supreme Court [S Ct], 2010Mu1256 (S Kor).

(ii) Damages for pain and suffering from divorce and criminal punishment of adultery after the breakup

According to arts 840 and 806 of the Civil Code, the divorcing party can sue for damages due to pain and suffering against the responsible spouse,¹⁹ and according to art 241 of the Korean Criminal Code [Hyongbeop], adultery constitutes a crime punishable by imprisonment of up to two years. While all of these considerations do not necessarily necessitate a fault-based divorce law, they have contributed to the current understanding of Korean divorce law. This is because these sanctions have been interpreted to apply even to the cases in which adultery or other infidelity was committed after the marriage had been broken up but not yet legally dissolved. While this interpretation seems to be almost compelling for criminal punishment, it is not necessarily applicable for civil liability, because the damage as a requisite for civil liability is a very flexible concept.²⁰

In an *en banc* decision on 20 November 2014, the Supreme Court ruled that neither the betraying spouse nor the third party who knowingly participated in the act of infidelity ought to compensate the betrayed spouse's pain and suffering if the act of infidelity had been committed after their spousal relationship had already been irretrievably dissolved.²¹ According to the majority opinion, this act does not interfere with the spousal relationship and does not incur the compensatable damage of infringing the spousal right to a spousal relationship, as an already broken-up relationship cannot be further infringed. Three justices' concurring opinion maintained that the rationale of the majority opinion contradicts the criminal punishment of adultery committed even after the breakup. Two justices supported the majority opinion by pointing out that the punishment of adultery should be further limited, at least when it was committed after the breakup. Thus, one of two hurdles preventing the establishment of no-fault divorce law has been lifted.

The Constitutional Court has reviewed the constitutionality of art 241 of the Criminal Code several times, and parts of these cases are still pending. Interestingly, many constitutional justices have become increasingly sceptical of this provision.²² On 20 May 2014, art 47(2) of the Korean Constitutional

¹⁹ Most modern no-fault divorce laws do not adopt damage claims for pain and suffering associated with the divorce, because this might reopen a hidden backdoor for a fault-based divorce law. However, in the Civil Code of 1958, which did not have any provision regarding the division of marital property, this claim could have served for the protection of the party who maintained the household instead of earning an income – usually, the wife.

²⁰ The author proposed that the duty of fidelity between spouses remain untouched even though their marriage had broken up, while the compensatability of the pain and suffering arising from the other spouse's infidelity (so-called 'heart balm action') could be denied. Dongjin Lee, 'Need to Sanction Marital Infidelity after Breakdown of Spousal Relationship? A Comparative Law Perspective [Bubugwan-gye-ui Sasilsang Patan-gwa Bujeonghaengwi-e Daehan Chaegim: Bigyobeobjeop Gochallobuteo-ui Sisa]', *Seoul Law Journal [Seoul daehaggyo Beobhak]*, Vol 54, No 4, 61 (2013) (S Kor).

²¹ Supreme Court [S Ct], 2011Mu2997 (S Kor).

²² Constitutional Court, 89Heonma82, 10 September 1990 (S Kor, only one justice against the punishment of adultery itself, and three justices against punishing by imprisonment and not by

Court Act [Heonbeobjaepansobeop] was revised. While the original version of that provision prescribed that a Constitutional Court's decision declaring a certain criminal punishment unconstitutional should have retroactive effect,²³ the revised version limited the retroactivity to the cases committed after the Constitutional Court's last decision declaring it constitutional was rendered. This revision is said to be exactly the preparation for a decision declaring art 241 of the Criminal Code unconstitutional. The other hurdle is expected to be lifted soon.

(b) Enlarging the scope of marital property division

(i) Division of future retirement benefits and pensions

Article 839-2 of the Civil Code, which has been added by the 1990 revision, prescribes that a divorcing party can file for a division order of the actual marital property, ie all of the properties acquired by either party during their marriage, except those properties donated or bequeathed, irrespective of who the titleholder is. This provision sets the limitation period of the claim as only 2 years from the time of divorce, and does not mention anything about what property is subject to the division process, how the ratio of division is to be determined, and in what way the divided interest is to be transferred to the party. All of these considerations are left within the judge's reasonable discretion or to the development of case law.

As in other jurisdictions, whether and how future retirement benefits and pensions should be divided has been one of the most controversial issues regarding the division of marital property in Korea. Undoubtedly, all of these benefits are 'marital'. The problem is whether these future benefits are 'property' and 'divisible'. The case law has denied their property character and their divisibility for a long time: the value of future retirement benefits and pensions sometimes rests on various factors such as when and for what reason the beneficiary retires, what the terms of the plan are, how successful the trustee's investment has been, etc, so that these might be only contingent claims at the present time. Thus, future retirement benefits can be divided only when the date of retirement and the amount of the benefits have already been fixed. Otherwise, the fact that one spouse is expected to have retirement benefits in the future shall be taken into account only as a factor to raise the division ratio

fine); Constitutional Court, 2006Heonba60, 25 October 2001 (S Kor, even though the majority opinion did not judge the punishment as unconstitutional, they urged that legislators should consider abolition of this provision); Constitutional Court, 2007Heonga17-21, 2008Heonga7-26, 2008Heonba21-47 (S Kor, four justices against the punishment itself, and one justice against punishing by imprisonment and not by fine. It is necessary for a statutory provision to be declared unconstitutional under the Constitutional Court Act if more than five justices agree that it is unconstitutional).

²³ As a result, the case should have been reviewed even if it had reached the final judgment and the punishment had been completed decades previously. Moreover, if the defendant was imprisoned, he or she could be compensated for the false imprisonment. The Constitutional Court must regard all these as not only too burdensome but also improper because this overruling is based on social change of values rather than on the error of the prior judgments.

for the other party and not the value of marital property.²⁴ This approach has been considered to hold true in the case of future pensions, as well.

The problem is that this approach is of little use when the value of the divisible property, with the future retirement benefits or pensions excluded, is so low that even assigning all of the marital property divisible to the latter, ie determining the division ratio as 100:0, does not guarantee a reasonable division. In two *en banc* decisions on 14 July 2014, the Supreme Court overruled this case law:²⁵ though the amount or value of the future retirement benefits or pensions is uncertain, it is still possible to estimate its current value. The value of another receivable, which is undoubtedly a divisible item of property, is also uncertain in the sense that there always remains the possibility of default or insolvency of the debtor. Most importantly, it is sometimes impossible to divide marital property fairly with future retirement benefits or pensions excluded from the division process.

Instead, the *en banc* decision regarding pensions²⁶ allows the division of the future pensions by ordering the beneficiary to pay the other ex-spouse periodically – usually monthly – the amount equivalent to a ‘fixed portion’ of the future pension payment that the beneficiary receives, rather than a fixed amount. This approach has its own merit in that the judge decides only the division ratio and need not estimate the current value of future pensions: the current value of future pensions is especially speculative because it rests on when the pensions end, usually when the beneficiary dies. This approach also has its own shortcoming that the value of marital property division can vary depending on the ex-spouse’s future behaviour or status, which can no longer be attributed to the already divorced claimant.

Contrarily, neither abovementioned decision addresses whether the court can order that some portion of the receivables of the future retirement benefits or pensions be assigned directly to the spouse. The court simply delegates the task of determining a permissible and adequate way of transferring the divided interest to the lower instance judge’s reasonable discretion. This is regrettable because the issue of whether a retirement benefit claim or pension claim is assignable in this situation is highly controversial in Korea. It will be very effective and convenient if the claimant is paid by the trustee and not by the ex-spouse. Even though the Supreme Court did not share this view, it should have revealed its position in order to eliminate legal and practical uncertainty regarding this issue. Article 64 of the Korean National Pension Act [Gugminyeongeumbeop]²⁷ prescribes that half of the pension benefits shall be paid directly to the beneficiary’s ex-spouse when the beneficiary had continued the marriage with the ex-spouse for 5 years or more as an enrollee of the

²⁴ Supreme Court [S Ct], 94Mu1713-1720, 23 May 1995 (S Kor); Supreme Court [S Ct], 98Mu213, 12 June 1998 (S Kor).

²⁵ Supreme Court [S Ct], 2013Mu2250 (S Kor. For future retirement benefits); 2012Mu2888 (S Kor. For future pensions).

²⁶ 2012Mu2888.

²⁷ This Act is basically applied only to those who do not have pensions otherwise.

national pension before their divorce. This kind of legislative reaction, of course with further elaboration, should be extended to other pensions and future retirement benefits. And it is regrettable that the issue of division of future retirement benefits and pensions begins to be resolved by case law and not by legislation even though the necessity of enactment has been pointed out for years.

Note that this overruling does not apply to so-called *new property* such as good will, professional licence ('medical student syndrome'), and other interests that are difficult to quantify. One of the reasons that the Supreme Court relied on in the abovementioned decisions is that receivables of future retirement benefits and pensions are still personal property: they can be seen as existing rights, even if contingent or undue. This reasoning cannot be transferred to new property such as good will or professional licence.²⁸

(ii) Division of marital debt

As there is marital asset, there is marital debt. Korean marriage law adopts the 'separate property system' as a default rule (art 830 of Civil Code), so that the debt-holder shall be usually one of the couple, and the other party shall not assume his or her spouse's (marital) debt *ipso jure* in relation to the third party creditor. As long as a debt is 'marital', however, the burden of it should be shared between the couple. Thus, one party paying marital debt can seek reimbursement or contribution from the other party. Additionally, unpaid marital debts shall be deducted from the value of marital assets in calculating the (net) value of marital property.

The problem arises when the amount of marital debt of both parties combined exceeds the value of the marital assets, ie the balance sheet of their marriage shows a deficit. The case law did not allow any division in this case.²⁹ In an *en banc* decision on 20 June 2013, the Supreme Court overruled this case law:³⁰ when the amount of marital debt exceeds the value of marital assets, the division of debt shall be ordered. This overruling has its own merit: the party who owes marital debt to a third-party creditor in his or her name need not pay before seeking reimbursement or contribution from the other spouse; the debtor can be reimbursed through the marital division process before paying the creditor. Moreover, the debtor can seek this reimbursement or contribution in the division process of marital property in the family court, which is more generous to the plaintiff, especially regarding evidentiary requirements, in comparison with the reimbursement claim process in a civil court.

²⁸ Thus, the only way to take the existence of *new property* into account in the property division process under Korean divorce law is again to raise the division ratio. See Supreme Court [S Ct], 98Mu213, 12 June 1998 (S Kor, for a PhD degree in Economics).

²⁹ Supreme Court [S Ct], 97Mu933, 26 September 1997 (S Kor); Supreme Court [S Ct], 2001Mu718, 4 September 2002 (S Kor).

³⁰ Supreme Court [S Ct], 2010Mu4071-4088 (S Kor).

The decision went further, however. It also declared that the court could order one party to assume the other party's marital debt itself in relation to the creditor, which enables the creditor to sue the other party directly. Of course, this order does not discharge the original debtor by itself, because a discharge of a debt presupposes the consent of the creditor, art 454 of the Civil Code, who is not subject to this order because the creditor is not the party of this procedure. As a result, this order makes the other party an additional debtor for the creditor ('cumulative assumption of debt'). If the creditor agrees to discharge the original debtor, of course, out of the division process of marital property, the assuming debtor becomes the only debtor. The Supreme Court seems to have invented this method of division in order to enable the division of debt when divorcing couples are insolvent, where the money payment order is of no use.³¹ The creditor, however, has little reason to agree to discharge the original debtor once the creditor has an additional debtor by the court order. And in that case, we cannot see any reason why the creditor should have an additional debtor. Thus, this new method of division should be utilised carefully. Fortunately, lower courts addressing debt division cases usually seem to utilise reimbursement payment orders and rarely utilise assumption of debt orders.

(c) Development of joint custody

Article 837 of the Civil Code prescribes that divorcing parties should negotiate who shall have the custody of their child, and in cases when divorcing parties cannot reach an agreement or their agreement is against the best interest of the child, the family court shall decide the custody holder. This provision has been interpreted to presuppose that only one of both parents has custody (and the other has the right to visitation, art 837-2 of the Civil Code). Recently, however, a practice to vest custody to both parents jointly ('joint custody'), if it seems possible and adequate, has emerged in the Seoul Family Court and some other family courts. In two decisions on 13 April 2012, the Supreme Court expressly affirmed that joint custody should be allowed under Korean family law,³² and at the same time limited the applicability of joint custody to cases where the conflicts between parents were not so severe that the success of joint custody could be expected.³³ Korean family law practices seem to be still very cautious in utilising joint custody. The fact that joint custody has been developed by case law without any empirical study regarding the costs and benefits of it in Korean society might explain this hesitation.

³¹ Note that they are not necessarily insolvent even when the balance sheet of their marriage shows a deficit. They might own additional property not included in the marital property.

³² Supreme Court [S Ct], 2011Mu4719 (S Kor).

³³ Supreme Court [S Ct], 2011Mu4665 (S Kor).

III ADOPTION AND PARENTAL RESPONSIBILITY

(a) Control on adoption

(i) *Full adoption by an unmarried adopter*

Korean family law has three modes of adoption: simple adoption (arts 866 to 908 of the Civil Code), full adoption (arts 908–2 to 908–8 of the Civil Code), and adoption according to the Korean Act on Special Cases Concerning Adoption [Ibyangteuglyebeop] (ASCCA). An adoption according to ASCCA is a kind of full adoption (art 14 of ASCCA), applied to cases where the adoptee is ‘a child in need of protection’ in the meaning of the Korean Child Welfare Act [Adongbohobeop] (art 2 of ASCCA) – that is, a child in an orphanage or in similar circumstances.

According to art 908–2(1) of the Civil Code, those who desire full adoption should meet all of the following requirements: (1) adopters should be a couple married to each other for more than 3 years; (2) the adoptee should be a minor; (3) the adoptee’s parents should consent to the full adoption; and (4) the adoptee should consent to the adoption with his or her legal representatives’ – usually parents’ – approval if the adoptee is aged 13 or over; if not, the legal representatives’ consent substitutes for the adoptee’s consent. If these requirements are not met, the family court has no choice but to disapprove the full adoption irrespective of whether that adoption would facilitate the best interest of the child.

Among the listed requirements, the requirement (1) is the most controversial.³⁴ Most of all, it prevents an unmarried single, unmarried cohabiting couples and gay/lesbian couples³⁵ from participating in the full adoption process. In 2009, a medical doctor challenged the constitutionality of this provision. She was a very close friend of the prospective adoptee’s father. Since the father of the prospective adoptee died in 2005, she provided his wife and two children with financial assistance and continued a family-like relationship with them. In 2009, she agreed with the mother and the children that it would be in the best interest of the children for her to adopt the children, so she filed for approval of a full adoption. The Seoul Family Court dismissed the case on 13 November 2009 on the ground that she was unmarried.³⁶ She re-filed for approval of full adoption in 2010,³⁷ and the Seoul Family Court requested a constitutional review of requirement (1) of art 908–2(1) of the Civil Code to the

³⁴ It was already the most controversial provision while it was being drafted. At that time, it was debated whether the requirement of 3 years of marriage was necessary or adequate, because it would create serious inconvenience to the adopter who is the spouse of the adoptee’s parent and wants to adopt the spouse’s child as soon as they get married. Article 908–2(1) 1 of the Civil Code reduces the marriage period from 3 years to one year in this case.

³⁵ Transsexuals can marry, because they can change their legal gender, though under strict requirements. Supreme Court [S Ct], 2004Su42, 22 June 2006 (S Kor).

³⁶ Seoul Family Court, 2009Nudan9821 (S Kor).

³⁷ Seoul Family Court, 2010Nudan9938.

Constitutional Court in 2011.³⁸ The reasons that the Seoul Family Court provided as a ground for requesting a constitutional review were as follows: (1) the provision allows full adoption only to a married couple so that it discriminates against the unmarried person. ASCCA also allows full adoption to an unmarried person; if a full adoption by an unmarried person contradicts the best interest of the adoptee, the family court could refuse to approve it. Thus, there is no compelling reason to forbid this kind of full adoption legislatively. Thus, this provision causes unreasonable discrimination (art 11 of the Korean Constitution [Heonbeop]); (2) an unmarried person has a right to self-determination on adoption. Due to this provision, however, the unmarried individuals who would be good adoptive parents in every aspect would be prevented from full adoption, which is an infringement of the fundamental right to pursue one's own happiness (art 10 of the Constitution).³⁹

The expectation was betrayed. The Constitutional Court ruled that requirement (1) of article 908-2(1) of the Civil Code is constitutional.⁴⁰ Though the majority of constitutional justices – five – were of an opinion that that provision was unconstitutional, the requirement that more than six constitutional justices should be of an opinion that a certain provision was unconstitutional in order to declare it unconstitutional (art 23(2) of the Constitutional Court Act) was not met. The grounds provided by the opinion of the four constitutional justices who held the article to be constitutional are as follows: (1) one of the main functions of full adoption is to enable the adoptive child to be recorded in the family relationship certificate without revealing that the child is an adoptive child and thereby to be publicly shown as a legitimate child, which cannot be fulfilled satisfactorily when the adoptive parent is not married because it would at least indicate the illegitimacy of the child. The adoption process, according to ASCCA, is applied only to 'a child in need of protection' and sets more strict requirements than the Civil Code in some aspects. Both kinds of full adoption cannot be compared directly. Thus, not allowing unmarried people to participate in full adoption according to the Civil Code does not create unreasonable discrimination; (2) not allowing unmarried people to participate in full adoption is for the purpose of promoting the best interest of the adoptive child, which can be a proper purpose of legislation. Even though unmarried individuals also can sometimes be good adoptive parents, they have the alternative of simple adoption.⁴¹ Thus, that provision does not infringe the freedom of family life (art 36 of the Constitution) disproportionately.

³⁸ Seoul Family Court, 2010Zugi1832 (S Kor).

³⁹ Ingu Bae, 'A Critical Review of the Requirement of Full Adoption [Chinyangjajedo Seonglibyogeon-ui Munjejeom-e Gwanhan Sogo]', *Judiciary [Sabeop]*, Vol 21, 233 (2012) (S Kor). The author of the abovementioned article was the presiding judge of the court that requested the constitutional review.

⁴⁰ Constitutional Court, 2011Heonga42, 26 September 2013 (S Kor).

⁴¹ Simple adoption does not require that the adopter be married. It just requires that married couple adopt jointly. See arts 869, 870, and 874 of the Civil Code. It remains open how Korean courts will decide on the applications for approval of single or LGBT's simple adoption of

This reasoning does not seem agreeable, however. The Constitutional Court should have explained why the family court's approval is so insufficient that legislative restriction is inevitable and compelling. The Court does not seem justified in asserting that the legislative restriction pursues its proper purpose and the prospective adopter and adoptee can utilise an alternative – simple adoption. The four justices' understanding of the purpose of full adoption is not correct either. The main purpose of full adoption is to stabilise the rearing of the adoptive child. It has little to do with the issue whether the adoptive child would look like a legitimate biological child of the adoptive parents.

(ii) Adoption of grandchild

A Supreme Court's decision on 24 December 2010 seems to be the only Supreme Court case that has addressed the best interest of the child criteria in adoption law.⁴² In this case, the adoptee's grandparents filed for approval of full adoption, because they wanted their daughter – the adoptee's mother – to live her life without caring about her illegitimate child any longer. Not only the first instance court and the appellate court, but also the Supreme Court did not approve this adoption. The Supreme Court even maintained that the best interest of the child is, of course, the paramount criterion in adoption approval, but it is not the only criterion.

It is regrettable that the courts did not review whether this adoption contradicted the best interest of the child thoroughly based on every detail of the case. Instead, the court merely noted that this adoption would make the adoptee's mother an aunt to her (elder) sisters and the adoptee's grandparents to her parents so that it would harm the family order and family relationship. This kind of adoption is certainly controversial. The most important reason is, however, that it is very hard in this case to prevent the daughter from interfering with rearing of the child after the full adoption so that the purpose or effect of full adoption can be easily frustrated.

(b) Enlarging state intervention in parental responsibility

(i) Rejection of transfusion of baby by the parents and family court's intervention

When parents abuse their parental authority or do not fulfil their parental responsibility, the only reaction conceivable under Korean family law has been full deprivation of parental authority (art 924 of the Civil Code). As this consequence is so severe, this sanction has rarely been imposed and, even when it was imposed, a significant amount of time was required to reach the final judgment. As a result, cases insufficiently severe to deprive parents of their full

minors in view of the best interest of the child (art 867 of Civil Code of 2012). The court's approval requirement of simple adoption was introduced recently, and few cases have provided the criteria for it until now.

⁴² Supreme Court [S Ct], 2010Su151 (S Kor).

authority or that necessitate immediate intervention have actually been neglected for decades. The problem of this regime can be shown by a lower court's decision.

In a Seoul Eastern District Court's decision on 21 October 2010, the parents of a baby, who were Jehovah's Witnesses, rejected surgery that required a blood transfusion, which was essential to save the baby's life.⁴³ The hospital sued for a preliminary injunction to order the parents not to disturb the surgery by the child's doctors, including the blood transfusion. The court ruled for the hospital. The reasons provided by the court are as follows: the baby must have wanted to live if the baby had been conscious, because this is every being's instinct ('presumed consent to medical treatment'); the parents' rejection of the treatment has no effect because it contradicts the best interest of the baby. The abovementioned reasons might be agreeable. This decision, however, does not provide any reason why the hospital can sue, ie the legal basis of the hospital's (or doctor's) standing.⁴⁴ Regarding the doctor's right to treat, this is not a right against the patient, but only against third parties, and this is a right that can be established only when the patient or the patient's representative requests treatment. Even when the patient's consent is presumed, the patient did not actually request medical treatment and could not do so. As it is hard to say that this religious belief is enough to deprive parents of parental authority totally and commence a guardianship proceeding for the baby, they would remain the only persons who could actually request the treatment. It is not persuasive that a hospital or doctor has a right against the only persons who can establish the right itself. While there was an urgent necessity for the court to intervene in this case to save the baby's life, the reasoning provided by the court was not agreeable. In order to address this kind of case, a legislative response was required.

Article 924(1) of the Civil Code, which was revised on 15 October 2014, vests in the family court a power to suspend parental authority, and art 924–2 of the Civil Code, which was enacted by the same revision, enables the limitation of parental authority. In these cases, the family court can appoint a guardian for the minor and have that person address what is required to protect the child – for example, to consent to and request the medical treatment – instead of the parents, when both parents cannot or do not fulfil their parental responsibility (arts 927–2 and 909 of the Civil Code of 2014). This approach is more flexible than the one that the recently revised Japanese Civil Code adopted. All of these amendments are supposed to take effect from 16 October 2015.

⁴³ Seoul Eastern District Court, 2010Kahap2341 (S Kor).

⁴⁴ According to a recent decision on 26 June 2014 (Supreme Court [S Ct], 2009Do14407), a doctor is not criminally punishable for voluntary or involuntary manslaughter when the patient who rejected a blood transfusion died due to the rejection. Thus, it might be said that neither the hospital nor the doctor has its own (private) interest in the blood transfusion of the patient.

(ii) Reaction on child abuse

The Korean Act on the Special Cases Concerning the Punishment, Etc of Crimes of Child Abuse [Adonghagdaebeomjoe-*ui* Cheobeoldeung-e Gwanhan Teuglyebeop] was enacted on 28 January 2014 and was brought into effect on 9 September 2014. This new legislation not only reinforces the punishment of child-abuse-related crimes; it also requires all relevant people, especially teachers in daycares, kindergartens, and schools, to report immediately if they are suspicious of child abuse, and vests policemen and officers of child welfare institutions with a power of emergency intervention. At the same time, it grants prosecutors and judges dealing with child abuse cases discretion to choose probation instead of criminal punishment. All of these developments show the recent trend in Korean family law that state intervention in the parent-child relationship is increasingly reinforced.

IV FAMILIAL SUPPORT

(a) Spousal support reimbursement or indemnity claim of parent who paid medical expenses for the dependant against the wife

For a long time, the familial support reimbursement cases in Korean courts have been confined to those brought by a child – usually represented by the other parent – against a parent, by one parent against the other parent – Korean family law allows both ways – or by the deserted wife against her husband. In a decision on 27 December 2012, the Supreme Court had an opportunity to decide a reimbursement or indemnity case brought by a dependant’s parent against his wife. In that case, the dependant became unconscious in the course of brain surgery and has remained in this state. His mother sued the wife for the reimbursement or indemnity of medical expenses she had paid for the dependant, on the basis that the person responsible for the medical expenses of the dependant should be the wife and not the mother. This is because the wife has a duty to support her husband under spousal support, and medical expenses are included in this support. The appellate court dismissed the mother’s claim, providing the following justification:⁴⁵ the mother is responsible for supporting her son as much as the wife is responsible for supporting her husband; and there is no reason to believe that the former’s duty is subordinate to the latter’s under the Civil Code.

The Supreme Court set aside the appellate court’s decision. It had to provide a justification, because arts 976 and 977 of the Civil Code indicated that there was no predetermined order among those responsible for familial support, and that it is the family court’s responsibility to decide in a specific case who is or are responsible and to what extent they are responsible. The Supreme Court adopted the so-called doctrine of ‘dichotomy of familial support’ in this

⁴⁵ Supreme Court [S Ct], 2011Da96932 (S Kor).

decision, which differentiates the support between spouses and that of a minor child by his or her parents, ie spousal and child support ('first degree support') from the support among other relatives ('second degree support'). While the conclusion of this decision seems agreeable, the reasoning behind it, especially the adoption of the doctrine of dichotomy of support, is not necessarily so. The important thing here is, however, this dichotomy: once expressly adopted by the Supreme Court, it is expected to influence future solutions to various issues concerning familial support.

(b) Introduction of advance payment of child support by the state

One of the defects of Korean support law has been that familial, ie private, support has played too significant a role, and public support has played too minor a role. One of the reasons is that Korean social security law usually requires as a condition for eligibility for public support that there remains nobody responsible for support of the dependant – it is not sufficient that the one who is responsible does not fulfil his or her responsibility and it is very difficult to enforce the dependant's claim by civil litigation. As private support was hard to enforce, this regime produced serious loopholes in protection of the dependant. Thus, proposals have been made to establish a special agency for supporting the dependant and to introduce a system in which the state provides support in advance ('advance payment') before it subrogates the dependant's support claim.⁴⁶ The Korean Act on the Guarantee and Support of the Performance of the Child Support [Yangyugbi Ihaenghwagbo Mit Jiwone Gwanhan Beoblyul], enacted on 24 March 2014 and brought into effect on 25 March 2015, introduced this advance payment system for children, though to a limited extent, into Korean law and established a special agency to support this and other processes regarding the performance and enforcement of child support.

V CONCLUSION

Korean family law is changing more rapidly than ever. Legislators, the Supreme Court, and – though some of the results have been disappointing – also the Constitutional Court, have all contributed to these changes, demonstrating a dynamic process. One thing notable is that legislators have played a significant role in reforming the law regarding parent-child relationships whereas it has been the courts that have played a role in reforming the law regarding marriage and divorce or spousal relationships. It is not a new phenomenon at all. Legislators have shown a tendency to be involved in promoting child protection eagerly, which is politically popular and less controversial these days, and have shown some reluctance in being involved in rearranging spousal relationships,

⁴⁶ Jinsu Yune, above n 7, at 261.

which is politically more controversial and not so popular. Courts intervene to make a breakthrough, when they think legislative action cannot be waited for any longer.

The orientation of all these changes seems to be clear, though: to liberalise marriage and divorce, to reinforce state control and intervention with the parent-child relationship, and to re-establish a balance between private and public support. Many of these changes have not been completed yet, of course. While this orientation is almost the same as that of the development of family law in other jurisdictions, the route of the development has some different aspects. If the former reflects the universality of family law, the latter might show the singularity of each legal or social process.

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MAURITIUS

PROTECTION ORDERS UNDER THE MAURITIAN PROTECTION FROM VIOLENCE ACT

*Jamil Ddamulira Mujuzi**

Résumé

En 1997 l'Assemblée Nationale Mauricienne a adopté la Loi de protection contre les violences domestiques. Une des ordonnances prévues dans la loi pour prévenir, combattre ou traiter des effets de la violence domestique est l'ordonnance de protection. Les autres ordonnances sont les ordonnances d'occupation et de location. Depuis que cette loi est entrée en vigueur, les Cours ont rendu plusieurs arrêts relatifs à des ordonnances de protection. Le but de ce chapitre est d'examiner ces jugements et de discuter des questions suivantes : les motifs précis pour une ordonnance; la relation entre une ordonnance de protection et une ordonnance d'occupation; le non-respect d'une ordonnance de protection; l'abus d'une ordonnance de protection; la durée d'une ordonnance de protection; et la preuve de la violence domestique. L'auteur traite tout d'abord de la définition de la violence domestique avant de discuter des autres questions.

I INTRODUCTION

In 1997 the Mauritian National Assembly passed the Protection from Domestic Violence Act ('the Act').¹ The purpose of the Act is to address the problem of domestic violence. In *Police v Vijay Mahadoo*² the Court held that 'domestic violence can take many forms, it is impossible to assess the extent of such conduct but there seems little doubt that it is widespread'.³ International human rights bodies such as the Committee against Torture,⁴ the Committee on the Elimination of All Forms of Discrimination against Women⁵ and the

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¹ Act 6 of 1997.

² *Police v Vijay Mahadoo* 2010 BMB 56.

³ *Police v Vijay Mahadoo* 2010 BMB 56, p 4.

⁴ Concluding observations of the Committee against Torture on the third periodic report of Mauritius, CAT/C/MUS/CO/3, 15 June 2011, para 16.

⁵ Concluding observations of the Human Rights Committee on the fourth periodic report of Mauritius, CCPR/CO/83/MUS 27 April 2005, para 10.

Human Rights Committee,⁶ have called upon Mauritius to put in place effective measures to combat domestic violence. One of the orders provided for in the Act to prevent, combat or deal with the effects of domestic violence is that of protection orders. Other orders are occupation⁷ and tenancy orders.⁸ Case law from Mauritian courts shows that the acts of domestic violence include pulling the complainant's hair,⁹ changing door locks and insulting the complainant in front of her children,¹⁰ insulting the complainant face to face¹¹ or over the phone,¹² slicing victim's chest with a cutter,¹³ assault,¹⁴ and intimidating and threatening the complainant.¹⁵ Case law also shows that the victims of domestic violence have included the accused's or perpetrator's ex-concubine,¹⁶ former husband,¹⁷ mother-in-law assaulting daughter-in-law,¹⁸ mother-in-law,¹⁹ husband,²⁰ wife,²¹ the accused's brother,²² accused's sister,²³ accused's mother,²⁴ accused's father in law,²⁵ and accused's father.²⁶ The role of the police in fighting domestic violence is also highlighted in some cases. There are cases

⁶ Concluding comments of the Committee on the Elimination of Discrimination against Women on the combined third, fourth and fifth periodic report of Mauritius, CEDAW/C/MAR/CO/5, 25 August 2006, 19; Concluding comments of the Committee on the Elimination of Discrimination against Women on the combined sixth and seventh periodic reports of Mauritius, CEDAW/C/MUS/CO/6-7, para 21.

⁷ Section 4(1) provides that '(1) Any person who has been the victim of an act of domestic violence and who reasonably believes that his spouse is likely to commit any further act of domestic violence against him, may apply to the Court ... for an occupation order granting him the exclusive right to live in the residence belonging to him, the respondent spouse or both of them.' See subsections 2–8 for details on occupation orders.

⁸ Section 5(1) provides that '(1) Any spouse who has been the victim of an act of domestic violence and who reasonably believes that his spouse is likely to commit any further act of domestic violence against him, may apply to the Court ... for a tenancy order so that the tenancy of the residence occupied by him should vest in him.' See subsections 2–8 for details on tenancy orders.

⁹ *Police v Anil Purrmessur* 2011 LPW 69.

¹⁰ *Police v Anand Nithoo* 2011 LPW 78, 2.

¹¹ *Verloppe Marie Sabrina v Verloppe Jean Marc Steeve* 2008 LPW 404; *L'etang Marie Leone Jeanne v L'etang Marjolene* 2007 LPW 177; *Police v Kowlessur Amitanand* 2014 LPW 238; *Rose Shirley v Rose Desire* 2009 LPW 124.

¹² *Police v Woodallee Mohamad Reaz* 2008 LPW 286.

¹³ *Police v Etienne* MO 2014 PMP 399, p 2.

¹⁴ *Jugroop Bedwantee v Jugroop Bassantee* 2009 LPW 221; *Dabbadie Beverley v Dabbadie Jacques Percy G* 2009 MBG 93; *Police v Ramcurn Janmajay* 2007 PMP 72.

¹⁵ *Police v Orange Louis Philippe* 2009 MBG 168.

¹⁶ *Police v Anil Purrmessur* 2011 LPW 69; *Police v Jokenson Leopold* 2013 PMP 45.

¹⁷ *Police v Anand Nithoo* 2011 LPW 78.

¹⁸ *L'etang Marie Leone Jeanne v L'etang Marjolene* 2007 LPW 177.

¹⁹ *Jugroop Bedwantee v Jugroop Bassantee* 2009 LPW 221.

²⁰ *Police v Etienne* MO 2014 PMP 399; *Police v Dhunmoo Deviani* 2013 MOK 4.

²¹ *Police v Kowlessur Amitanand* 2014 LPW 238; *Dulbhujun Fasila v Dulbhujun Satrageet* 2006 PMP 2; *Bundhoo Swaleha v Bundhoo Reaz* 2006 LPW 6; *Police v Woodallee Mohamad Reaz* 2008 LPW 286; *Police v Ramcurn Janmajay* 2007 PMP 72; *Rose Shirley v Rose Desire* 2009 LPW 124.

²² *Police v Rouben Edley Ramsamy* 2010 LPW 78.

²³ *Police v Manette Marie Michel Patrick* 2013 LPW 90; *Police v Mohun Shirin* 2007 PMP 47.

²⁴ *Police v Munigadu Satyanand* 2014 PMP 235; *Police v Sobhun Mohamad Nasser* 2008 LPW 411; *Police v Beekye Goorooduth* 2007 LPW 34.

²⁵ *Police v Seegoolam Phoolmatee* 2007 PMP 59.

²⁶ *Police v Ramasaumy Raj & Anor* 2007 RDR 51.

where the victims called the police to the house to assist her²⁷ and cases where the victims chose not to report an act of domestic violence to the police because he did not want to leave his concubine and child alone,²⁸ or ‘in the interest of the children’²⁹ or because she did not want the police to get involved.³⁰ In one case where the victim was assaulted by her spouse and reported the matter to the police, the police asked her to withdraw the charge against the perpetrator.³¹ In one case a victim called the police to her house and the police informed her that there were no vehicles available to come to her assistance and she had to walk to the police station.³² Sometimes the victims do not give reasons why they did not report domestic violence cases to the police.³³ In *Sadasing K v R Sadasing*³⁴ the Supreme Court held that:³⁵

‘As for the allegation that Respondent was often beaten up, there was no evidence of any declaration made to the police, but it is quite understandable that a woman may not wish to avail herself of the rights to complain to a District Magistrate under the Protection from Domestic Violence Act. It seems that for her own sake and for the sake of the children she is prepared to resume conjugal life.’

Sometimes the facts of the case are silent on the relationship between the accused and the complainant.³⁶ The purpose of this chapter is to discuss the issues that are emerging from case law on the issue of protection orders. However, before I deal with protection orders, it is necessary to deal first with the definition of domestic violence in the Act.

II DEFINITION OF DOMESTIC VIOLENCE

Section 2 of the Act defines ‘domestic violence’ to include

‘any of the following acts committed by a person against his spouse, a child of his spouse or another person living under the same roof – (a) wilfully causing or attempting to cause physical injury; (b) wilfully or knowingly placing or attempting to place the spouse or the other person in fear of physical injury to himself or to one of his children; (c) intimidation, harassment, ill-treatment, brutality or cruelty; (d) compelling the spouse or the other person by force or threat to engage in any conduct or act, sexual or otherwise, from which the spouse or the other person has the right to abstain; (e) confining or detaining the spouse or the other person against his will; (f) harming a child of the spouse; (g) causing

²⁷ *L'etang Marie Leone Jeanne v L'etang Marjolene* 2007 LPW 177.

²⁸ *M v M* 1999 SCJ 21.

²⁹ *Beguilot Cindy Sharon Dominique v Beguilot Paul Livio Michel* 2009 LPW 103, p 1.

³⁰ *Ramayya v AUndee* 2014 LPW 174.

³¹ *Police v Gopaul Marie Brigitte* 2010 LPW 98.

³² *Dabbadie Beverley v Dabbadie Jacques Percy G* 2009 MBG 93.

³³ *B v B* 1999 SCJ 186, p 2.

³⁴ *Sadasing K v R Sadasing* 1999 SCJ 387.

³⁵ *Sadasing K v R Sadasing* 1999 SCJ 387, p 3.

³⁶ *Police v Lollchand Dan* 2009 RDR 107; *Police v Dharmalingum Chinapyyel* 2008 FLQ 88; *Police v Bholah Kaviraj* 2011 PMP 21.

or attempting to cause damage to the spouse's or the other person's property; (h) threatening to commit any act mentioned in paragraphs (a) to (g).'

The above definition is exclusive to the Domestic Violence Act and is not applicable to other pieces of legislation.³⁷ In *Owadally F v Owadally F*³⁸ the Supreme Court referred to s 2 of the Act and held that '[d]omestic violence is given a meaning which is inclusive rather than exclusive'.³⁹ In *Police v Vijay Mahadoo* the Court held that⁴⁰

'Section 2 of the Protection from Domestic Violence Act does not give a particular definition to the word "domestic violence" but broadly sets out the different acts committed by a person against his spouse or child, which would be encompassed by such term and which indeed can take many forms. It is not limited to the use or threat of physical force but concerned with other forms of physical, sexual or psychological molestation or harassment and would include any form of verbal abuse.'

In the light of s 2, an act of domestic violence cannot be committed against a person who does not live under the same roof as the perpetrator. In *Ramphul Soobitha v Ramphul Jaya*⁴¹ the Court had to define what amounts to living under the same roof. The Court observed:⁴²

'Since the legislator has not defined the phrase "living under the same roof", we have to see what is the natural and ordinary meaning of the phrase. The natural and ordinary meaning would be one which the normal speaker of English would ascribe to the words in their context. Now, Counsel for Respondent submitted that the normal speaker of English would purportedly understand "living under the same roof" to mean "living under the same cast of slab". However, when put in context, this natural and ordinary meaning falls short of the general legislative purpose underlying the particular provision in the Act. Hence the context in which a word or phrase is used takes all its importance and it involves the policy and rationale of the particular Act.'

The Court concluded:⁴³

'We now come to the next question, that is, what was the general legislative purpose when the Act was enacted by Parliament in 2004? The intention of the legislator becomes clear when we compare the Protection From Domestic Violence

³⁷ In *Henriksen C v The State* 2012 SCJ 271, one of the issues was whether s 2 of the Act is applicable to the definition of violence under s 240 of the Criminal Code. The Supreme Court held that 'The Protection from Domestic Violence Act ... is a legislation which has been enacted to afford protection against domestic violence and the interpretation of violence in its section 2 is expressly limited to the Act itself and was neither expressly nor implicitly extended to cover the definition of "coups ou violences graves" under section 240 of the Criminal Code.' See pp 6-7.

³⁸ *Owadally F v Owadally F* 2013 SCJ 54.

³⁹ *Owadally F v Owadally F* 2013 SCJ 54, para 5.

⁴⁰ *Police v Vijay Mahadoo* 2010 BMB 56, p 4.

⁴¹ *Ramphul Soobitha v Ramphul Jaya* 2007 RDR 50.

⁴² *Ramphul Soobitha v Ramphul Jaya* 2007 RDR 50, p 2.

⁴³ *Ramphul Soobitha v Ramphul Jaya* 2007 RDR 50, pp 2-3.

Act 1997 with the Protection From Domestic Violence Act 2004. The 2004 Act, which repealed and replaced the 1997 Act, made it possible for persons other than spouses to apply for a protection order. The only condition attached, however, is that they must be living under the same roof. Hence, we note that the 2004 Act tried to capture all the acts of domestic violence which usually occur in the Mauritian context, whereby such acts are perpetrated by not only spouses but by in laws and relatives other than spouses as well. In many cases the authors of such acts do not live “under the same cast of slab” as their victims. In such circumstances, ascribing the natural and ordinary meaning to the phrase “living under the same roof” used in the 2004 Act as meaning “living under the same cast of slab” would therefore defeat the whole purpose for which that provision had been enacted in 2004. The more so since even if the victims of domestic violence in general do not live under the same cast of slab as the authors of such violence, the former may still fear for their security whereby the latter live in the same building and the danger may well be present. In light of the above, therefore the only possible meaning of the phrase, having regard to the intention of the legislator, cannot be but “living in the same building”, which building may well consist of different floors.’

The above reasoning does not seem to be in line with an earlier Supreme Court decision in *Ah Ling Kyan Tye v Jacqueline Antoine*⁴⁴ in which the Court held that ‘[t]he Act does not define the word “lives”. Therefore the word has to be given its ordinary dictionary meaning’.⁴⁵ The Court referred to an English dictionary and held that ‘[t]he natural meaning of the word “live” is to abide or reside with some degree of permanency, or for an indefinite period’.⁴⁶ In the Court’s opinion, a degree of permanency is required for a person to be said to be living with another person. In the light of above two different interpretations, it is the author’s view that the Supreme Court’s decision takes precedence because it is the highest court in Mauritius and its judgments bind lower courts.

For the court to find that an act of domestic violence has been committed, the perpetrator and the victim do not have to live in the same room. What matters is that they share a roof⁴⁷ or ‘live in different houses found in the same yard’.⁴⁸ However, in *Owadally F v Owadally F*⁴⁹ the Supreme Court appears to suggest that, in the case of spouses who have separated as opposed to being divorced, s 2 is applicable even if they are not living together.⁵⁰ In my opinion the Supreme Court’s interpretation is not supported by the wording of s 2. However, there is case law to the effect that, even if both parties live separately

⁴⁴ *Ah Ling Kyan Tye v Jacqueline Antoine* 1999 SCJ 77.

⁴⁵ *Ah Ling Kyan Tye v Jacqueline Antoine* 1999 SCJ 77, p 4.

⁴⁶ *Ah Ling Kyan Tye v Jacqueline Antoine* 1999 SCJ 77, p 4.

⁴⁷ *Bundhoo Swaleha v Bundhoo Reaz* 2006 LPW 6; *Appigadoo Anushka v Appigadoo Vishnu* 2008 LPW 121.

⁴⁸ *Police v Toulouse Joseph Jacques Desire Laval* 2007 BMB 53, p 1. However, in *Police v Munigadu Satyanand* 2014 PMP 235 the accused argued that he no longer lived in the same house as the complainant but the court did not investigate that matter and convicted of violating a protection order.

⁴⁹ *Owadally F v Owadally F* 2013 SCJ 54, para 7.

⁵⁰ This is also the view taken in *Veerapen Poospavadee v Veerapen Soopaya* 2010 MOK 28.

but the perpetrator often comes to the complainant's house, a protection order will be granted.⁵¹ It is argued that even in these cases courts are stretching the limits of s 2, to ensure that they protect victims of domestic violence. In effect, courts are sending a message to the legislators that the definition may have to be revisited. It is argued that the definition of domestic violence in s 2 is very restrictive at least in two ways. First, it excludes people who do not share a roof with the perpetrator even. Secondly, it leaves out some acts or omissions which have been classified as domestic violence in other jurisdictions, such as, economic abuse, and emotional, verbal or psychological abuse.⁵² It is argued that a more progressive approach would have been to also include a definition of a domestic relationship and give it a wide interpretation to include people who are closely related to the perpetrator, for example, by way of marriage or recent marriage but who do not live under the same roof as the perpetrator. This would have enabled the drafters of the Act to include acts such as financial abuse which may be committed against a person who is dependent on the perpetrator financially but who does not share the same roof as the perpetrator. This is an approach that has been taken in domestic violence legislation in countries such as Namibia,⁵³ Uganda,⁵⁴ Kenya⁵⁵ and South Africa.⁵⁶ Although the definition of domestic violence is limited to people who live under the same roof as the perpetrator, the act itself does not have to be committed in the house or residence that perpetrator shares with the victim. Case law shows that courts have found the accused to have breached protection orders for acts that they committed in places other than the residence they share with the victim, such as, in a hair shop⁵⁷ and at a bus stop.⁵⁸ It is imperative to deal with the issue of protection orders in the next section.

III PROTECTION ORDERS

Protection orders are governed by s 3 of the Act.⁵⁹ Section 3(1) provides:

‘(1) Any person who has been the victim of an act of domestic violence and who reasonably believes that his spouse is likely to commit any further act of domestic violence against him, may apply to the Court ... for a protection order restraining the respondent spouse from engaging in any conduct which may constitute an act of domestic violence and ordering him to be of good behaviour towards the applicant.

⁵¹ See, for example, *Verloppe Marie Sabrina v Verloppe Jean Marc Steeve* 2008 LPW 404; *Ecumoir v Ecumoir* 2011 UPW 11 (husband and wife had been living separately for 10 years).

⁵² See, for example, s 2 of the Namibian Domestic Violence Act.

⁵³ Section 2 of the Combating of Domestic Violence Act.

⁵⁴ Section 2 of the Domestic Violence Act, 2010.

⁵⁵ See clause 2 of the Protection against Domestic Violence Bill, 2012.

⁵⁶ See s 2 of the Domestic Violence Act, 1998.

⁵⁷ *Police v Anil Purmessur* 2011 LPW 69.

⁵⁸ *Ramsurrun Auma Devi v Ramsurrun Rajesh Bidiaburat* 2009 LPW 87.

⁵⁹ *Ramjaun AH v NB Ramjaun* 1999 SCJ 357 the Supreme Court dismissed the applicant's argument that s 3 was unconstitutional for violating his right to be heard before an independent and impartial court.

(2) On an application being made for a protection order, the Court shall cause notice thereof to be served on the respondent spouse who shall further be summoned to appear before Court on such day as may be fixed by the Court (not later than 14 days of the date of the application) to show cause why the order applied for should not be made.'

Section 3(4) provides for the factors that the court should consider in determining an application for a protection order:

- (a) the need to ensure that the aggrieved spouse is protected from domestic violence;
- (b) the welfare of any child affected or likely to be affected, by the respondent spouse's conduct;
- (c) the accommodation needs of the aggrieved spouse, his children as well as those of the respondent and his children;
- (d) any hardship that may be caused to the respondent spouse or to any of his children as a result of the making of the order;
- (e) any other matter which the Court may consider relevant.'

It is clear that the list of the factors that a court is required to consider in determining an application for a protection order is not exhaustive. Apart from the above four factors, the court is also empowered to consider any other matter which it may consider relevant. Section 3(5) empowers the court which has issued a protection order to impose conditions that will prevent the perpetrator from committing acts of domestic violence against the victim again. These include prohibiting the respondent from: being on premises occupied by the applicant; contacting, harassing, threatening or intimidating the applicant; approaching the applicant; damaging the property of the applicant; and causing another person to engage in the above prohibited conduct. Under s 3(6) of the Act, a protection order and an order made under s 3(5) shall not exceed a period of 24 months. Section 3(7) provides for the circumstances in which a protection order may be varied or revoked. Under s 3(8) a court may issue an interim protection order if it is 'satisfied that there is a serious risk of harm being caused to the applicant before the application may be heard and that the circumstances revealed in the application are such as to warrant the intervention of the Court even before the respondent spouse is heard'. Where an interim protection order is issued, s 3(9) obliges a court clerk to take steps to ensure that a copy of the same is served on the respondent immediately. The protection order governed by s 3 relates to spouses whether or not they live under the same roof and to other people who do not live under the same roof as the perpetrator. Section 3A of the Act provides for protection orders of people who live under the same roof. It is to the effect that

'(1) Any person who has been the victim of an act of domestic violence by a person, other than his spouse, living under the same roof, and who reasonably believes that that person is likely to commit any further act of domestic violence against him, may apply to the Court ... for a protection order restraining that person from engaging in any conduct which may constitute an act of domestic violence and ordering him to be of good behaviour towards the applicant.

(2) Where an application for a protection order is made under subsection (1), the Court shall cause a notice of the application to be served on the respondent ordering him to appear before the Court on such day as may be specified in the notice, and which shall not be later than 14 days from the date of the application, to show cause why the order applied for should not be made.’

Section 3A(3)–(9) reproduces the same relevant provisions discussed under s 3 above and therefore will not be repeated here. However, one of the most important aspects to note about ss 3 and 3A is that, for a person to apply for a protection order, he or she must have been a domestic violence victim first. Both sections state that, for a person to apply for a protection order, he or she must have ‘been the victim of an act of domestic violence’ and that he must ‘reasonably believe[] that that person is likely to commit any further act of domestic violence against him’. In other words, a person who has not suffered domestic violence, although knowing that he or she is likely to suffer domestic violence, does not qualify to apply for a protection order.

Secondly, a person who has been a victim of domestic violence but does not ‘reasonably believe’ that perpetrator ‘is likely to commit any further act of domestic violence against him’ does not qualify to apply for a protection order. In one case the Supreme Court held that the victim was entitled to a protection order because ‘evidence that the likelihood of violence recurring by the appellant, both physical and verbal, was real’.⁶⁰ In *Takah Vijantee v Takah Randhir*⁶¹ in dismissing the applicant’s application for a protection order, the Court held, inter alia, that it was not ‘satisfied ... that the Applicant had on the said day/s suffered from any act/s of domestic violence at the hands of the Respondent and does not find that there any valid reason to apprehend such acts in the future’.⁶² The effect of ss 3 and 3A is that to qualify for a protection order the person must prove two things: the person has been a victim of domestic violence and reasonably believes that the perpetrator may commit another act of domestic violence against him or her. It is also important to note that the belief in question must be reasonable. Merely believing that you are likely to suffer another act of domestic violence from the perpetrator is not enough. Case law shows that an application for a protection order will not be dismissed on a mere technicality. Otherwise this would defeat the object of the Act which is to protect people against domestic violence.⁶³ Both spouses may be granted protection orders against one another. In other words, a wife may be granted a protection order against her husband and the same husband may be

⁶⁰ *B v B* 1999 SCJ 186, p 3.

⁶¹ *Takah Vijantee v Takah Randhir* 2006 UPW 44.

⁶² *Takah Vijantee v Takah Randhir* 2006 UPW 44, p 2.

⁶³ *Dabbadie Beverley v Dabbadie Jacques Percy Georgie* 2008 MBG 212; *Akaloo Yajna Samidha v Akaloo Navneet Akaloo* 2010 UPW 4; *Virgimie Roseeawon v Vedanand Roseeawon* 2010 LPW 81.

granted a protection order against his wife.⁶⁴ A protection order will not be granted against the respondent if there is a judge's order granting him the right to visit his child.⁶⁵

Another aspect to note about ss 3 and 3A is that it is the victim himself or herself who must apply for a protection order. Under s 11(4) '[a]n Enforcement Officer may, with the consent of an aggrieved spouse, file on his behalf an application for an interim or permanent protection ... order and shall to that effect swear an affidavit reciting the facts on which he relies to make the application on behalf of the aggrieved spouse'.⁶⁶ This means that, if the victim is, for whatever reason, unwilling or unable to apply for a protection order, a court will not grant a protection order. However, an enforcement officer may apply for protection order on behalf of the victim who consents to this. Either way, the consent of the victim is required. It is argued that this provision is very restrictive. Mauritius may consider adopting the approach that was adopted in the Namibian domestic violence legislation. Section 4(2) of the Namibian Combating of Domestic Violence Act⁶⁷ provides that '[n]otwithstanding any other law, an application may be brought on behalf of a complainant by any other person who has an interest in the well-being of the complainant, including but not limited to a family member, a police officer, a social worker, a health care provider, a teacher, traditional leader, religious leader or an employer'. Section 10(1) of the Ugandan Domestic Violence Act⁶⁸ provides that '[a] victim or a representative of the victim may apply to magistrates' court for a protection order'. Since the commencement of the Protection from Domestic Violence Act, courts have developed jurisprudence relating to ss 3 and 3A. Below I will discuss that jurisprudence.

(a) The relationship between a protection order and an occupation order

As mentioned earlier, one of the orders that a court may make under the Act is the occupation order. Occupation orders are governed by s 4 of the Act. Section 4(1) provides:

'Any person who has been the victim of an act of domestic violence and who reasonably believes that his spouse is likely to commit any further act of domestic violence against him, may apply to the Court ... for an occupation order granting him the exclusive right to live in the residence belonging to him, the respondent spouse or both of them.'

⁶⁴ *Police v Dowlut Yazid* 2013 LPW 2; *Police v Isseljee Bibi Noorjahan* 2008 PL3 26; *Police v Isseljee Mohammad Eshan* 2008 PL3 25; *Police v Gopaul Marie Brigitte* 2010 LPW 98; *Police v Chundunsing D* 2014 PMP 143; *Police v Boff Serge* 2008 MOK 52.

⁶⁵ *Tuffigo Isabelle v Annoua Martial* 2007 RDR 69.

⁶⁶ Section 2 of the Act defines an enforcement officer as 'any officer of the Ministry of Women, Family Welfare and Child Development, authorised by the Minister to act as enforcement officer and any police officer'.

⁶⁷ Combating of Domestic Violence Act, No 4 of 2003.

⁶⁸ Domestic Violence Act, 2010.

The question that arises is whether a person who has not been granted a protection order may apply for an occupation order. In other words, is a protection order a prerequisite for an occupation order? In *Bauda Marie Marianne v Jean Gervaise Desire*,⁶⁹ the applicant, who was represented by a lawyer, applied for an occupation order on the ground that the respondent, her former husband with whom she shared a house, had ‘on several occasions physically threatened and verbally abused both applicant and their two daughters’.⁷⁰ In dismissing the application, the court held, inter alia, that the ‘applicant has stated that she has been threatened since her divorce in October 2006. There is no evidence from the applicant as to whether she has applied for a protection order to support the averment’.⁷¹ It is argued that s 4 does not make it a prerequisite that for a person to be granted an occupation order to have a protection order. However, it is logical that, before applying for an occupation order, a person must prove that he or she has been a victim of domestic violence and one of the ways through which this could be proved is to apply for a protection order. However, a protection order is not the only proof that a person has been subjected to domestic violence. The victim may prefer to lay an assault charge against the accused and evidence is adduced during the trial to show that the victim has been subjected to domestic violence. A court may issue a protection order and an occupation order simultaneously. However, before it issues an occupation order, it has to be satisfied that the applicant is a victim of domestic violence.⁷² A protection order does not have to expire on the same day as an occupation order. An occupation order may expire before a protection order.⁷³ In this case the accused will be allowed to stay in the same house as the complainant.

(b) Failure to comply with a protection order

Section 13(1) of the Act provides that ‘[a]ny person who wilfully fails to comply with any interim order, protection order ... made under this Act shall commit an offence’. A person found guilty of breaching a protection order is liable to pay a fine or to be sentenced to prison for a period not exceeding 2 years. To be convicted of wilfully failing to comply with a protection order, the prosecution must prove that a person ‘was aware that there was a protection order in force at the material time’.⁷⁴ In *Police v Dody Danand*⁷⁵ the Court referred to s 13(1) of the Act and held that ‘[w]ilfulness requires basic *mens rea* in the sense of either intention or recklessness ... [O]ne of the essential elements of the offence charged, reflected in the word “wilfully”, is the knowledge by the accused of

⁶⁹ *Bauda Marie Marianne v Jean Gervaise Desire* 2008 LPW 122.

⁷⁰ *Bauda Marie Marianne v Jean Gervaise Desire* 2008 LPW 122, p 1.

⁷¹ *Bauda Marie Marianne v Jean Gervaise Desire* 2008 LPW 122, p 2.

⁷² *Dulbhujun Fasila v Dulbhujun Satrageet* 2006 PMP 2. In this case a protection order and an occupation order were issued simultaneously.

⁷³ *Police v Roopun Heyman* 2009 BMB 59.

⁷⁴ *Police v Mudon I* 2011 FLQ 54, p 3. Emphasis in original. See also *Police v Veerasoo Ramanah* 2008 RDR 114, p 2.

⁷⁵ *Police v Dody Danand* 2014 PMP 128.

the protection order issued against him'.⁷⁶ If it is alleged that the accused wilfully failed to comply with a protection order, the prosecution must prove beyond reasonable doubt that the accused was aware of the existence of a protection order against him.⁷⁷

Ways of proving that the accused was aware of the existence of a protection order include leading evidence to show that 'there was an usher's return ... whereby the accused was served personally with a copy of the complainant's affidavit and interim protection order summoning him to attend Court';⁷⁸ that the protection order was granted to the complainant in the presence of the accused;⁷⁹ the accused has been issued with a copy of the protection order (by the court usher);⁸⁰ or the accused admits that he was aware of the protection order against him.⁸¹ Leaving a copy of the protection order with an adult person who lives in the same house as the accused is not the same thing as serving the protection order on the accused and the accused will be taken not to be aware of the existence of a protection order.⁸² The fact that the complainant left a copy of the protection order on the kitchen table, and the accused went to the kitchen, is not evidence that he is aware of the protection order against him.⁸³ The fact that the relationship between the accused and the complainant is not correctly reflected in the protection order does not invalidate the protection order.⁸⁴

⁷⁶ *Police v Dody Danand* 2014 PMP 128, para 3.2.

⁷⁷ *Police v Dody Danand* 2014 PMP 128, para 4.1.1.

⁷⁸ *Police v Veerasoo Ramanah* 2008 RDR 114, p 2. In *Police v Moonesawmy Seevadarsen* 2009 RDR 125, the court in acquitting the accused of the charge of wilfully breaching a protection order, held, inter alia, that 'There is nothing on record to suggest that the accused was aware that, at the material time, the declarant was covered by a protection order. No personal service was effected on him. Further the prosecution has failed to establish that the accused was present in court on 05/06/08 when the interim protection order was extended to 12/06/08.' See p 2. See also *Police v Dody Danand* 2014 PMP 128 where the Court held that 'No evidence was ushered in to establish that the protection order was brought to the knowledge of the accused or that he was in any manner whatsoever aware that a protection order had been issued against him.' See para 4.1.3.

⁷⁹ *Police v Munigadu Satyanand* 2014 PMP 235, p 2; *Police v Neeliah R* 2007 FLQ 40, p 1; *Police v Neeliah A* 2007 FLQ 39, p 1; *Police v Raja Sanjai Sunil Nagawa* 2011 FLQ 55, p 2; *Police v Louis Jacques Minerve* 2010 BMB 88, p 1; *Police v Bhugun M* 2009 PL2 7, p 1.

⁸⁰ *Police v Orange Louis Philippe* 2009 MBG 168; *Police v Callea Shri Robeen* 2007 LPW 187; *Police v Beekye Goorooduth* 2007 LPW 34.

⁸¹ *Police v Legris Jean Claude* 2007 LPW 98, p 1; *Police v Isseljee Bibi Noorjahan* 2008 PL3 26; *Police v Chundusing D* 2014 PMP 143, p 2; *Police v Chekhorji Dhiraj* 2008 RDR 25, p 1; *Police v Chedumbrum* 2013 UPW 63, p 2.

⁸² *Police v Dabbadie Jacques Percy Georgy* 2009 MBG 61. A copy of the protection was left with the accused's mother in law.

⁸³ *Police v Boff Serge* 2008 MOK 52, p 2.

⁸⁴ In *Police v Beekye Goorooduth* 2007 LPW 34 the Court observed that 'the protection order issued orders the accused to be of good behaviour towards his spouse, one Geeta Beekye, whilst it is abundantly clear from the record that Geeta Beekye is the mother and not the spouse of the accused. Given that the accused was well aware against whom he should refrain from engaging in any conduct which may constitute domestic violence, I find that the above flaw in the order is not such as to vitiate the validity of the same.' See p 2.

For an accused to be convicted of an offence under s 13, it must also be proved that he 'knew the meaning of a protection order and he was aware of the consequences of a breach of the said order'.⁸⁵ Sometimes courts state that the accused was aware of the existence of a protection order against someone without expounding on how the person came to know about that order.⁸⁶ Although there have been numerous cases in which people have been found guilty of wilfully failing to comply with protection orders, in the majority of the cases the punishment imposed on the offender is not mentioned. However, in one case the Supreme Court dealt with the appropriateness of the sentence that had been imposed on a person who wilfully failed with a protection order. In *Phagoo G v The State*⁸⁷ the appellant pleaded guilty to wilfully failing to comply with a protection order and the district court sentenced him to 6 months' imprisonment. He had assaulted his wife 5 days after she had been granted a protection order. He appealed against the sentence to the Supreme Court arguing that it was excessive. In setting aside the 6 months' sentence and replacing it with a fine, the Supreme Court held, inter alia:⁸⁸

'The appellant had been living together with complainant for the past nineteen years and they had two children. Domestic violence, even if it is a slap in the face given in a fit of anger, cannot be condoned. But the sentence must be proportionate to the degree of the offence and must not, by its severity, be likely to put an end to a long relationship and destroy the family unit. The deterrent effect to be achieved here is to bring home to the appellant that he cannot use any violence towards his spouse ... The sentence for a breach of a protection order is a maximum fine of Rs 10,000 and a maximum term of 2 years' imprisonment. Imposing a custodial sentence requires serious justification. The more reasonable approach is a graduated one where for a first breach of a protection order, a fine may be imposed.'

The Supreme Court makes it very clear that a custodial sentence should not be lightly imposed on a person who has been convicted of wilfully failing to comply with a protection order. A court imposing a custodial sentence must justify, and seriously so, why it is imposing such a sentence. It appears that the burden is not on the offender to convince the court why a custodial sentence should not be imposed on him. In determining an appropriate sentence, the court should also be conscious of the fact that that sentence should not rupture the family unit. It should just deter the offender from committing domestic violence again.

Because of the fact that failure to comply with a protection order is a criminal offence, the prosecution has to prove the accused's guilt beyond a reasonable doubt. Evidence to prove guilt has included oral evidence by the perpetrator and medical evidence (a medical certificate showing the injuries that the victim

⁸⁵ *Police v Vijay Mahadoo* 2010 BMB 56, p 2.

⁸⁶ *Police v Celestin Louis Clement* 2011 BMB 107, p 2; *Police v Chedumbrun* 2013 UPW 63, p 2; *Police v Damur Ramdhawa* 2010 BMB 18, p 2; *Police v Jean Jacques Francois* 2009 PL2 76, p 1.

⁸⁷ *Phagoo G v The State* 2001 SCJ 55, 2001 MR 14.

⁸⁸ *Phagoo G v The State* 2001 SCJ 55, 2001 MR 14, p 3.

sustained as a result of the accused's conduct). Although it is very important that a medical certificate is adduced in evidence in cases of assault, failure to do so is not fatal to the prosecution's case. Courts have held that 'in an assault case, there is no need to adduce corroborative medical evidence'.⁸⁹ Section 8A of the Act provides for one of the ways through which a court may supervise compliance with a protection order. It is to the effect that '[t]he Court may, in addition to any order made under this Act and where it so deems appropriate, direct a probation officer to report to it on the compliance of such order, at such intervals as it thinks fit'. In *Ecumoir v Ecumoir*⁹⁰ the Court, after granting the applicant a protection order against the respondent for one year, also ordered:⁹¹

'The Family Protection Office is to follow up the matter. In application of section 8A of the Protection from Domestic Violence Act, the Court further orders the probation office to report to it on the compliance of the order at each interval of 4 months until completion of the period of protection order.'

The Court made a similar order in *Dabbadie Beverley v Dabbadie Jacques Percy G*⁹² and in *Addingadoo Luchmee v Addingadoo Ramoorthee*.⁹³

(c) Abuse of protection order

There have been cases where people have argued that the holder of a protection order is abusing it to harass the respondent. Although in some of these cases courts have found the allegations of abusing a protection order to be unfounded,⁹⁴ there have been cases where courts have found that some people have abused protection orders. For example, in *Police v Neeliah R*⁹⁵ where the accused was prosecuted for wilfully failing to comply with a protection order, the Court, in acquitting him, found that 'bearing in mind the quality of the testimony of the complainant it is clear that ... [she] made foul use of the Interim Protection Order by having the accused prosecuted for the present offence which appears by all means to be a concocted one the more so the presence of bad blood between the parties'.⁹⁶ In *Police v Hazaree Abdool*⁹⁷ where the complainant alleged that the accused had assaulted her but did not adduce evidence to substantiate her allegation, the court in acquitting the accused held, inter alia:⁹⁸

'It is clear that she has been taking the authorities for a ride and has been making an abuse of the protection order issued to her. It is clear that she has been fishing

⁸⁹ *Police v Anil Purmessur* 2011 LPW 69, p 2.

⁹⁰ *Ecumoir v Ecumoir* 2011 UPW 11.

⁹¹ *Ecumoir v Ecumoir* 2011 UPW 11, p 2.

⁹² *Dabbadie Beverley v Dabbadie Jacques Percy G* 2009 MBG 93, p 9.

⁹³ *Addingadoo Luchmee v Addingadoo Ramoorthee* 2009 MBG 176, p 3.

⁹⁴ *Police v Anil Purmessur* 2011 LPW 69; *Police v Kalla Mohamed Iqbal* 2012 LPW 145.

⁹⁵ *Police n Neeliah R* 2007 FLQ 40.

⁹⁶ *Police v Neeliah R* 2007 FLQ 40, p 2.

⁹⁷ *Police v Hazaree Abdool* 2008 MBG 55.

⁹⁸ *Police v Hazaree Abdool* 2008 MBG 55, p 3.

for protection orders and then embarking on a crusade to create cases of breach of protection orders which was a most easy task being given [sic] that the police station was within walking distance from her place.’

The Act does not make it an offence to abuse a protection order. It is argued that there may be a need to criminalise abuse of protection orders if people are to be deterred from abusing them.

(d) Duration of the protection order

As mentioned earlier, s 3(6)(a) of the Act provides that ‘[a] protection order ... shall remain in force for such period, not exceeding 24 months, as the Court may specify’. In *Dabbadie Beverley v Dabbadie Jacques Percy G*⁹⁹ the Court referred to s 3(6)–(10) of the Act and held that in the light of the fact that ‘[t]he legislator has not provided any set period for the duration of the’ protection order, it ‘finds that it is perfectly entitled to grant the applicant a protection order for a period that it finds befitting taking into consideration that the applicant has made out her case on a balance of probabilities’.¹⁰⁰ Case law shows that protection orders have been issued for 23 days,¹⁰¹ 2 months,¹⁰² 3 months,¹⁰³ or approximately 3 months,¹⁰⁴ 4 months,¹⁰⁵ 5 months,¹⁰⁶ 6 months,¹⁰⁷ 8 months,¹⁰⁸ 9 months,¹⁰⁹ 12 months,¹¹⁰ 18 months,¹¹¹ and 24

⁹⁹ *Dabbadie Beverley v Dabbadie Jacques Percy G* 2009 MBG 93.

¹⁰⁰ *Dabbadie Beverley v Dabbadie Jacques Percy G* 2009 MBG 93, p 8.

¹⁰¹ *Police v Sowdagar Mohammad Nizamuddin* 2008 FLQ 49. This was an interim protection order.

¹⁰² *Police v Beekhun* 2013 FLQ 20; *Police v Beekye Gooroodut* 2007 LPW 268 (interim protection order); *Police v Emilie Pierre Rosario* 2007 LPW 269 (interim protection order).

¹⁰³ *Police v Rouben Edley Ramsamy* 2010 LPW 78; *Police v Latulipe Muslim Hossen* 2007 LPW 300; *Police v Meunier C* 2014 PMP 230; *Police v Gopaul Marie Brigitte* 2010 LPW 98; *Police v Bholah Kaviraj* 2011 PMP 21.

¹⁰⁴ *Police v Chumurrnun Mahendranath* 2007 PMP 82. From 2 July 2007–21 November 2007.

¹⁰⁵ *Police v Orian Marie Sabrina* 2012 BMB 45.

¹⁰⁶ *Police v Celestin Louis Clement* 2011 BMB 107.

¹⁰⁷ *Verloppe Marie Sabrina v Verloppe Jean Marc Steeve* 2008 LPW 404; *Letang Marie Leone Jeanne v Letang Marjolene* 2007 LPW 177; *Police v Kowlessur Amitanand* 2014 LPW 238; *Police v Mudon I* 2011 FLQ 54; *B v B* 1999 SCJ 186; *Appigadoo Anushka v Appigadoo Vishnu* 2008 LPW 121; *Rose Shirley v Rose Desire* 2009 LPW 124; *Police v Godon Berthy Norbert* 2010 PL3 20; *Police v Orange Louis Philippe* 2009 MBG 168; *Police v Beekye Goorooduth* 2007 LPW 34; *Veeran George v Veeran Marie Josee* 2007 LPW 182; *Police v Goder Jean Emmanuel Victor* 2008 MBG 213.

¹⁰⁸ *Police v Roopun Heyman* 2009 BMB 59.

¹⁰⁹ *Police v Anand Nithoo* 2011 LPW 78; *Bundhoo Swaleha v Bundhoo Reaz* 2006 LPW 6; *Police v Vijay Mahadoo* 2010 BMB 56; *Police v Woodallee Mohamad Reaz* 2008 LPW 286; *Venkamah Nadine Christiane Odette v Venkamah Kooram* 2009 MOK 155.

¹¹⁰ *Phagoo G v The State* 2001 SCJ 55, 2001 MR 14; *Owadally F v Owadally F* 2013 SCJ 54; *Jugroop Bedwantee v Jugroop Bassantee* 2009 LPW 221; *Ecumoir v Ecumoir* 2011 UPW 11; *Police v Toulouse Joseph Jacques Desire Laval* 2007 BMB 53; *Police v Dhumnoo Deviani* 2013 MOK 4; *Police v Dowlut Yazid* 2013 LPW 2; *Police v Sobhun Mohamad Nasser* 2008 LPW 411; *Ramsurrun Auma Devi v Ramsurrun Rajesh Bidiaburat* 2009 LPW 87; *Police v Lollchand Dan* 2009 RDR 107; *Addingadoo Luchmee v Addingadoo Ramoorthee* 2009 MBG 176; *Police v Hazaree Abdool* 2008 MBG 55; *Police v Dody Danand* 2014 PMP 128; *Ramayya v Aundee* 2014 LPW 174; *Police v Jean Jacques Francois* 2009 PL2 76.

months.¹¹² However, in some cases, the issue and expiry dates of the protection order are not mentioned.¹¹³ There are cases in which the date on which the protection order was issued is mentioned but its expiry date is not mentioned.¹¹⁴ In one case an incorrect date is given for the expiry of the protection order.¹¹⁵ It would appear that the seriousness of the domestic violence act committed will determine the duration of the protection order. For example, in *Dookhit Marie Belinda v Dookhit Sooryadev*,¹¹⁶ the Court before granting the applicant a protection order for 2 years held that it considered the fact that the ‘seriousness of the violence revealed as per the evidence which warranted the applicant to seek refuge at SOS Femmes with her children’.¹¹⁷ There have been cases where several protection orders have been granted to the victim against the same person. These have included three¹¹⁸ and six protection orders.¹¹⁹

IV PROVING ACTS OF DOMESTIC VIOLENCE

Before a person who alleges to be a victim of domestic violence is granted a protection order, he or she must prove, on a balance of probabilities, that the accused has committed an act of domestic violence.¹²⁰ In *Takah Vijantee v Takah Randhir*¹²¹ the court held that ‘[a] Protection Order is not to be had for the asking’.¹²² The allegation must be proved by leading evidence such as oral evidence and medical evidence in the form of a medical certificate. Case law shows that courts have taken two different approaches on the issue of whether a medical certificate is necessary for the complainant to prove that he or she

¹¹¹ *Dabbadie Beverley v Dabbadie Jacques Percy G* 2009 MBG 93.

¹¹² *Police v Etienne* MO 2014 PMP 399; *Dulbhujun Fasila v Dulbhujun Satrageet* 2006 PMP 2; *Dookhit Marie Belinda v Dookhit Sooryadev* 2008 MOK 148; *Police v Kalla Mohamed Iqbal* 2012 LPW 145; *Police v Nubee Farook* 2007 LPW 393; *Veerapen Poospavadee v Veerapen Soopaya* 2010 MOK 28; *Virginie Roseawon v Vedanand Roseawon* 2010 LPW 81.

¹¹³ *Police v Ramjeawon Giandeo* 2008 RDR 203; *Police v Ramcurn Jammajay* 2007 PMP 72; *Police v Manette Marie Michel Patrick* 2013 LPW 90; *Police v Ramasawmy Raj & Anor* 2007 RDR 51; *Police v Legris Jean Claude* 2007 LPW 98; *Police v Chedumbrun* 2013 UPW 63.

¹¹⁴ *Police v Ravina Jean Marley* 2009 LPW 306; *Police v Munigadu Satyanand* 2014 PMP 235; *Police v Seegoolam Phoolmatee* 2007 PMP 59; *Police v Soobratty Ismael* 2008 MBG 17; *Police v Parmessur Abdool Mohamad Rehad* 2011 PL3 75; *Police v Neeliah A* 2007 FLQ 39; *Police v Jokenson Leopold* 2013 PMP 45; *Police v Mohun Shirin* 2007 PMP 47; *Police v Louis Jacques Minerve* 2010 BMB 88; *Police v Bhugaloo R A* 2009 PL2 125.

¹¹⁵ In *Police v Coupén Devarany* 2010 BMB 99, the Court states that ‘A certified true copy of the Protection Order issued by the Magistrate of the District Court of Black River dated 03 August 2010 and which shall remain in force until 03 August 2010 ordering the accused to refrain from engaging in any conduct which may constitute an act of domestic violence against the complainant and to be of good behaviour towards her (Doc A) and the defence statement (Doc B) wherein the accused had denied the charges levelled against her, were produced’. See p 1.

¹¹⁶ *Dookhit Marie Belinda v Dookhit Sooryadev* 2008 MOK 148.

¹¹⁷ *Dookhit Marie Belinda v Dookhit Sooryadev* 2008 MOK 148, p 3.

¹¹⁸ *Venkamah Nadine Christiane Odette v Venkamah Kooram* 2009 MOK 155.

¹¹⁹ *Police v Mudon I* 2011 FLQ 54.

¹²⁰ *Verloppe Marie Sabrina v Verloppe Jean Marc Steeve* 2008 LPW 404.

¹²¹ *Takah Vijantee v Takah Randhir* 2006 UPW 44.

¹²² *Takah Vijantee v Takah Randhir* 2006 UPW 44, p 1.

was assaulted by the accused. The first approach is that, if an applicant alleges that he or she was assaulted by the respondent, a court will not grant a protection order unless the applicant adduces a medical certificate in support of the allegations.¹²³ The same approach has been taken in cases where a person is accused of breaching a protection order and the complainant alleges that he or she was assaulted.¹²⁴ This explains why in many cases the complainants have submitted medical certificates in evidence.¹²⁵ In case where the complainant tenders a medical certificate in evidence, it must be consistent with the complainant's oral evidence otherwise it will be rejected.¹²⁶ The second approach is that the lack of a medical certificate does not necessarily mean that the accused did not assault the complainant and the accused may still be convicted of violating a protection order.¹²⁷ Failure by the complainant to adduce a medical certificate is not fatal to his/her case where there is other evidence to prove that the accused assaulted the complainant.¹²⁸

V CONCLUSION

This chapter has dealt with the definition of domestic violence and has also illustrated case law from Mauritian courts on the issue of protection orders issued under the Domestic Violence Act. As indicated above, there may be a need to amend some sections of the Act to strengthen it in combating domestic violence. The Supreme Court recommended that '[t]here may now be an urgent need for Family Courts and more specifically regional Family Courts to deal with among other cases, cases of domestic violence and child protection'.¹²⁹ As mentioned above, leaving a copy of the protection order with an adult person who lives in the same house as the accused is not the same thing as serving the protection order on the accused and the accused will be taken not to be aware of the existence of a protection order.¹³⁰ It is argued that this law may need to be amended so that the same principles that govern the serving of summons apply. Section 40(3) of the District and Intermediate Courts (Criminal Jurisdiction) Act¹³¹ provides that 'the summons may be served by any usher or officer and shall be served on the party charged personally, or a copy of it shall

¹²³ *Bhim Saroojnee v Bhim Totanand* 2009 LPW 292; *Beguinet Cindy Sharon Dominique v Beguinet Paul Livio Michel* 2009 LPW 103; *Police v Isseljee Mohammad Eshan* 2008 PL3 25; *Police v Chundunsing D* 2014 PMP 143.

¹²⁴ *Police v Rosseawon Khoosoomul* 2008 MBG 91.

¹²⁵ *Police v Soobratty Ismael* 2008 MBG 17; *Police v Bhugun M* 2009 PL2 7; *Virginie Roseawon v Vedanand Roseawon* 2010 LPW 81.

¹²⁶ *Police vs Beekhun* 2013 FLQ 20; *Police v Boff Serge* 2008 MOK 52; *Police v Damur Ramdhawa* 2010 BMB 18.

¹²⁷ *Police v Roopun Heyman* 2009 BMB 59.

¹²⁸ *Police v Parmessur Abdool Mohamad Rehad* 2011 PL3 75; *Police v Lollchand Dan* 2009 RDR 107; *Veerapen Poospavadee v Veerapen Soopaya* 2010 MOK 28; *Police v Dharmalingum Chinapyl* 2008 FLQ 88

¹²⁹ *M v M* 1999 SCJ 21.

¹³⁰ *Police v Dabbadie Jacques Percy Georgy* 2009 MBG 61. A copy of the protection was left with the accused's mother in law.

¹³¹ District and Intermediate Courts (Criminal Jurisdiction) Act Cap 174 – 5 November 1888.

be left at his residence'. In case a protection order cannot be served on the perpetrator personally, leaving a copy of the same at the perpetrator's residence should suffice.

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NEW ZEALAND

RECENT CHANGES TO THE DIVISION OF RELATIONSHIP PROPERTY IN NEW ZEALAND: A NEW WAY FORWARD?

*Mark Henaghan and Ruth Ballantyne**

Résumé

La jurisprudence récente a apporté des changements significatifs en matière de partage de biens conjugaux ('relationship property') au moment de la séparation. Ces changements portent tant sur la liste des biens inclus que sur la quote-part à laquelle un conjoint peut prétendre en cas de déséquilibre économique entre les parties. Ces changements pourraient bien paver une nouvelle voie en la matière permettant de mieux atteindre les objectifs de la Property (Relationships) Act de 1976.

I INTRODUCTION

Recent case law has brought about several significant changes to the division of relationship property between parties who have chosen to end their relationships. These changes have impacted upon the kind of assets that can be classified as relationship property and the degree of additional relationship property one party may receive as a result of an economic disparity between the parties as a result of the division of functions during their relationship. These changes may herald a new way forward and have the potential to better meet the express objects of the Property (Relationships) Act 1976 in that they may allow the court to better 'recognise the equal contribution of both spouses' to the relationship,¹ as well as better 'provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation'.² The changes may also enhance the principles of the Property (Relationships) Act 1976, particularly 'the principle that men and women have

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¹ Property (Relationships) Act 1976, s 1M(b).

² Property (Relationships) Act 1976, s 1M(c).

equal status, and their equality should be maintained and enhanced’,³ ‘the principle that all forms of contribution ... are treated as equal’,⁴ and ‘the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their [relationship]’.⁵

II RELATIONSHIP PROPERTY CLASSIFICATIONS

Two recently decided New Zealand relationship property cases have significant ramifications for future cases in terms of determining what counts as relationship property for the purposes of the Property (Relationships) Act 1976.

(a) *Thompson v Thompson*

Mr and Mrs Thomson were married in 1971 and had five adult children.⁶ Mr Thompson worked in the ‘health foods/dietary supplements industry’.⁷ The parties established a health and fitness company called Nutra-Life Health and Fitness Ltd (‘Nutra-Life’) in 1984.⁸ The shares in Nutra-Life (and other associated companies) were held in Health Foods International Ltd (‘HFI’), another company created by the parties in 1989.⁹ In 1994 the shares in HFI (which held the Nutra-Life shares), which were formerly held by Mr and Mrs Thompson personally, were sold to the ML Thompson Family Trust (‘the MLT Trust’) (of which Mr Thompson was one of the three trustees) for \$1.11m. This was deemed to be a ‘fair market value’ at the time of the sale.¹⁰ The parties separated in August 2002.¹¹ In December 2006 Next Capital Health Ltd (‘Next’) bought the Nutra-Life business for \$72.3m (including goodwill) and paid Mr Thompson an additional payment of \$8m in exchange for a 2-year restraint of trade.¹² Mr Thompson was to stay on as a director of Next and was to receive a 19.95 per cent stake in the company after making a \$12m investment into Next.

In general terms, the restraint of trade clause prevented Mr Thompson from being involved with:¹³

‘[A]ny activity or business which is the same as or similar to the businesses of the Vendors as of the Completion Date, including in respect of the research,

³ Property (Relationships) Act 1976, s 1N(a).

⁴ Property (Relationships) Act 1976, s 1N(b).

⁵ Property (Relationships) Act 1976, s 1N(c).

⁶ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [4].

⁷ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [4].

⁸ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [4].

⁹ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [4].

¹⁰ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [4].

¹¹ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [5].

¹² *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [6] and [8].

¹³ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [14].

development, manufacture, production, marketing, distribution or worldwide sale of nutritional products, supplements, herbal and sports nutrition products, and the licensing of certain trade marks.’

The restraint of trade clause was to be in effect for either 5 years after the completion date of the sale, or 2 years after Mr Thompson stopped being a director of Next.¹⁴

The parties agreed that the sale proceeds from Next were to be treated ‘as in effect relationship property’ and would be divided evenly (alongside the rest of their relationship property) according to the Property (Relationships) Act 1976.¹⁵ However, the parties were unable to agree how the \$8m restraint of trade payment should be treated. Mr Thompson argued that the restraint of trade payment was his own separate property because it was acquired as a result of his own personal attributes. Therefore, it should not be divided as relationship property. However, Mrs Thompson argued that the restraint of trade payment would not have been paid to Mr Thompson but for the existence of the Nutra-Life business itself, and that therefore the payment was not because of Mr Thompson’s personal attributes.

The Family Court found that the restraint of trade payment was separate property under s 9(4)(a) of the Property (Relationships) Act 1976 because Mr Thompson acquired it after the date of separation and Judge Rogers therefore held that it was not to be treated as relationship property.¹⁶ Mrs Thompson appealed this decision to the High Court, which held that the restraint of trade payment was indeed separate property, but Andrews J exercised her discretion under s 9(4) of the Property (Relationships) Act 1976 to treat an unspecified part of the restraint of trade payment as relationship property to be divided between the parties.¹⁷ Mr Thompson successfully appealed that decision to the Court of Appeal, which found that the entire \$8m restraint of trade payment was separate property and that the s 9(4) discretion should not be used to treat part of the payment as relationship property.¹⁸ Mrs Thompson appealed that decision to the Supreme Court.

In the Supreme Court Mrs Thompson argued that Mr Thompson’s ability to insist on a payment for the restraint of trade clause in the sale and purchase agreement was itself a ‘right or interest, which is capable of being monetised, without personal effort’.¹⁹ Mrs Thompson’s argument relied on the definition

¹⁴ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [15]. The restraint of trade clause only applied in New Zealand, Australia, the Middle East, the United Kingdom, and Asia.

¹⁵ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [5].

¹⁶ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [2]. See *CHT v MLT* [2013] NZFC 306, [2014] NZFLR 224.

¹⁷ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [2]. See *Thompson v Thompson* [2013] NZHC 2001.

¹⁸ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [3]. See *Thompson v Thompson* [2014] NZCA 117, [2014] 2 NZLR 741.

¹⁹ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [50].

of property contained in s 2 of the Property (Relationships) Act 1976, which defines property as including ‘any other right or interest’.²⁰ Mrs Thompson claimed that the ‘property interest [namely Mr Thompson’s ability to insist on a payment in exchange for his restraint of trade] came into existence after marriage but before separation and for this reason was relationship property’.²¹

The Supreme Court held that this was ‘quite an elusive argument’ and noted that the property interest as asserted by Mrs Thompson was ‘not entirely easy to capture in words’.²² As the Supreme Court said:²³

‘If described in positive terms (along the lines of the ability to make a good living in the industry or, more plausibly, a subset of that ability referable to personal contacts, knowledge of the way the business operated, etc) [the property interest] rather resembles the earning capacity in issue in *Z v Z (No 2)* which the Court of Appeal considered not to be property for the purposes of the Act. If put in negative terms, along the lines of an ability to diminish the realisable value of the Nutra-Life business unless bought off, it does not resemble an orthodox property interest.’

The Supreme Court did not agree with Mrs Thompson’s classification of the restraint of trade payment. Rather, the Supreme Court proceeding on the following three-step basis:²⁴

- (a) the parties proceeded on the basis that the trust assets were to be treated as ‘in effect relationship property’;
- (b) if the HFI shares had remained relationship property, the \$8m payment would have been relationship property; and
- (c) it is appropriate under s 9(4) to classify the \$8m payment as relationship property.

Essentially, the Supreme Court decided that the purpose of the restraint of trade clause was solely to protect the goodwill of the business acquired by the purchaser. This conclusion was based on the ‘reasonableness of restraint’ clause included in the sale and purchase agreement that limited the effects of the clause, stating that the restrictions extend ‘no further in any respect, than is reasonably necessary and is solely for the protection of [Next] in respect of the goodwill of the Business’.²⁵ Mrs Thompson was also not to be prejudiced against as a result of the transfer of the shares in Nutra-Life from HFI to the MLT Trust, especially because the HFI shares would otherwise have remained relationship property.²⁶ On this basis the restraint of trade payment was

²⁰ Property (Relationships) Act 1976, s 2. In the Court of Appeal Mrs Thompson referred to the property interest specifically as the ‘principal’s goodwill’. See *Thompson v Thompson* [2015] NZSC 26 at [50].

²¹ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [50].

²² *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [52].

²³ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [52].

²⁴ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [57].

²⁵ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [16].

²⁶ *Thompson v Thompson* [2015] NZSC 26; [2015] NZFLR 150 at [66].

appropriately classified as relationship property under s 9(4) of the Property (Relationships) Act 1976. Section 9(4) states as follows:²⁷

‘9 Separate property defined

[...]

(4) The following property is separate property, unless the court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:

- (a) all property acquired by either spouse or partner while they are not living together as a married couple or as civil union partners or as de facto partners.’

This important decision reinforced the finding in *Z v Z (No 1)*,²⁸ an earlier Court of Appeal decision, which found that the fair market value of a sole practitioner law firm included the goodwill in the business in terms of a restraint of trade covenant. This finding significantly increased the value of the law firm (and the amount of relationship property to be divided between the parties). The goodwill in the law firm was worth \$80,000 if supported by a restraint of trade clause, but only worth \$25,000 without the restraint of trade clause. As Richardson J said in the Court of Appeal:²⁹

‘In the hypothetical market the willing but not anxious seller must be taken to seek the maximum price obtainable from what is available for sale. Protection against the hypothetical seller’s competition through a covenant in restraint of trade is an element of goodwill increasing the price a hypothetical buyer would otherwise be prepared to pay. As an element in the goodwill the covenant attaches to the business and cannot properly be characterised as a purely personal attribute.’

Not to include the value of the restraint of trade clause as part of the law firm’s goodwill would have been to deny the wife in *Z v Z (No 1)* her entitlement to her half of the real value of the law firm. As Bisson J said:³⁰

‘It is accepted that the wife is entitled to an equal share with her husband in matrimonial property, including the law practice carried on by the husband. A just division requires its true market value to be assessed on a hypothetical sale to the best advantage in the interests of both partners in the matrimonial partnership. This necessarily contemplates such a sale being accompanied by a covenant in restraint of competition by the husband so as to achieve the real market value of the practice as a going concern. Without such a covenant the wife would receive less than her fair share in the value of an asset in which she is entitled to share equally by virtue of her contribution to the matrimonial partnership and the husband would receive more than his half share in the asset being vested in him.’

²⁷ Property (Relationships) Act 1976, s 9(4).

²⁸ *Z v Z (No 1)* [1989] 3 NZLR 413 (CA).

²⁹ *Z v Z (No 1)* [1989] 3 NZLR 413 at 415.

³⁰ *Z v Z (No 1)* [1989] 3 NZLR 413 at 418.

Likewise, if the husband in *Thompson v Thompson* had successfully argued that the \$8m restraint of trade payment was separate property the wife would have received 'less than her fair share in the value of an asset in which she is entitled to share equally' under the Property (Relationships) Act 1976. Such a result would also have opened the door to the possibility of future restraint of trade payments being paid to one party to a relationship (as their own separate property) as a way of reducing the true value of the business asset in question, and therefore ultimately unfairly limiting the amount of relationship property to be divided between the parties. For example, a business classified as relationship property could be sold for \$5m with a separate \$2m restraint of trade payment made to the individual in the relationship who has primarily worked in the business. In such a case the business (which has already been classified as relationship property) is really worth \$7m and therefore the entire value of the business (the \$7m) should be divided according to the Property (Relationships) Act 1976. Any other result would seriously undermine the very purposes and principles of the Property (Relationships) Act 1976.

(b) *Clayton v Clayton*

*Clayton v Clayton*³¹ concerns family trusts, which are a very significant issue in New Zealand relationship property law. New Zealand is estimated to have approximately 500,000 family trusts, which is likely to be more trusts per capita than any other country in the world.³² Trusts have become an important part of relationship property disputes because, in general terms, when property is put into trust it is no longer owned by the parties jointly or by either party to a relationship, and so it is not generally available as relationship property. This can significantly affect the amount of relationship property to be divided between the parties and therefore the amount of money each party ultimately receives upon the breakdown of the parties' relationship.

There are currently three primary ways that the courts can remedy the unfair disposal of relationship property into trusts. These are set out in s 182 of the Family Proceedings Act 1980 and ss 44 and 44C of the Property (Relationships) Act 1976. These three methods are discussed in turn below, before an examination is made of the recent Court of Appeal decision of *Clayton v Clayton*, which presents another possible avenue for reclaiming relationship property assets that have been disposed of into trusts.³³

(i) *Section 182 of the Family Proceedings Act 1980*

Courts can interfere in the disposition of relationship property to trusts only in limited circumstances. Section 182 of the Family Proceedings Act 1980 (which

³¹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233.

³² Martin Hawes 'Sorting Badly Managed Trusts' (22 September 2013) www.stuff.co.nz.

³³ See generally, Jessica Palmer and Nicola Peart 'Clayton v Clayton: a step too far?' (2015) 8 NZFLJ 114 for an in-depth examination and critique of the Court's decision and reasoning in *Clayton* regarding this new avenue for reclaiming relationship property.

only applies to divorced married and civil union couples) allows the court to consider agreements made between parties in particular circumstances and to make orders as the court thinks fit. Section 182(1) of the Family Proceedings Act 1980 provides as follows:³⁴

‘182 Court may make orders as to settled property, etc

(1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, a Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the court thinks fit.’

For example, s 182 of the Family Proceedings Act 1980 allows the court in particular circumstances to consider the property held in trust and reconstitute the trust in a fairer way between the parties provided there is an expectation that the parties were to share in the property held in trust.

This took place in *Ward v Ward* where a farm, which was the married couple’s primary asset, was held in trust. The trust had primarily been established for the benefit of the parties and their two children.³⁵ However, at the end of the parties’ 12-year marriage the husband insisted that because the farm was in trust (so therefore neither the husband nor the wife ‘owned’ the farm) it could not be divided as relationship property. The Supreme Court ultimately used s 182 of the Family Proceedings Act 1980 to divide the original trust into two trusts: a trust containing 50 per cent of the parties’ farm for the benefit of the wife and the parties’ two children and an identical trust for the benefit of husband and the parties’ two children.³⁶

(ii) Section 44 of the Property (Relationships) Act 1976

The Property (Relationships) Act 1976 itself provides limited remedies where relationship property has been disposed of into a trust. For example, s 44 of the Property (Relationships) Act 1976 allows the court to set aside dispositions of relationship property to trusts where the party seeking relief can prove that there was an intent to defraud the other party when the property was put into the trust. Such fraudulent intent is difficult to prove as property is often put into trust for acceptable legal reasons such as to protect assets from creditors. Section 44 of the Property (Relationships) Act 1976 provides as follows:³⁷

³⁴ Family Proceedings Act 1980, s 182(1).

³⁵ *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [1].

³⁶ See *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [2] and [63].

³⁷ Property (Relationships) Act 1976, s 44.

'44 Dispositions may be set aside

(1) Where the High Court or a District Court or a Family Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person (**party B**) under this Act, the court may make any order under subsection (2).

(1A) The court may make an order under this section on the application of party B, or (in any proceedings under this Act or otherwise) on its own initiative.

(2) In any case to which subsection (1) applies, the court may, subject to subsection (4),—

- (a) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for valuable consideration, or his or her personal representative, shall transfer the property or any part thereof to such person as the court directs; or
- (b) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for adequate consideration, or his or her personal representative, shall pay into court, or to such person as the court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property; or
- (c) order that any person who has, otherwise than in good faith and for valuable consideration, received any interest in the property from the person to whom the disposition was so made, or his or her personal representative, or any person who received that interest from any such person otherwise than in good faith and for valuable consideration, shall transfer that interest to such person as the court directs, or shall pay into court or to such person as the court directs a sum not exceeding the value of the interest.

(3) For the purposes of giving effect to any order under subsection (2), the court may make such further order as it thinks fit.

(4) Relief (whether under this section, or in equity, or otherwise) in any case to which subsection (1) applies shall be denied wholly or in part, if the person from whom relief is sought received the property or interest in good faith, and has so altered his or her position in reliance on his or her having an indefeasible interest in the property or interest that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.'

(iii) Section 44C of the Property (Relationships) Act 1976

Section 44C of the Property (Relationships) Act 1976 is the other way trusts can be challenged by the court. This provision applies where placing the property in trust defeats the rights of one partner to a relationship to that property. Section 44C of the Property (Relationships) Act 1976 provides as follows:³⁸

³⁸ Property (Relationships) Act 1976, s 44C.

‘44C Compensation for property disposed of to trust

- (1) This section applies if the court is satisfied—
 - (a) that, since the marriage, the civil union, or the de facto relationship began, either or both spouses or partners have disposed of relationship property to a trust; and
 - (b) that the disposition has the effect of defeating the claim or rights of one of the spouses or partners; and
 - (c) that the disposition is not one to which section 44 applies.
- (2) If this section applies, the court may make 1 or more of the following orders for the purpose of compensating the spouse or partner whose claim or rights under this Act have been defeated by the disposition:
 - (a) an order requiring one spouse or partner to pay to the other spouse or partner a sum of money, whether out of relationship property or separate property;
 - (b) an order requiring one spouse or partner to transfer to the other spouse or partner any property, whether the property is relationship property or separate property;
 - (c) an order requiring the trustees of the trust to pay to one spouse or partner the whole or part of the income of the trust, either for a specified period or until a specified amount has been paid.
- (3) The court must not make an order under subsection (2)(c) if—
 - (a) an order under subsection (2)(a) or (b) would compensate the spouse or partner; or
 - (b) a third person has in good faith altered that person’s position—
 - (i) in reliance on the ability of the trustees to distribute the income of the trust in terms of the instrument creating the trust; and
 - (ii) in such a way that it would be unjust to make the order.
- (4) The court may make 1 or more orders under subsection (2) if it considers it just to do so, having regard to—
 - (a) the value of the relationship property disposed of to the trust;
 - (b) the value of the relationship property available for division;
 - (c) the date or dates on which relationship property was disposed of to the trust;
 - (d) whether the trust gave consideration for the property, and if so, the amount of the consideration;
 - (e) whether the spouses or partners, or either of them, or any child of the marriage, civil union, or de facto relationship, is or has been a beneficiary of the trust;
 - (f) any other relevant matter.’

Under s 44C all that needs to be proven is that the trust has the effect of defeating a claim under the Property (Relationships) Act 1976. There is no requirement to prove intent to defraud. Thus the legal requirements are met

merely if property acquired during the relationship, which would otherwise be relationship property, has been put into trust.

Although s 44C of the Property (Relationships) Act 1976 seems like an easier option than s 44, the remedies provided by s 44C are very limited. There is no power to enter into the trust and access the assets held in the trust. The court can only order one party to pay a specified sum to the disadvantaged party, or order the transfer of property to the disadvantaged party. This proves impossible where all the assets are held in trust. The compensation cannot be paid directly out of trust assets.

(iv) The case

The Court of Appeal case of *Clayton v Clayton* opens up another potential avenue to claim assets held in trust. In *Clayton* the parties had two children and had been married for 17 years, before separating in 2006.³⁹ The vast majority of the parties' assets (except for the family home) were held in various trusts and companies associated with Mr Clayton,⁴⁰ who was a 'successful businessman with significant sawmilling and timber processing interests'.⁴¹ The shares in Mr Clayton's companies were all owned by Mr Clayton directly, 'or through trusts in which he is a trustee and/or beneficiary'.⁴²

The case concerned both pre-separation and post-separation trusts. The pre-separation trusts in question were the Claymark Trust (which was settled in 1994), the Vaughan Road Property Trust (which was settled in 1999), and two education trusts for the parties' two children (which were settled in 2004). All of these trusts were settled while the parties were still married.⁴³ Mr Clayton had a particularly close connection with all of the trusts. For example, he was the settlor and a trustee of each trust.⁴⁴ The trusts also gave and received loans from each other, to Mr Clayton personally, and to the companies owned by him.⁴⁵ Both parties and their two children were 'discretionary beneficiaries' of the Claymark Trust and the Vaughan Road Property Trust.⁴⁶ Mrs Clayton was not a beneficiary of the education trusts.⁴⁷

The other trusts in question (which Mr Clayton settled after the parties had separated) were the Denarau Resort Trust, the Sophia No 7 Trust, the Chelmsford Trust, and the Lighter Quay 5B Trust.⁴⁸ Mrs Clayton was not a beneficiary of any of these trusts.⁴⁹

³⁹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [6].

⁴⁰ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [7].

⁴¹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [8].

⁴² *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [9].

⁴³ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [11].

⁴⁴ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [12].

⁴⁵ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [12].

⁴⁶ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [12].

⁴⁷ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [12].

⁴⁸ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [13].

⁴⁹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [14].

The Family Court made a variety of different rulings on the different trusts. The Court held that Mrs Clayton was permitted to obtain only her half share of the debt owing by the Claymark Trust to Mr Clayton.⁵⁰ The Family Court also found the Vaughan Road Property Trust to be ‘illusory’ in that the property was really within Mr Clayton’s control.⁵¹ The Family Court said that Mrs Clayton was entitled to a half share of the two educational trusts and the four post-separation trusts (the Denarau Resort Trust, the Sophia No 7 Trust, the Chelmsford Trust, and the Lighter Quay 5B Trust), but was not entitled to any share of the Claymark International Trust.⁵² Mr Clayton appealed this decision to the High Court and Mrs Clayton cross-appealed.⁵³

The High Court upheld the Family Court’s finding that Mrs Clayton could only claim half of the Claymark Trust’s debt owed to Mr Clayton and that the Vaughan Road Property Trust was illusory.⁵⁴ The High Court also agreed that Mrs Clayton was able to obtain a half share of both of the educational trusts.⁵⁵ However, the High Court came to a different result than the Family Court had in terms of the four post-separation trusts. The High Court allowed Mr Clayton’s appeal in terms of Mrs Clayton gaining a half share of the Denarau Resort Trust, the Chelmsford Trust, and the Lighter Quay 5B Trust.⁵⁶ The High Court remitted these trusts back to the Family Court ‘for further evidence to be adduced and the question of remedy reconsidered’.⁵⁷ The High Court upheld the Family Court’s findings in terms of Mrs Clayton’s entitlement to a half share of the Sophia No 7 Trust, but also remitted the matter back to the Family Court to consider the appropriate remedy.⁵⁸

Mr Clayton appealed the parts of the High Court decision that he disliked to the Court of Appeal and Mrs Clayton also cross-appealed in a similar fashion.⁵⁹ In the Court of Appeal Mrs Clayton argued that the Claymark Trust was a settlement within the meaning of s 182 of the Property (Relationships) Act 1976 and that the Court should exercise its discretion to divide the trust equally between the parties.⁶⁰ However, the Court of Appeal did not accept Mrs Clayton’s submissions that the lower courts ‘erred in deciding that the Claymark Trust was not a ‘nuptial settlement’ and that therefore no order for provision should be made’.⁶¹ Mrs Clayton’s appeal on this issue was dismissed

⁵⁰ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [17].

⁵¹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [17].

⁵² *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [17].

⁵³ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [19].

⁵⁴ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [19].

⁵⁵ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [19].

⁵⁶ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [19].

⁵⁷ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [19].

⁵⁸ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [20].

⁵⁹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [20].

⁶⁰ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [172] and [173].

⁶¹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [177].

and the Court of Appeal said that she was not ‘entitled to provision from the assets of the Claymark Trust’ in accordance with s 182 of the Family Proceedings Act 1980.⁶²

In terms of the Vaughan Road Property Trust, Mr Clayton claimed that the trust was not illusory.⁶³ The Court of Appeal agreed with Mr Clayton that the trust was not illusory because the distinction made by the High Court between a sham and an illusory trust was not supportable.⁶⁴ However, the Court of Appeal held that Mr Clayton’s right to exercise his general power of appointment under clause 7(1) of the trust deed was relationship property.⁶⁵ Clause 7(1) of the Vaughan Road Property Trust said:⁶⁶

‘7. APPOINTMENT AND REMOVAL OF DISCRETIONARY BENEFICIARIES

7.1 Power to appoint and remove Beneficiaries: The Principal Family Member may, by deed, before the expiry of the Trust Period:

- (a) appoint any person to become a member of the class of Discretionary Beneficiaries ...
- (b) remove any person from the class of Discretionary Beneficiaries ...’

This clause gave Mr Clayton a significant degree of power comparable to a kind of property right. As the Court of Appeal said:⁶⁷

‘[W]hen the donee of the power is entitled to appoint the subject matter of the power to himself or herself without regard to the interests of others the law may regard the donee as the effective owner of that property. In such a case, the fact that the donee has an “absolute disposing power” may be recognised in practical terms as conferring a property right.’

This property right can be classified as relationship property because it fits within the definition of property contained in s 2 of the Property (Relationships) Act 1976 in that Mr Clayton’s power of appointment is a ‘right’ that creates an ‘interest’.⁶⁸ Given the wide definition of property contained in s 2 of the Property (Relationship) Act 1976, the Court of Appeal took the view that this definition should be interpreted consistently with the purposes and

⁶² *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [178].

⁶³ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [32].

⁶⁴ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [77].

⁶⁵ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [1]. See also, Jessica Palmer and Nicola Peart ‘*Clayton v Clayton*: a step too far?’ (2015) 8 NZFLJ 114 discussing and questioning the soundness of this conclusion; also see generally, Jessica Palmer and Nicola Peart ‘Double Trouble: the power to add and remove beneficiaries and the power to appoint and remove trustees’ New Zealand Law Society CLE Ltd *Trusts Conference* (Auckland and Wellington, 2015).

⁶⁶ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [25].

⁶⁷ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [100].

⁶⁸ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [111].

principles of the Act, which are to ensure a just division of relationship property by recognising the equal contribution of both spouses to the partnership.⁶⁹

The Court of Appeal ultimately determined that the value of Mr Clayton's power of appointment (the relationship property in question) was 'the value of the property received in the event that the power was exercised, that is, the net value of the assets of the trust'.⁷⁰ This gave Mrs Clayton an entitlement to an equal share in Mr Clayton's equity in the assets of the Vaughan Road Property Trust as at 31 March 2011.⁷¹

In terms of the educational trusts, Mrs Clayton was successful in the Court of Appeal in showing that the education trusts had been set up with the intent to defeat her relationship property claim and that therefore she was 'entitled to half the net equity' of the two trusts under s 44 of the Property (Relationships) Act 1976.⁷²

Regarding the four post-separation trusts, in her appeal, Mrs Clayton sought a half share of the current equity of all four of the trusts from the Court of Appeal under s 44 of the Property (Relationships) Act 1976, as the High Court had granted her only a half share of the Sophia No 7 Trust.⁷³ The Court of Appeal allowed Mrs Clayton to obtain a half share of not just the Sophia No 7 Trust as per the High Court,⁷⁴ but also the Denarau Resort Trust as in the Family Court decision.⁷⁵ The Court of Appeal also allowed Mrs Clayton to have a share of a personal loan to Mr Clayton of \$40,000 from the Chelmsford Trust under s 44 of the Property (Relationships) Act 1976 because the loan was 'made by Mr Clayton with the intention of defeating her rights under the PRA'.⁷⁶ However, the rest of this trust was off limits to Mrs Clayton,⁷⁷ alongside the entire Lighter Quay 5B Trust.⁷⁸

Clayton v Clayton demonstrates how financially significant relationship property issues can be when trusts are involved and the extraordinary amount of relationship property that can be disposed of into trusts to defeat one partner's access to those assets. In this case in particular, the evidence before the court demonstrates the disparity between the financial value of available relationship property and that which had been secured as separate property within Mr Clayton's various trusts and business. Mr Clayton contends that the

⁶⁹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [114].

⁷⁰ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [113]. See also, Jessica Palmer and Nicola Peart '*Clayton v Clayton: a step too far?*' (2015) 8 NZFLJ 114 questioning how the Court reached this conclusion, '[e]ven if the power was property, that did not automatically mean it was relationship property. No reason was given for this classification'.

⁷¹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [113].

⁷² *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [147].

⁷³ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [180] and [19].

⁷⁴ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [213].

⁷⁵ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [196] and [199].

⁷⁶ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [225].

⁷⁷ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [228].

⁷⁸ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [237] and [238].

relationship property owed to Mrs Clayton (to achieve equitable distribution) is ‘sole ownership of the former matrimonial home and chattels (valued at \$850,000 as at 31 March 2011) and \$30,000 already paid’.⁷⁹ Much to the contrary, ‘Mrs Clayton considers that, apart from the value of Mr Clayton’s separate property, which is agreed at \$500,000, she is entitled to half of the value of the business and trust assets ... estimated at the time of the Family Court hearing [by her expert witness] at [\$14,415,500]’,⁸⁰ a difference of about \$13.5m or about 15 times more than Mr Clayton’s proposed amount. Breaking down how such a vast difference accumulated as ‘separate property’: Mr Clayton’s business interests were valued (as of 31 March 2011) at \$17.5m,⁸¹ the Vaughan Road Property Trust valued at \$4.5m (net asset position),⁸² (although substantially more complicated) the Stacey Clayton Education Trust and the Anna Clayton Education Trust valued at between \$750,000 and \$1m depending on how their equity is calculated,⁸³ the Claymark Trust valued at \$1.3m,⁸⁴ the Denarau Resort Trust valued at *negative* \$150,000 (net equity position),⁸⁵ the Sophia No 7 Trust valued at \$275,000 (gross property equity),⁸⁶ the Chelmsford Trust valued at about \$1.4m (gross property equity),⁸⁷ and the Lighter Quay 5B Trust which has an non-disclosed net equity resulting from a property sale held against a loan owing to the Vaughan Road Property Trust of about \$250,000.⁸⁸ As such it is clear that following the Court of Appeal’s decision, Mrs Clayton is entitled to approximately \$3m from the trusts.⁸⁹ This is in addition to the previously agreed to settlement value of the house, chattels, and amount already paid (totalling \$880,000) and the interest in Mr Clayton’s business potentially up to \$8.75m (were she to receive a full 50 per cent stake in all of Mr Clayton’s business interests, which was not an issue expressly before the Court).⁹⁰

At the time of writing this case has just been given leave to be appealed before the Supreme Court.⁹¹ As such the rejection or acceptance by the Supreme Court

⁷⁹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [15].

⁸⁰ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [15] and [16]. Note the value indicated here is reflective of Mrs Clayton’s half interest in the total ‘property pool’ valued at the time at almost \$29m.

⁸¹ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [243].

⁸² *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [24].

⁸³ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [117]–[147].

⁸⁴ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [151].

⁸⁵ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [190]. However, the Court’s decision appears to entitle Mrs Clayton to 50 per cent of the equity in the property rather than 50 per cent of the net equity of the trust.

⁸⁶ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [203].

⁸⁷ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [216].

⁸⁸ *Clayton v Clayton* [2015] NZCA 30; [2015] NZFLR 233 at [230]–[231].

⁸⁹ This included half of the net equity of the VRPT, SCET, ACET, Sophia No 7 Trust, Denarau Resort Trust (assuming the equity of the gross assets), as well as half of the \$40,000 loan from the Chelmsford Trust.

⁹⁰ On this analysis, and dependent upon the per cent stake granted in Mr Clayton’s total business interests, Mrs Clayton may receive up to \$12.5m from the net pool of assets to which the Court has deemed to be relationship property.

⁹¹ *Clayton v Clayton* [2015] NZSC 84.

as to either the result or reasoning of this case will provide even greater insight into the future of trusts and ‘power’ as relationship property under the current statutory regime.

III SECTION 15 CLAIMS

Section 15 of the Property (Relationships) Act 1976 says:

‘15 Court may award lump sum payments or order transfer of property

(1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (**party B**) are likely to be significantly higher than the other spouse or partner (**party A**) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.

(2) In determining whether or not to make an order under this section, the court may have regard to—

- (a) the likely earning capacity of each spouse or partner:
- (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
- (c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

- (a) order party B to pay party A a sum of money out of party B’s relationship property:
- (b) order party B to transfer to party A any other property out of party B’s relationship property.

(4) This section overrides sections 11 to 14A.’

Section 15 enables a partner who has given up or limited their career to support the other partner to gain a greater share of relationship property upon division. Two recent High Court cases, *Jack v Jack*⁹² and *Williams v Scott*⁹³ are going to the Court of Appeal on this issue.⁹⁴

In *Jack v Jack* both the Family Court and the High Court awarded the wife 70 per cent of the parties’ relationship property on the basis that she had given up her career to support her husband’s career as a surgeon. At the end of the parties’ 24-year marriage the relationship property was valued at \$1.6m, which

⁹² *Jack v Jack* [2014] NZHC 1495.

⁹³ *Williams v Scott* [2014] NZHC 2547; [2015] NZFLR 355.

⁹⁴ *Jack v Jack* [2014] NZHC 2502 and *Williams v Scott* [2014] NZHC 3385 respectively.

amounted to \$800,000 each under the normal provisions of equal division. Mr Jack earned a salary of over \$1m per annum at the end of the relationship and after many years out of the workforce bringing up a family Mrs Jack was on a salary of \$26,000 per annum. Both the Family Court and the High Court took into account not only Mrs Jack's loss of opportunity in developing her own career, but also the fact that she had, by her work in the home, supported and enhanced Mr Jack's career. The 70 per cent share amounted to just over \$300,000 extra. Mr Jack is appealing this to the Court of Appeal, which he has been granted leave to do.

In *Williams v Scott* the wife had also given up her career to support her husband in establishing a successful law firm. The wife was trained professional in both accountancy and law. When the couple separated after a long 26-year marriage the husband was on a salary of over \$250,000 per annum and the wife was earning \$84,000 having come back into the work force. There was \$8.5m dollars of relationship property and the Family Court awarded the wife an extra 10 per cent of that property, \$850,000, as compensation for the fact that she had lost the opportunity to develop her career fully and had supported the husband in his career. The High Court cut the compensatory amount down from \$850,000 to \$250,000 on the basis that the Judge in the court below 'was in error by virtue of not having a clear picture of the relationship property before him, and he also did not, after assessing quantum, stand back and consider whether the outcome he reached was just'.⁹⁵

Both these cases are important in setting the parameters of s 15 awards. Unlike other jurisdictions such as in the United Kingdom where generous amounts of maintenance can be awarded in order to compensate for giving up a career such as in *Miller v Miller; McFarlane v McFarlane*,⁹⁶ in New Zealand maintenance laws are restricted because they are focused on reasonable needs rather than compensation. Section 15 of the Property (Relationships) Act 1976 has been criticised because of its open-ended discretion, and a number of different methods have been used by the Courts to try and work out the fairest way to award compensation. The Court of Appeal in the earlier cases of *X v X [Economic disparity]*⁹⁷ and *M v B*⁹⁸ was not prepared to give categorical direction on how compensation is to be calculated under s 15 claims. The Court went so far as to unanimously hold in *X v X* that '[t]here could be no set formula for the quantification of an award to be made under s 15 of the Property (Relationships) Act'.⁹⁹ However, it is noteworthy that the majority accepted a complex formulaic calculation as prescribed by expert witnesses, as the means by which to determine the s 15 award.

⁹⁵ *Williams v Scott* [2014] NZHC 2547; [2015] NZFLR 355 at [159].

⁹⁶ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618, where the initial order for maintenance gave Mrs McFarlane £225,000 per annum (later amended and increased to £350,000 per annum) on the basis that she had given up her career as a lawyer to care for their children.

⁹⁷ *X v X* [2009] NZCA 399; *X v X [Economic disparity]* [2010] 1 NZLR 601.

⁹⁸ *M v B* [2006] 3 NZLR 660 (CA).

⁹⁹ *X v X* [2009] NZCA 399; *X v X [Economic disparity]* [2010] 1 NZLR 601.

IV CONCLUSION

The relationship property disputes discussed in this article demonstrate that where the law leaves discretion as to what constitutes property or how compensation is to be paid, litigation becomes inevitable, in order to clarify the boundaries. At this stage, the case law shows that New Zealand courts are doing their best to reflect the underlying principles of the Property (Relationships) Act 1976,¹⁰⁰ which set out that a relationship (including marriage) is to be treated as a partnership, to which the parties contribute in different, but equal ways, and that neither party should be disadvantaged by the other or advantaged at the expense of the other at the end of the partnership.

¹⁰⁰ Property (Relationships) Act 1976, s 1N(1).

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POLAND

SOME REMARKS ON COHABITATION IN POLAND

*Anna Stępień-Sporek, Anna Sylwestrzak and Małgorzata Balwicka-Szczyrba**

Résumé

La cohabitation, relation de fait plus que de droit entre un homme et une femme, n'a pas été réglementée en détail par la loi polonaise. Le terme 'cohabitation' n'a pas un sens clair et précis, et il n'est pas utilisé dans la législation polonaise. Les textes ne présentent pas un concept unique et cohérent, et la diversité des opinions amène à douter d'un statut juridique pour les cohabitants. Quand émerge le besoin de régler la propriété des cohabitants, ces règles sont utilisées pour correspondre au mieux à la réalité de la relation. Toutefois, le manque de règles spécifiques entraîne également des problèmes pratiques. Quand une relation cesse, les effets de l'absence de mesures légales appropriées pour assurer les intérêts de la partie vulnérable économiquement se révèlent particulièrement importants et peuvent conduire dans des cas extrêmes à la misère et à la perte du logement.

I INTRODUCTION

The increasing number of unmarried couples living together is a worldwide trend.¹ Simultaneously social attitudes toward cohabitation have changed even in countries such as Poland, in which such form of relationships was not popular for many decades.² At present, around 3 per cent of Poles declare themselves as cohabiting,³ although in reality the scale of the phenomenon is larger due to many people's hiding it for a number of reasons. Therefore, it is important to analyse legal treatment of cohabitation in Poland. The Polish lawmaker still takes the view that the parties to cohabitation have chosen to

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¹ Eg C Grant Bowman, *Unmarried Couples, Law and Public Policy* (Oxford University Press, New York, 2010) p 101; J Dorbritz in C Höhn, D Avramov, I E Kotowska (eds) *People, Population Change and Policies: Lessons from the Population Policy Acceptance Study Vol 2: Demographic Knowledge – Gender – Ageing* (e-book google, Springer, Netherlands, 2008) pp 35–44.

² A Baranowska-Rataj, A Mynarska, A Matysiak, 'Free to stay, free to leave: Insights from Poland the meaning of cohabitation' (2014) 31 (36) *Demographic Research* 1107–1136: <http://dx.doi.org/10.4054/DemRes.2014.31.36>.

³ See: http://episkopat.pl/aktualnosci/5738.1,Konkubinat_I_co_dalej.html.

avoid regulation and thus the state should respect their choice.⁴ However, the rapid growth of cohabitation, which often is accompanied by a lack of information about the consequences of cohabitation, actively encourages the lawmaker to reconsider this position. The first step to such reconsideration is defining what cohabitation is and carefully analysing the present regulations.

This chapter aims to highlight the problems arising from the present *status quo*. It will consist of three parts. The first part will discuss the definition of cohabitation. Defining cohabitation is already difficult as men and women may live together in many different ways. The second part will describe economic consequences of cohabitation during the relationship, while the third one will bring up the consequences of its ending.

II DEFINITION OF COHABITATION

The discussion among scholars regarding cohabitation in many countries, which has been occurring for a few decades in Europe⁵ and in Poland, means that it is essential to define the term ‘cohabitation’ (in Polish – *konkubinat*⁶). At first glance, it is obvious that there are many models of cohabitations. For example, some relationships are short-term but very intense and similar to marriage, while others are long-term relationships but without a deep commitment. Some cohabitants intend to become married, while others do not want to hear about any formal relationship in the future. Some have a common household and children, while others do not consider children as an important aim. The variety of cohabitation forms seems to be even greater than the models of marriages. However, not all relationships of two people should be treated as cohabitation and be the subject of regulation, especially because cohabitants often intentionally do not want to have their relationship regulated. On the other hand, long-lasting relationships can be a source of many problems, especially at the end. Some of these will be highlighted in the other parts of this chapter. Therefore, some criteria of cohabitation as a relationship which needs at least minimal regulation should be mentioned. It seems that the

⁴ Doubts regarding regulation on cohabitation are expressed by scholars in different countries (eg T Sverdrup, ‘Statutory Regulation of Cohabiting Relationships in the Nordic Countries. Recent Developments and Future Challenges’ in K Boele-Woelki, N Dethloff and W Gephart (eds) *Family Law and Culture in Europe* (Intersentia, Cambridge – Antwerp – Portland, 2014) pp 65–75).

⁵ Eg J M Eekelaar and S N Katz (eds) *Marriage and Cohabitation in Contemporary Societies* (Butterworths, Toronto, 1980); M Antokolskaia, ‘Economic Consequences of Informal Heterosexual Cohabitation From a Comparative Perspective: Respect Parties’ Autonomy or Protection of the Weaker Party?’ in A- Verbeke, J M Scherpe, C Declerck, T Helms and P Senaeve (eds.) *Confronting the Frontiers of Family and Succession Law* (Liber Amicorum Walter Pintens, Cambridge – Antwerp – Portland, 2012); I Lund-Andersen ‘The division of property between unmarried cohabitants on the termination of cohabitation – a Scandinavian perspective’ in A Büchler and M Müller-Chen (eds) *Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (Stämpfli, Bern, 2011).

⁶ Some dictionaries recommend using words: ‘lascivious cohabitation, left-handed marriage, common-law marriage, concubinage’ (E Ożóg, *Słownik terminologii prawniczej. Część 1 polsko-angielska* (Oficyna Wydawnicza Branta, Bydgoszcz, 2001) p 135).

definition offered by Wanda Stojanowska, stating that cohabitation is ‘a real union between a man and a woman who live together in a way parallel to married life without being married’ is not sufficient.⁷

Some commentators have offered a list of characteristics of cohabitation starting from a long period of relationship and an economic integration through an emotional and sexual relationship, and finishing with the demonstration to third persons that cohabitants are wife and husband.⁸ This set of criteria is not sharp and it is very hard to give a clear and straight border between cohabitation and a non-marital relationship of two people. Even if cohabitation is compared with marriages, it is still hard to offer universal features that define cohabitation. It is a truism that there are different models of marriages. Sometimes it can turn out that some instances of cohabitation are more like traditional marriages with a man as a bread-winner and a woman as a house-keeper.⁹ On the other hand, some spouses decide to have equal rights with both spouses being very active at work and at home, being also parents committed to children.

The Supreme Court has used some definitions of cohabitation in its judgments, but they were introduced while provisions of different laws were explained. Introducing the definition of ‘cohabitation’, even if limited to particular legislation, would facilitate a determination of whether a particular extramarital relationship is cohabitation or not. It is important that these provisions do not use the term ‘cohabitation’ but ‘close person’ and similar terms.¹⁰ In one of the judgments, it is explained that ‘cohabitation should be understood as a life together analogous to marriage but without the legal bound. It means the existence of a home and a spiritual, physical and economic bond between a man and a woman’.¹¹ In other judgments, the common home and relationship similar to matrimony is pointed out as essential.¹² Cohabitation is also defined as ‘a long-standing community over the lifetime of a man and a woman’ and its features are ‘(1) a relationship of a man and a woman, (2) a stable relationship, (3) a conjugal life, (4) the lack of legal regulation of the relationship’.¹³

Similar opinions are expressed by many authors, but the approach of different scholars is not unanimous. The common core of various definitions is a permanent relationship of a man and a woman not connected by marriage.¹⁴

⁷ W Stojanowska ‘Poland: Cohabitation’ (1988–1989) 27 J Fam L 275.

⁸ See A Szlęzak, *Stosunki majątkowe między konkubentami* (UAM, Poznań, 1992) p 11.

⁹ See A Szlęzak, *Stosunki majątkowe między konkubentami* (UAM, Poznań, 1992) p 12.

¹⁰ Such as ‘people being in de facto relationships’ or ‘living together’, ‘being in intimate relations’ or actually ‘cohabiting’. See A Stępień-Sporek, and M Ryznar ‘The Legal Treatment of Cohabitation in Poland and the United States’ *UMKC Law Review*, Vol 79, no 2, 2010, pp 380–381.

¹¹ The decision of Supreme Court of 31 March 1988, I KR 50/88, LEX no 20315.

¹² The decision of Supreme Court of 2 May 1963, III CO 14/63, LEX no 106463.

¹³ The decision of Supreme Court of 5 May 1997, II CKN 485/97, LEX no 583765.

¹⁴ See A Szlęzak, *Stosunki majątkowe między konkubentami* (Poznań 1992) p 14. Some scholars use the term ‘cohabitation’ for both same- and opposite-sex couples (T Smyczyński, ‘Czy

Other features of cohabitation are treated in many ways. For example, Seweryn Szer treated all permanent opposite-sex relationships as cohabitation, even if the couple maintains only sexual relations.¹⁵ However, this point of view was subject to criticism.¹⁶ According to the prevailing opinion of scholars, economic bonds such as a common household are essential to create cohabitation.¹⁷ Nonetheless, this statement does not facilitates the creation of a definition of cohabitation.

Andrzej Szlęzak noticed that the problem in defining the relationship under discussion lay in different models of marriages. Cohabitation and marriage are compared and similarities are sought. But it is quite easy to recognise marriage because it is defined by the Family and Guardianship Code and personal relations between spouses during marriage do not play an important role.¹⁸ Some marriages are more traditional, while others are modern with equality of spouses in all aspects as the most important value. Relationships between cohabitants can also differ in similar ways as between spouses, but there are not sharp criteria that allow clear determination of whether a particular relationship is cohabitation or another relationship. Recognising this, the author suggested that cohabitations should have some characteristics universal in nature.

First, cohabitation should not be conducted for a special economic purpose, especially in order to lead commercial activity, but the ground for it should have emotional explanations and should be underpinned by a common household. Secondly, the relationship should be long-standing, but this does not mean that it is permanent.¹⁹ Thirdly, there should be special bonds between the cohabitants, namely emotional, physical, and economic.²⁰

At the end of this part of the chapter, it is worth mentioning that cohabitation can exist as long as permanent consent to being together lasts. In the case of a lack of such consent, the relationship breaks. It can happen any moment and does not require any formalities – one of the cohabitants can leave the other without any explanation. This is a significant difference between cohabitation and marriages. In marriages, the consent to be together is important at the

potrzebna jest regulacja prawna pożycia konkubentów (heteroseksualnego i homoseksualnego' in P Kasprzyk (ed.), *Prawo rodzinne w Polsce i w Europie: Zagadnienia wybrane* (Scientific Society of the Catholic University of Lublin, Lublin, 2005) p 462; compare the decision of Supreme Court of 7 July 2004, II KK 176/04, Lex no 121668). In common parlance it is just a relationship between a woman and a man (M Nazar in T Smyczyński (ed) *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze* (Vol. 11, C H Beck, Warsaw, 2009) p 910).

¹⁵ S Szer, 'Konkubinat' *Studia Cywilistyczne* 1969, vol XIII–XIV, p 358.

¹⁶ K Kruczałak, Problem uprawnień konkubiny do renty odszkodowawczej w świetle art 446 § 2 zd II kc, *Państwo i Prawo* 1974, no 10, pp 80–81. See also the decision of Supreme Court of 15 October 1975, V KR 93/75, LEX no 63538.

¹⁷ Eg J S Piątowski in J S Piątowski (ed) *System prawa rodzinnego i opiekuńczego* (Wrocław 1985) p 226.

¹⁸ A Szlęzak, *Stosunki majątkowe między konkubentami* (UAM, Poznań, 1992) p 15.

¹⁹ Even marriages are dissolvable by divorce. Cohabitation can be dissolved easily.

²⁰ A Szlęzak, *Stosunki majątkowe między konkubentami* (UAM, Poznań, 1992) pp 15–17. See also decision of the Supreme Court of 27 May 2003, IV KK 63/03, LEX no 80281.

beginning and a subsequent absence of this consent does not lead automatically to the end of marriage. Divorce is a formal issue and additional premises should be provable.²¹ Taking into account this issue, it is essential to consider the implications of the unions under discussion.

III ECONOMIC CONSEQUENCES OF COHABITATION

Cohabitation is a de facto relationship, not a family-law institution.²² The approach to cohabitation can be called neutral or pragmatic.²³ Therefore, as one should presume, it is not governed by the provisions of the Polish Family and Guardianship Code.²⁴ The legal effects of cohabitation are not subject to regulations concerning the legal effects of marriage, neither by reference nor by analogy (the legislator's failure to regulate cohabitation may not be interpreted as a loophole in the construction of the law), which means that the cohabitants are not entitled to the rights and obligations specific to marriage.²⁵ There is not a matrimonial property regime. Also, their joint acquisition of assets in the form of ownership or other property rights under the co-ownership regime does not result in the cohabitants' joint property being established as a separate group of assets. Each of the cohabitants retains his or her personal property, including shares in co-ownership rights or other property rights. However, items which have been purchased individually shall be allocated in whole to the purchaser's property and, in the case of purchases for common use, shall form an object of an economic, but not a legal, community. Special rules on accountability for the spouse's obligations do not apply to cohabitants, nor are they bound to the spousal maintenance obligation. In practice, the lack of a maintenance obligation is compensated for either through actual voluntary contributions to the household or entry into an agreement for a monetary or non-monetary annuity.

The manner in which the cohabitants' property relationships are organised is subject, to a large extent, to the general legal regime, ie regulations which apply to parties regardless of any personal relations that may bind them. Noteworthy in this context are especially the regulations on co-ownership, as related to the joint possession and management of shared items, provisions on powers of attorney, civil partnership agreements, commission agreements, agreements for free-of-charge loans, donation agreements, and loan agreements. As long as

²¹ For more details on Polish divorce law see eg A Stępień-Sporek, P Stoppa and M Ryznar 'Divorce Law in Poland: A New Regime Needed?' in B Atkin (ed) *The International Survey of Family Law 2013 Edition* (Jordan Publishing, Bristol, 2013) pp 321–331.

²² Eg T Smyczyński, *Prawo rodzinne i opiekuńcze* (C H Beck, Warsaw, 2009) p 4.

²³ A Stępień-Sporek and M Ryznar 'The Legal Treatment of Cohabitation in Poland and the United States' *UMKC Law Review*, Vol 79, no 2, 2010, p 382.

²⁴ Opposing views have been expressed, however, which enable the provisions on marriage to be applied to cohabitation by analogy – L Stecki, Gloss on Supreme Court decision of 30 January 1986, *OSP i KA* 1987, item 117.

²⁵ M Nazar, 'Cywilnoprawne zagadnienia konkubinatu de lege ferenda' *Państwo i Prawo* 1989, no 12, p 105; B Paul, 'Koncepcje rozliczeń majątkowych między konkubentami' *Przegląd Sądowy*, 2003, no 3 p 18; S Szer, 'Konkubinaty' *Studia Cywilistyczne* 1969, vol XIII–XIV, p 359.

cohabitation lasts, the parties will be inclined to waive any mutual claims for receivables under binding agreements, as any gains earned fall under the cohabitants' community, and their purpose is to effect common intentions, whereby it is irrelevant which cohabitant actually disposes of such funds. Therefore, as a rule, provisions concerning settlement on termination of cohabitants' civil law relationships (dissolution of a partnership, abolition of co-ownership, etc) may apply only after the cohabitation ceases, whereas applying them while it lasts would be exceptional.

Only in rare cases does the legal system take into account the existence between parties of a personal relationship, other than when provided for in the Polish Family and Guardianship Code. Two categories of provisions may be enumerated here as regards to: (1) relatives and (2) living together. The provisions which apply on the premise of close relations will pertain to cohabitants living together, as the emotional bond between them, which is an important part of a residential union, may be considered as a basis on which to classify the relationship as 'close'. For example, the law on annuities may be reserved – in accordance with art 908 § 3 of the Polish Civil Code – on behalf of a person, including a cohabitant, in a close relationship with the transferor of real estate. In the provisions of the Polish Civil Code, we may also find examples in which material security is provided for a person in a close relationship with the deceased if the deceased's estate has been used to a certain extent by the surviving relative. Article 923 of the Polish Civil Code specifically serves to secure residential interests, whereby the testator's relative living with him or her until the former's death is entitled to continue to use, to the extent as hitherto, the residential premises and furnishings therein for 3 months after the inheritance is opened. The continuity of subsistence is guaranteed by art 446 § 2 sentence 2 of the Polish Civil Code, whereby, in the event of death of a relative who was a breadwinner (voluntarily and continuously providing the means of subsistence), the recipient of such benefits may demand an annuity from the person responsible for the breadwinner's death, provided that it is clear from the circumstances that the principles of community life so require. The principles of community life shall not prevent the above-mentioned benefits from being granted to a cohabitant.²⁶

The provisions, which establish the premise of living together, have a narrower scope of application, as they refer specifically to cohabitants. An example of such a regulation may be found in the provisions of the Polish Civil Code concerning rental agreements. In the event of the death of a cohabitant who was the tenant, the other cohabitant's residential interests shall be secured by the manner in which the surviving cohabitant entered into the lease relationship, as long as he or she permanently lived on the rented premises at the moment of the other cohabitant's death.

Noteworthy in this context is the question of cohabitation agreements, in which – besides typical agreements – an important role is played by unnamed

²⁶ A Zieliński, 'Zarys instytucji konkubinatu' *Palestra* 1983, no 12, p 19.

agreements, entered into on the principle of freedom of contract.²⁷ This category includes cohabitants' framework understanding, which provides a basis for the partners' cooperation without obliging them to any specific performance. This differs from other commonly concluded agreements in content and purpose. Cohabitation agreements are intended to create conditions favourable to the continuance of the partners' personal and property relationships. In a cohabitation agreement, the cohabitants define the common place of residence, decide whether they will both work for profit or create the so-called 'joint budget' for shared expenses.²⁸ In light of that general cohabitation agreement, the cohabitants' further legal actions will be usually enforceable in nature. The unnamed agreements also include cohabitant cooperation agreements that exist in two variants: (1) those which govern the joint acquisition of specified property items (eg in order to build a house), (2) those which govern outlays being made on property items which belong to the other cohabitant (eg renovation of a house, which belongs to one of the cohabitants, but is inhabited by both).²⁹ The above-mentioned agreements share two traits: they are unchallengeable and limited in time by the duration of cohabitation. Enforcement by the state is unacceptable, as this would be an attempt to impose a personal relationship on cohabitants. Such a profound interference is not permitted by the literature.³⁰

All of the above-mentioned agreements may contain reservations to make legal effects conditional upon the cohabitation lasting or upon the occurrence of de facto events which would demonstrate that the cohabitants live together. A case in point is the reservation of a suspending condition (eg birth of a child) or dissolving condition (eg free-of-charge loan of items while the cohabitation lasts), or a reservation in a rental agreement for a fixed period of the right to terminate in case the cohabitation should cease. The doctrine allows such provisions and regards them as compliant with the principles of community life.³¹

Characteristically, cohabitation agreements frequently do not document the text of the contract of cohabitants. The reason for this is that the parties share a personal bond, which encourages mutual trust. Therefore, such agreements are usually oral or even *per facta concludentia* (by implication). This circumstance makes it difficult to establish the actual substance of the understanding; still, cohabitants may mitigate the unfavourable effects of unclear law through subsequent amicable settlement.

²⁷ S Jaworski, 'Prawne aspekty konkubinatu' *Monitor Prawniczy* 2012, no 21, p 1169.

²⁸ M Nazar, *Rozliczenia majątkowe konkubentów* (Lubelskie Wydawnictwo Prawnicze, Lublin, 1993) pp 149–151.

²⁹ M Nazar, *Rozliczenia majątkowe konkubentów* (Lubelskie Wydawnictwo Prawnicze, Lublin, 1993) p 156.

³⁰ M Nazar, *Rozliczenia majątkowe konkubentów* (Lubelskie Wydawnictwo Prawnicze, Lublin, 1993) p 162.

³¹ A Szlęzak, *Stosunki majątkowe między konkubentami* (UAM, Poznań, 1992) p 50.

To conclude the discussion on the effects of cohabitants' residential union, we should also mention matters related to inheritance law problems. In Polish law, there are no provisions to allow statutory inheritance between people only living together. Therefore, inheritance, as in the case of other *mortis causa* benefits (general bequest, specific bequest), is possible only if the testator has left a valid will, which designates his or her cohabitant as the beneficiary of his or her entire estate, or provides for another benefit for that cohabitant.

IV PROPERTY SETTLEMENT ON TERMINATION OF COHABITANTS' RESIDENTIAL UNION

As cohabitation is not a legal institution, but a *de facto* relationship based on people actually living together, Polish law lacks provisions to define the manner in which property settlement on termination of cohabitants' residential union is to be effected. As no statutory regulations exist, the views on this question contained in the literature or in court judgments vary widely. Jurisprudence has proposed several concepts for solving this problem, which fall into two groups. One represents universalist concepts, the other case-based concepts.

Universalist solutions assume that it is possible to apply to cohabitants' property settlement provisions regarding a different legally regulated institution, which closely resembles cohabitation. Such solutions propose a uniform and holistic treatment of all property relationships of cohabitants within the framework of a single legal institution.³² There is no agreement, however, as to what institution that should be, although references have been made to a civil partnership, employment relationship, or even marriage.

Case-based solutions, on the other hand, claim that it is impossible to apply to cohabitation, in particular to property settlement on its termination, only one legal institution that most closely resembles it. This view allows the application of property settlement rules based on at least two legal institutions, which have been found to resemble most closely a given *de facto* state. It may turn out that a legal institution applied in order to effect settlement on termination of one cohabitation will not be suitable for another, as cohabitation is a very diverse *de facto* relationship. It must be emphasised that case-based solutions prevail in the Polish literature³³ and court judgments.³⁴ As was rightly pointed out in the resolution of the Supreme Court of 2 July 1955,³⁵ an extramarital relationship in itself produces no property relations between those who remain in such a

³² M Nazar, *Rozliczenia majątkowe konkubentów* (Lubelskie Wydawnictwo Prawnicze, Lublin, 1993) p 56.

³³ A Szlęzak, *Stosunki majątkowe między konkubentami* (UAM, Poznań, 1992) p 23; M Nazar, *Rozliczenia majątkowe konkubentów* (Lublin, 1993) pp 60–61.

³⁴ See decision of Supreme Court of 30 January 1970, III CZP 62/69, LEX no 6659; decision of Supreme Court of 30 January 1986, III CZP 79/85, OSNC 1987/1/2.

³⁵ Decision of Supreme Court of 7 July 1955, II CO 7/55, OSN 1956, item 72.

relationship. If property relations do arise between cohabitants, the rights and obligations resulting therefrom shall be considered on the basis of regulations applicable to such relations.³⁶

The manners in which property settlement on termination of cohabitation shall be effected may be divided into contractual and statutory measures. The statutory measures regarding settlement include settlement based on a cohabitation agreement or based on a co-owner agreement. The principles of such settlement, as voluntarily agreed to by the parties to the agreement, shall be included in the text of the agreement. Regarding statutory settlement, a number of regulation proposals have been considered, in particular those related to provisions on termination of marriage, abolition of co-ownership, dissolution of employment relationship, withdrawal from a civil partnership, *negotiorum gestio*, and refund of benefits gained through unjust enrichment. These are discussed in greater detail below.

Applying provisions on marriage, in particular those concerning the statutory marital and property regimes as set forth in art 31 of the Polish Family and Guardianship Code, even by analogy,³⁷ although proposed in the literature, gives rise to reasonable doubts. The reason is particularly that cohabitation is not a legal institution and may involve persons of the same sex, while marriage does not. Therefore, jurisprudence tends to exclude such a possibility.³⁸

Applying provisions on abolition of co-ownership, ie arts 210–221 of the Polish Civil Code to property settlement on termination of cohabitation is a different problem. It is beyond question that such provisions would apply when particular property items that were purchased during the cohabitation are co-owned by the cohabitants. Pursuant to art 195 of the Polish Civil Code, several persons, including cohabitants, may be entitled to indivisible ownership of the same item. However, applying provisions on co-ownership and abolition thereof to settlement on termination of cohabitation in accordance with a universalist solution³⁹ gives rise to reasonable doubts. First, law now in force does not define ways in which co-ownership may arise. The basic practical problem related to cohabitation is to ascertain precisely which property items are co-owned. The opinion that entry into cohabitation in itself triggers co-ownership between cohabitants is especially untrue. Also, co-ownership is not triggered by the cohabitants' entering into a joint business undertaking.⁴⁰ Further doubts arise when we examine the manner in which regulations on co-ownership are applied to the community of other property rights acquired while cohabitation lasted. This manner of regulation, as applied directly, may only govern co-ownership of objects. Applying it by analogy to property rights

³⁶ Decision of Supreme Court of 6 December 2007, IV CSK 301/07, OSNC 2009/2/29.

³⁷ L Stecki, 'Gloss on Supreme Court decision of Jan 30, 1986' OSPiKA 1987, item 117.

³⁸ See decision of Supreme Court of 30 January 1986, III CZP 79/85, OSNC 1987/1/2.

³⁹ A Zieliński supports this concept in his 'Zarys instytucji konkubinatu' Palestra 1983, no 12, p 16. See also decision of Supreme Court of 30 January 1986, III CZP 79/85, OSNC 1987/1/2.

⁴⁰ M Nazar, 'Gloss on Supreme Court resolution of Jan 30th, 1986' OSPiKA 1988, item 56; A Szlęzak, *Stosunki majątkowe między konkubentami* (UAM, Poznań, 1992) p 93.

other than ownership, as postulated by Andrzej Zieliński,⁴¹ has been rightly criticised.⁴² A legal loophole may not be said to exist when cohabitation, as a de facto relationship, is hardly regulated at all. Also, we cannot help but disagree that the concept of co-ownership (community) is close in its purpose to that of cohabitation.

It is noteworthy that in certain de facto relationships, especially when it is difficult to obtain evidence in proceedings related to cohabitants' settlement, certain presumptions arising out of possession may be relevant for the cohabitants' legal situation. The presumption based on art 339 of the Polish Civil Code, which states that 'the person in actual possession of a thing is an owner-like possessor', can be applied as well as the presumption of legal possession based on art 341 of the Polish Civil Code.

Provisions concerning expiry of an employment contract may also be applied to property settlement on termination of cohabitation. Opinions have been expressed to allow applying provisions governing employment contracts to relationships under discussion, at least in some cases.⁴³ This solution has also been questioned, not least because it would be necessary for typical features of an employment contract to exist between the cohabitants. Such features refer mainly to the employee being subordinate to the employer and carrying out work at the employer's risk.⁴⁴ Therefore, the application of the Labour Code to property settlement on termination of cohabitation should be limited to exceptional cases, where a legal relationship has arisen between the cohabitants, characterised by all the required features of an employment contract.

The doctrine also examines the extent to which it would be possible to apply to cohabitants' property settlement, at least in some cases, provisions on dissolution of a civil partnership, including art 875 of the Polish Civil Code.⁴⁵ This view is rightly criticised, as it is usually difficult to find an exclusively economic purpose of cohabitation. Such an exclusively economic purpose lies at the heart of a civil partnership. The purpose, for which cohabitation arises, is

⁴¹ A Zieliński, 'Zarys instytucji konkubinatu' *Palestra* 1983, no 12, p 16 and following.

⁴² See B Paul, 'Koncepcje rozliczeń majątkowych między konkubentami' *Przegląd Sądowy* 2003, no 3, p 34; M Nazar, *Rozliczenia majątkowe konkubentów* (Lubelskie Wydawnictwo Prawnicze, Lublin, 1993) s 85.

⁴³ E Dolecki, 'Wzajemne rozliczenia konkubentów o wynagrodzenie za pracę' *Nowe Prawo* 1963, no 1, p 58; S Szer, 'Konkubinat' *Studia Cywilistyczne* 1969, vol XIII–XIV, p 362; A Policiński, 'Roszczenie konkubiny z tytułu pracy świadczonej w gospodarstwie rolnym' *Nowe Prawo* 1970, no 4, p 505.

⁴⁴ B Paul, 'Koncepcje rozliczeń majątkowych między konkubentami' *Przegląd Sądowy* 2003, no 3, p 23 and literature referred to therein. See also decision of Supreme Court of 30 September 1966, III PZP 28/66, OSNC 1967/1/1.

⁴⁵ S Szer, 'Konkubinat' *Studia Cywilistyczne* 1969, vol XIII–XIV, p 363; T Jasiakiewicz, 'Rozliczenia majątkowe pomiędzy osobami tej samej płci pozostającymi w związku faktycznym i prowadzącymi wspólnie działalność gospodarczą' *Glosa* 2010, no 2, p 127.

above all personal in nature. Therefore, only after the cohabitants have concluded a civil partnership agreement will the relevant regulations become applicable.⁴⁶

Another set of regulations worth mentioning are those concerning unjust enrichment (art 405 and subsequent of the Polish Civil Code), to which the provisions on undue benefits in art 410 of the Polish Civil Code would be applied the most widely. The literature and court judgments point to cases, in which reference to the above-mentioned regulations has proved successful in relation to settlement on termination of cohabitation.⁴⁷ However, we should point to regulations in art 411 point 2 of the Polish Civil Code, under which no demands for refund of undue benefits may be made if this complies with the principles of community life. Assessment of a benefit in the light of the above-mentioned general clause may be relevant in the cohabitant's settlement.

Within the relationships discussed hereunder, certain provisions concerning *negotiorum gestio* may be applicable (art 752 and subsequent of the Polish Civil Code). Applicable to a given de facto state might be especially the regulations in art 753 § 2 of the Polish Civil Code, which states that a *negotiorum gestor* who acted in accordance with his or her duties may demand refund of justified expenses and outlays, including statutory interest, as well as exemption from obligations, contracted while handling another person's affairs.

Personal relations binding cohabitants usually cause them to omit to actively pursue claims against each other, which may have arisen. The limitation period shall run despite this (unlike in the case of marriage where provisions exist to suspend the limitation period), which means that claims might become barred by the statute of limitations even before either cohabitant decides to pursue them. At the same time, mutual settlement usually takes place after the cohabitation has ceased, which may be a few years after the claim has fallen due. In such a case, the defendant may counter the plaintiff's time-bar argument by pointing to the argument's non-compliance with the principles of community life (art 5 of the Polish Civil Code), as while the cohabitation lasted, the claim was prevented from being pursued by ethical considerations. Proceeding to enforce the claim might lead to conflict.⁴⁸

V CONCLUSION

Cohabitation as a de facto rather than legal relationship of a man and a woman⁴⁹ has not been regulated in detail by the Polish law. The term

⁴⁶ M Nazar, *Rozliczenia majątkowe konkubentów* (Lubelskie Wydawnictwo Prawnicze, Lublin, 1993) p 78 and literature referred to therein.

⁴⁷ See B Paul, 'Koncepcje rozliczeń majątkowych między konkubentami' *Przegląd Sądowy* 2003, no 3, p 30 and literature referred to therein.

⁴⁸ B Paul, 'Koncepcje rozliczeń majątkowych między konkubentami' *Przegląd Sądowy* 2003, no 3, p 40.

⁴⁹ The legal status of same-sex couples is however similar and Poland has not introduced any

‘cohabitation’ does not even have a clear and unambiguous meaning. Polish legislation does not use the terms ‘cohabitation’ or ‘concubinage’ which are replaced by ‘close persons’, people ‘being in de facto relationships’ or ‘living together’.⁵⁰ When need arises for cohabitants’ property settlement, either in the course or – more importantly – on termination of cohabitation, such regulations are utilised as best fit the actual character of the relationship. Literature presents no single cohesive concept. There are at least several. Such a variety of opinions leads to doubts as to cohabitants’ legal status. Choosing cohabitation as a model of relationship does not always result from a deliberate and free choice. The rationality of this choice can be also called into question.

Therefore, the lack of regulations in Polish law governing the legal effects of cohabitation also triggers a number of practical problems related in particular to general regulations being applied to cohabitants with no regard to the fact that they are or were bound in the past by a personal relationship. Meanwhile, that relationship has an enormous effect on the performance by cohabitants and is the reason for specific legal or de facto acts. Cohabitants frequently not only waive claims to which they are entitled to avoid conflict, but also resign their careers, jobs or other sources of income to take care of the de facto family. When such a relationship ceases, the effects of the unavailability of legal measures to secure the economically vulnerable party’s interests prove to be particularly severe and may lead in extreme cases to destitution and homelessness. Considering this, it is worth taking into account certain proposed regulatory models, which might – at least, to some extent – mitigate the above-mentioned consequences. The lack of regulations in the Polish law governing the legal effects of cohabitation calls for minimum legislative efforts to remedy the situation.

special regulations for gays and lesbians, which is still a controversial issue. See M Ryznar and A Stępień-Sporek ‘National Constitutional Approaches to Family Policy’ in *Arbeitskreis Europäische Integration* (Baden-Baden, Nomos Publishers, 2014). Available at SSRN: <http://ssrn.com/abstract=2231346> or <http://dx.doi.org/10.2139/ssrn.2231346>.

⁵⁰ M Nazar in T Smoczyński (ed) *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, Vol 11 (C H Beck, Warsaw, 2009) p 909.

PUERTO RICO

SUPPORT, LESBIAN ADOPTION, SAME-SEX MARRIAGE AND CHILD ABUSE

*Pedro F Silva-Ruiz**

Résumé

Cet exposé sur le droit de la famille portoricain en 2014 couvre essentiellement les sujets de l'obligation alimentaire, l'adoption, le mariage entre personnes de même sexe et les abus dont sont victimes les enfants. En ce qui concerne le soutien alimentaire, de nouvelles lignes directrices ont été adoptées en 2014. Le projet de loi sur le l'adoption par des couples de même sexe est toujours en attente d'un vote au Sénat mais il n'est pas clair s'il obtiendra la faveur d'une majorité de sénateurs. Quant au mariage homosexuel, la justice est actuellement saisie d'une demande de reconnaissance du mariage de deux femmes célébré aux États-Unis. Par ailleurs, une décision de la Cour suprême des États-Unis sur ce sujet est attendue car elle aura valeur de précédent à Porto Rico. Pour ce qui est de la protection de l'enfance, le gouvernement a créé en 2014 un comité qui devra faire rapport au Gouverneur et proposer un plan national de prévention des abus.

I INTRODUCTION

This report about family law in Puerto Rico for the year 2014 covers mainly the subjects of support, adoption, same-sex marriage and child abuse.

II SUPPORT

The Guides to Establish and Modify Support Decrees of 2006¹ were substituted by new ones, approved 30 October 2014.² The Guides became effective in November 2014. Article 7 defines many terms used in the Guides, for example:

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¹ Regulation (Reglamento) 7135, effective 24 May 2006, 44 pages (Department of the Family, Administration for Child Support – ASUME – Government of the Commonwealth of Puerto Rico).

² The Regulations were approved pursuant to art 19 of Law no 5 of 5 December 1986 (Organic Law for the Administration for Child Support – Ley Orgánica de la Administración para el Sustento de Menores). The official name of the Guide is: 'Guías mandatorias para computar las pensiones alimentarias en Puerto Rico' (71 pages). There is no English version of the Guide.

(1) ‘alimentista’ (one who enjoys maintenance) refers to the person of less than 21 years old. In Puerto Rico, a person becomes of age at 21 years;³ (2) ‘alimentos’ (support) is also defined, following the lines of art 142 of the Civil Code;⁴ (3) ‘deducciones mandatorias’ (mandatory deductions) are those paid as income tax, social security, medicare, the fee of professional associations of compulsory membership (membership of a lawyers’ association such as the Bar is no longer compulsory in Puerto Rico to be able to practise law once admitted by the Supreme Court after passing the exam), other deductions mandatory by law, and many others.

Articles 8 to 20 (Part III of the Guides) are the rules for determining the basic support (pensión alimentaria básica). Part IV, arts 21 to 25, deals with support when there is shared custody (custodia compartida) of the minor children. Part V, art 26, regulates medical assistance. All minors must have an accessible medical insurance. Part VI, art 27, deals with the revision of the Guides. It states the revision must be done at least every 4 years.

There has not been enough time to judge how the Guides will operate in everyday life.

III CHILD ABUSE (MALTRATO DE MENORES)

On 15 December 2014 it was announced that a committee appointed by the government will submit to the Governor a report and a national (island) plan for the prevention of child abuse in Puerto Rico.⁵ It is called ‘Plan nacional para la prevención del maltrato de menores en Puerto Rico, 2014–2024’.⁶

There has been no action yet.

IV LESBIAN ADOPTION

After the Supreme Court, in *Ex Parte AAR*,⁷ by a 5-4 vote, denied the adoption of JMAV by AAR, the non-biological mother, a bill was introduced in the Senate of Puerto Rico to amend art 138 of the Civil Code. The Senate Commission that studied the bill recommended its approval. Surprisingly, the

³ Article 247 of the Civil Code, 31 LPRA 971.

⁴ 31 LPRA 561.

⁵ See report by Del Valle-Hernández published in the newspaper EL NUEVO DIA, San Juan, Puerto Rico, 15 December 2014, p 10 (Puerto Rico Hoy). The report and plan will establish the priorities and strategies to be followed.

⁶ 112 pages. ‘Departamento de la Familia. Plan nacional para la prevención del maltrato de menores en Puerto Rico’; available only in Spanish at www2.pr.gov/agencias/secretariado/Documents/Plan%20nacional%20para%20la%20prevención%20del%20maltrato%20de%20menores%20en%20Puerto%20Rico%202014-2024.pdf.

⁷ *Ex Parte AAR* 2013 TSPR 16, 2013 JTS 16.

bill has not been brought before the Senate floor for a vote. Rumours are that there are not enough votes for approval.

In an interview with the Metropolitan Catholic Archbishop of San Juan, on 28 December 2014, he expressed the opinion that adoption by a same-sex couple is not the correct solution for childrearing of boys and girls.⁸

V CASE LAW

There were only two cases handed down by the Supreme Court in 2014; the first one is about a minor and the second one deals with the Uniform Interstate Family Support Act.

Rivera Serrano v Municipio Autónomo de Guaynabo,⁹ was decided on 8 October 2014. The issue was whether or not a suit for a tort should be rejected or denied when a mother failed to notify the mayor of the city, as required by law, where an accident took place. The Supreme Court decided that the failure to notify the mayor meant the mother could not sue for her damages, but the right of the minor to sue, represented by his mother, was not affected.¹⁰

The second case is *Rodríguez Rivera v De León Otaño*,¹¹ decided on 9 October 2014. The issue was whether the Court of First Instance has jurisdiction to hear a case for interstate support (caso interestatal de pensión de alimentos) brought under the 'Uniform Interstate Family Support Act' (Ley Interestatal Uniforme de Alimentos entre Parientes, LIUAP).¹² Article 2.201 of Law 180 (year 1997) reads:¹³

'In a proceeding to establish, enforce, or modify a support decree or to determine parentage, a tribunal of Puerto Rico may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

- (1) The individual is personally served within Puerto Rico;
- (2) The individual submits to the jurisdiction of Puerto Rico by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- (3) The individual resided with the child in Puerto Rico;
- (4) The individual resided in Puerto Rico and provided prenatal expenses or support for the child;

⁸ See interview with Monsignor González Nieves by Parés Arroyo, published in the newspaper EL NUEVO DIA, San Juan, Puerto Rico, 28 December 2014, p 10 (Puerto Rico Hoy). It is reported '... no cree que la adopción por parte de parejas del mismo sexo es la solución para la crianza de niños y niñas.'

⁹ 2014 TSPR 118, 2014 WL 5315076 (PR) (Opinion of the Court by Associate Justice Rivera García).

¹⁰ See p 8 of 11.

¹¹ 2014 TSPR 123 (Opinion of the Court by Associate Justice Rodríguez Rodríguez).

¹² Law no 180 of 20 December 1997, 8 LPRA 541 et seq.

¹³ 8 LPRA 542 (official translation).

- (5) The child resides in Puerto Rico as a result of the acts or directives of the individual;
- (6) The individual engaged in sexual intercourse in Puerto Rico and the child may have been conceived by that act of intercourse;
- (7) The individual asserted parentage in the putative father registry maintained in Puerto Rico by the appropriate agency, or
- (8) There is any other basis consistent with the Constitutions of Puerto Rico and the United States for the exercise of personal jurisdiction.'

The Supreme Court decided that the Court of First Instance and ASUME (an administrative agency) had jurisdiction to hear the case as the child lived in Puerto Rico.

VI LEGISLATION

Law no 164 of 11 June 2014 amended some articles of the Civil Code. The first one is art 950, 31 LPRC 2778, concerning the rights of a deaf mute (sordomudos) who knows how to read and write to accept or decline (repudiar) an inheritance. The second one is art 1215, 31 LPRC 3402, about those persons who cannot give consent to enter a contract. It repealed that part of the law stating '... and the deaf and dumb who do not know how to write'. It was substituted by the following language: '3. The deaf and dumb who cannot understand or communicate effectively by any means.'

Law no 229 of 19 December 2014, amended law no 54 of 1989 for the Prevention and Intervention with Domestic Violence. Article 2.1 deals with protective orders. It was amended to require a guide with recommendations about some measures/steps to be included with the order granted to the victim of domestic violence. For example, the victim of domestic violence must provide a photo of the aggressor to neighbours and to the police quarter closest to the residence of the victim. In this way, the law is trying to make the orders for protection more effective.

VII GAY MARRIAGE OR SAME-SEX MARRIAGE

A gay couple (two women) brought a case before the US District Court for the District of Puerto Rico (USDCPR) claiming their wedding in a state of the United States be recognised in the island. The Department of Justice of Puerto Rico opposed. The Court denied recognition of the marriage. The case was appealed to the Federal Circuit of Appeals in Boston (Mass). No decision has been handed down yet.¹⁴

¹⁴ See: (1) 'Justicia defenderá el matrimonio tradicional' (Dept of Justice to defend the traditional marriage), EL NUEVO DIA, 23 May 2014, p 16 (by José A Delgado); (2) 'Una ola difícil de detener – matrimonio gay gana terreno' (A wave difficult to stop – gay marriage wins ground), EL NUEVO DIA, 19 October 2014, pp 4–5 (by K López Alicea); (3) 'Juez deniega el matrimonio gay' (Judge denied gay marriage), EL NUEVO DIA, 22 October 2014, pp 4–5 (by

On 16 January 2015 the US Supreme Court granted a petition for a writ of certiorari of 14 November 2014. It agreed to review a federal appeals court decision upholding Michigan's ban on marriage for same-sex couples. The petition was filed by Michigan couple April De Boer and Jayne Rowse (both are women). Thus, the US Supreme Court will be considering the state ban on marriage (as well as those in other states) still denying marriage licences to gay couples. The decision will be a precedent in Puerto Rico.

K López and M Cobián); (4) 'Apelan a Boston por uniones gay' (Appeal taken to Boston for gay unions), EL NUEVO DIA, 29 October 2014, p 20 (by K López Alicea), and (5) 'Puerto Rico acataría la decisión de Boston' (Puerto Rico to go along with the decision reached in Boston), EL NUEVO DIA, 30 October 2014, p 18.

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SCOTLAND

WIN SOME, LOSE SOME, BUT NEVER GIVE UP

*Elaine E Sutherland**

Résumé

2014 restera dans les livres d'histoire comme l'année du référendum sur l'indépendance de l'Écosse mais les chroniqueurs du droit de la famille retiendront surtout que c'est aussi en 2014 que l'Écosse autorisa finalement le mariage entre personnes de même sexe. Le présent texte propose une analyse de cette réforme qui fut introduite par le *Marriage and Civil Partnership (Scotland) Act 2014* et il fait état de quelques problèmes qui doivent encore être résolus en ce qui concerne les relations entre adultes. Nous intéresserons ensuite à certains développements significatifs dans le domaine du droit de l'enfance, dont certains résultent du *Children and Young People (Scotland) Act 2014*, qui est l'autre loi majeure adoptée par le parlement écossais en droit familial au cours de cette remarquable année.

I INTRODUCTION

International observers might be forgiven for thinking that the only thing that happened in Scotland in 2014 was the referendum on Scottish independence. Certainly, it was a momentous event and, while those favouring independence did not prevail, the result and the debate that preceded and followed it will change the constitutional future of Scotland and the United Kingdom irrevocably. Late in 2014, the Smith Commission¹ reported with recommendations on further devolution of power to Scotland and these recommendations remain the subject of ongoing discussion at the time of writing.² Since Scotland has always had its own distinct system of family law, administered by Scottish

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¹ *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (The Smith Commission, Edinburgh, 2014): www.smith-commission.scot.

² Draft proposals for legislation implementing the Smith Commission's recommendations were published in January 2015: see, Scotland Office, *Scotland in the United Kingdom: An enduring settlement*, Cm 8990, 2015: www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement.

courts,³ and legislative competence on most family law matters had already been devolved to the Scottish Parliament, further devolution may have less immediately obvious impact on that area of the law than it will on a number of others. The proposed changes in respect of state benefits and taxation may, however, affect families quite radically.

However, the constitutional future of the United Kingdom is not the focus of this chapter,⁴ since we are concerned with developments in Scottish child and family law and, for chroniclers of it, 2014 will forever be notable as the year that Scotland finally embraced same-sex marriage. This chapter examines how that particular reform was effected by the Marriage and Civil Partnership (Scotland) Act 2014 and some of the challenges that remain in the context of adult relationships, before we turn our attention to significant developments in child law, many brought about by the Children and Young People (Scotland) Act 2014. First, brief mention will be made of the context in which Scots child and family law operates.

Regular readers of the *International Survey* will be familiar with the concern voiced in previous chapters from Scotland over access to the law and legal services.⁵ The point has been made – but it bears repeating – that no matter how fine the principles encapsulated in the law, its value is diminished if all members of the community do not have ready access to it and to the remedies it offers. There continues to be reason for disquiet on all aspects of accessibility in Scotland. The law is spread over a multitude of statutes and secondary legislation and understanding it requires constant cross-referencing. This is time-consuming and frustrating for lawyers and makes the task of lay advisers all but impossible. With the passing, in 2014, of the Marriage and Civil Partnership (Scotland) Act, the Children and Young People (Scotland) Act and other statutes, the picture has only become more complex and the case for codification of child and family law is now all the more pressing. Then there is the matter of access to legal aid and the various schemes that help those who cannot afford to pay for legal advice without help. Given that most members of the public cannot hope to negotiate their way through the legal quagmire unaided, many will need high quality legal advice to assist them in establishing what the law provides and how it applies in their particular case. Anecdotal evidence suggests that it is getting more difficult to secure legal aid for clients and this is supported by empirical evidence from the Scottish Legal Aid Board's most recent annual report which notes that children's legal assistance fell by

³ Appeals lie to the United Kingdom Supreme Court (formerly, the House of Lords), which sits as a Scottish Court when hearing appeals, and the European Court of Human Rights provides a further avenue of challenge.

⁴ Of particular relevance is the proposal to extend the franchise in Scotland to 16- and 17-year-olds, discussed at III(a)(iii), below. It is also worth noting that the regulation of assisted reproductive technology and abortion is likely to be devolved to the Scottish Parliament.

⁵ See particularly, Elaine E Sutherland 'Scotland: Can Family Law Be Rendered More Accessible?' in B Atkin (ed) *The International Survey of Family Law 2013 Edition* (Jordan Publishing, Bristol, 2013) 333.

10 per cent and civil legal aid fell by 2.4 per cent.⁶ Since family law cases make up 62 per cent of awards and 61 per cent of the total civil legal aid expenditure, that represents a considerable drop in provision. For litigants, there is the question of access to the courts. As a result of court closures, countless litigants have to travel further in their quest for justice and the remaining courts are taking longer to deal with cases.⁷

II ADULT RELATIONSHIPS

In 2013, the last full year for which statistics are currently available, 27,547 marriages took place in Scotland, some 9.8 per cent fewer than in 2012, while 217 male couples and 313 female couples registered civil partnerships, an overall drop of 7.7 per cent on the previous year.⁸ These figures reflect the dual nature of what was available in terms of formal relationships, with marriage being the different sex option and civil partnership being introduced in 2004 to provide a broadly equivalent status for same-sex couples.⁹ Since simple cohabitation, an option available irrespective of the gender of the parties, requires no formalities for its formation, it is not possible to provide comparative statistics for its incidence. All that was before the advent of same-sex marriage, of course, and the discussion below begins by examining the significant changes introduced by the Marriage and Civil Partnership (Scotland) Act 2014, before moving on to other recent legal developments.

(a) Marriage

Scotland became the 17th country¹⁰ in the world to allow persons of the same sex to marry, signalling commitment to the ideals of equality and respect for diversity that underscore what it means to live in a modern democracy. That is

⁶ *Scottish Legal Aid Board Annual Report 2013-2014* (SLAB, Edinburgh, 2014): www.slab.org.uk/common/documents/Annual_Report_2013_2014/A_-_Annual_Report_2013-14.pdf.

⁷ 'Figures show court closures have slowed justice system' *Scottish Legal News*, 22 December 2014: <http://us5.campaign-archive1.com/?u=91cb73bca688114fefed773f2&cid=955464aed9#1>.

⁸ General Register Office for Scotland, *Scotland's Population 2013: The Registrar General's Annual Review of Demographic Trends* (Scottish Government, Edinburgh, 2014), ch 6. 6,200 (23 per cent) marriages involved couples coming from abroad to get married in Scotland ('tourism marriages') and, of course, Scots going abroad to marry do not show up in domestic statistics. To put these figures in context, the Scottish population in 2013 was 5,327,700, the highest ever.

⁹ Civil Partnership Act 2004. See further, Elaine E Sutherland, *Child and Family Law* (2nd edn, W Green, Edinburgh, 2008) Chapter 12.

¹⁰ That depends on how one defines 'country'. In 2014, 16 states already provided for same-sex marriage, as did some parts of Mexico and the United States. Within the United Kingdom, the relevant legislation applying in England and Wales, the Marriage (Same Sex Couples) Act 2013, came into force on 13 March 2014 and the first same-sex marriages took place on 29 March 2014. The Scottish legislation came into force on 16 December 2014 and the first ceremonies took place on Hogmanay, 31 December 2014. Same-sex marriage is not available in Northern Ireland.

not to say that the reform was uncontroversial and the Marriage and Civil Partnership (Scotland) Act 2014 sought to ensure respect for the legitimate rights of those who oppose the change.

Different sex marriage in Scotland requires satisfying the usual triumvirate of requirements: that the parties have capacity to marry (and to marry one another); that they consent to do so; and that they have complied with the requisite formalities. As far as capacity and consent are concerned, the requirements are identical for same-sex marriage. The 2014 Act made a number of changes in respect of formalities for all marriages. Registrars may now require the parties to submit 'specified nationality evidence' along with certain other documents when giving notice of intention to marry¹¹ and the period of notice that must be given prior to the ceremony taking place has been increased from 14 to 28 days.¹² These requirements are designed to combat both sham and forced marriages.

Hitherto, couples could choose between a civil ceremony, performed by a registrar (a government employee), and a religious ceremony, performed by a celebrant associated with a specific religion. There are different rules governing the approval of different religious celebrants: that is, not all religions are treated equally.¹³ That broad division remains in place, but the 2014 Act added 'belief' celebrants to the mix.¹⁴ In addition, a religious or belief body must 'opt in' to performing same-sex marriages,¹⁵ allowing for those groups opposed to same-sex marriage to have nothing to do with it. The distasteful distinctions drawn in the approval process for different religious celebrants and the issue of opting in could have been avoided by making the solemnisation of marriage a wholly civil affair (as is the case, for example, in France), leaving couples free to have a religious, belief or secular celebration afterwards if they wished.¹⁶ The Scottish Government chose not to adopt that eminently sensible expedient.

A marriage may be void for a variety of reason, like non-age or the fact that the parties are too closely related,¹⁷ and the same rules apply to all marriage. However, the only ground on which a marriage is voidable, in Scotland, is that one of the parties was incurably impotent at the time of the ceremony. When

¹¹ Marriage (Scotland) Act 1977, s 3, as amended by the Marriage and Civil Partnership (Scotland) Act 2014, s 17.

¹² 1977 Act, ss 6, 7 and 19, as amended by the 2014 Act, s 18.

¹³ 1977 Act, s 9, as amended by the 2014 Act, s 13.

¹⁴ A 'religious or belief body' is defined in the 1977 Act, s 26(2), as amended by the 2014 Act, s 10(2), as: 'an organised group of people – (a) which meets regularly for religious worship; or (b) the principal object (or one of the principal objects) of which is to uphold or promote philosophical beliefs and which meets regularly for that purpose.'

¹⁵ Even before this amendment, 'other' groups like the Humanist Society Scotland and the Pagan Federation (Scotland) were permitted to perform civil marriage ceremonies. The first same-sex pagan wedding took place in January 2015: Katrine Bussey, 'Day of joy for witches married in city cellars', *The Scotsman*, 20 January 2015 (article not available online).

¹⁶ Elaine E Sutherland, 'Giving the state sole jurisdiction over marriage would simplify the law', (2013) 58(4) *Journal of the Law Society of Scotland* 5: www.journalonline.co.uk/Magazine/58-4/1012446.aspx.

¹⁷ Other grounds are that one of the parties is already married or civilly partnered, was

civil partnership was created, the legislators showed a distinct aversion to acknowledging the sexual dimension of same-sex relationships¹⁸ and that aversion has continued in the marriage context since the 2014 Act provides that only marriages between persons of different sexes may be voidable on the ground of impotence, that remedy not being available to same-sex couples.¹⁹

Similarly, while a different sex spouse may seek a divorce on the basis of a partner's adultery, a same-sex spouse is given a curiously restricted option.²⁰ The 2014 Act amended the Divorce (Scotland) Act 1976 to provide that, for same-sex couples, 'adultery has the same meaning as it has in relation to marriage between persons of different sexes'.²¹ Due to the very limited definition of adultery in Scotland,²² the result is that a wife in a same-sex marriage may seek a divorce based on adultery if her partner has sexual intercourse with a man, but not if she has sexual relations with another woman. The distinction will be of no practical effect, since same-sex spouses will be able to divorce due to sexual infidelity using the behaviour ground.²³ However, this unnecessary hair-splitting could have been avoided by removing adultery as a ground of divorce altogether and leaving all sexual infidelity to be addressed under the behaviour ground. Despite being urged by some to do so, the Scottish Parliament chose not to take that path.

(b) Civil partnership

When civil partnership was created as the marriage-equivalent exclusively available to same-sex couples several years before marriage was possible for them, the legal systems in the various parts of the United Kingdom were following a pattern familiar in many other jurisdictions.²⁴ However, that was not the only model adopted and in the Netherlands, for example, the relationship that paralleled marriage, registered partnership, was always open to all couples.²⁵

incapable of understanding the nature of marriage or of consenting to it, was in error as to the identity of the other party or the nature of the ceremony or gave consent under duress: 1977 Act, ss 1, 2 and 20A.

¹⁸ The Civil Partnership Act 2004 makes no provision for a voidable Scottish civil partnership, albeit there is recognition of voidable foreign equivalent relationship.

¹⁹ 2014 Act, s 5(1).

²⁰ Divorce (Scotland) Act 1976, s 1(3A), added by the 2014 Act, s 5(2). The distinction will be of no practical effect, since same-sex spouses will be able to divorce due to sexual infidelity using the behaviour ground.

²¹ Divorce (Scotland) Act 1976, s 1(3A), added by the 2014 Act, s 5(2).

²² *MacLennan v MacLennan* 1958 SC 105, at 109 ('the carnal connexion of a married person with any other person than him or her to whom she or he is married ... this obviously means carnal connexion with a person of the opposite sex').

²³ Divorce (Scotland) Act 1976, s 1(2)(b).

²⁴ This was the approach taken in the Nordic countries. See, Ingrid Lund-Anderson 'The Nordic Countries: Same Direction – Different Speeds' in Katharina Boele-Woelki and Angelika Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (Intersentia, Cambridge, 2012) 3.

²⁵ Wendy Schrama 'Marriage and alternative status relationships in the Netherlands' in John Eekelaar and Rob George *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014) 14 at 16.

With the introduction of same-sex marriage in Scotland, the question arose of what to do about civil partnerships.²⁶ Existing civil partnerships remain valid.²⁷ Anticipating that some civil partners would want to marry, the 2014 Act provides procedures for converting a civil partnership into a marriage or for civil partners to marry.²⁸ Thus, same-sex couples are given a choice between two kinds of formal relationship: civil partnership or marriage.

The difficulty with the current law is that civil partnership continues to be available to same-sex couples only, so the same choice is not available to different sex couples. At the very time one form of invidious discrimination was being removed, another was being created²⁹ and many of us argued in favour of extending civil partnership to different sex couples. The other option would be to follow the example of the Nordic countries that have introduced same-sex marriage and abolish civil partnership for the future.³⁰ Yet retaining civil partnership and making it available to all has a benefit. Marriage is unappealing to some couples for a variety of reasons, including its patriarchal or religious associations. For couples who would like to formalise their relationship, but find marriage objectionable, civil partnership offers that opportunity. There will be further consultation in Scotland on the issue in the future.

(c) Forced marriage

For some time, there has been evidence of individuals being forced into marriage, either in Scotland or by being taken out of the country for the ceremony. Any ‘marriage’ in Scotland secured by duress is void,³¹ as is such a

²⁶ The 2014 Act makes various amendments to the Civil Partnership Act 2004, perhaps the most significant of which is the possibility of a civil partnership being registered by a religious or belief celebrant: 2014 Act, s 22, adding new ss 93A, 94A–E and 95ZA to the 2004 Act. It also addresses such matters as forbidden degrees (new Sch 10), the waiting period (now 28 days), place of registration and other matters – and these parallel the provisions in relation to marriage.

²⁷ Another solution adopted in some US states is to convert registered partnerships into marriages on a specific date unless they have been dissolved before then. See, eg, Wash Rev Code §26.60.100 (2014). The objection there is that registered partners consented to enter a particular kind of relationship and the imposition of another by legislative fiat may not be consistent with their intention.

²⁸ 2014 Act, ss 8–11.

²⁹ The Equality and Human Rights Commission Scotland was alert to this issue when, shortly after the 2014 Act was passed, it consulted on its future guidance: Equality and Human Rights Commission Scotland, *Consultation on draft guidance relating to equality and human rights implications for the Marriage and Civil Partnership (Scotland) Act 2014* (2014), no longer available online.

³⁰ See, Lund-Anderson ‘The Nordic Countries: Same Direction – Different Speeds’ in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (Intersentia, Cambridge, 2012) 3 at 4.

³¹ Marriage (Scotland) Act 1977, s 20A. See, eg, *Sobrah v Khan* 2002 SC 382.

marriage of a domiciled Scot anywhere in the world.³² Some, but not all, of the increasingly stringent immigration rules seek to combat forced marriage.³³

However, it was felt that further preventative measures were required and, in 2011, the forced marriage protection order was created.³⁴ This enables the victim (the ‘protected person’) or someone else to seek a civil court order requiring a third party to refrain from certain conduct, like attempting to force the protected person to enter a marriage, or to do something, like surrendering a passport. Breach of such an order is an offence rendering the offender liable to up to 2 years’ imprisonment.

Debate followed on whether attempting to force a person into marriage should constitute a criminal offence in itself. On the one hand, it was argued that such an approach signalled clear condemnation of the practice and would have a deterrent effect. On the other hand, there was concern that criminalisation might deter victims (and others) from seeking official help. In the event, those supporting criminalisation prevailed and in 2014 a new offence of coercing a person to enter a marriage or practising deception in order to lure a person abroad for the purpose of forced marriage was created.³⁵ Conviction may result in up to 7 years’ imprisonment.

(d) Domestic abuse

Domestic abuse remains a significant problem in Scotland despite concerted legislative and other efforts to combat it.³⁶ Since 1981, one spouse has had the right to live in the family home regardless of the fact that the other is the owner or tenant of it and to have a violent partner excluded from the home.³⁷ Civil partners receive equivalent protection³⁸ and similar, more restricted, provision is made for cohabitants.³⁹ In addition, a range of court orders and criminal offences is designed to protect spouses, civil partners and cohabitants from abuse⁴⁰ and to protect victims of harassment and stalking, more generally.⁴¹ A specialist domestic abuse court was established in Glasgow, Scotland’s largest city, in 2004 and others have followed. Sadly, the Glasgow court is in danger of becoming a victim of its own success with a backlog of cases and lengthy

³² *Singh v Singh* 2005 SLT 749.

³³ Not every such requirement passed muster when it was subjected to human rights scrutiny: *R (on the application of Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621.

³⁴ Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011.

³⁵ Anti-social Behaviour, Crime and Policing Act 2014, s 122.

³⁶ See, most recently, *Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls* (Scottish Government, Edinburgh, 2014): www.scotland.gov.uk/Resource/0045/00454152.pdf.

³⁷ Matrimonial Homes (Family Protection) (Scotland) Act 1981.

³⁸ Civil Partnership Act 2004, ss 101–112 and 135.

³⁹ Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 18.

⁴⁰ Protection from Abuse (Scotland) Act 2001 and Domestic Abuse (Scotland) Act 2011.

⁴¹ Protection from Harassment Act 1997, Protection from Abuse (Scotland) Act 2001 and the Criminal Justice and Licensing (Scotland) Act 2010.

waiting times.⁴² Late in 2014, two pilot projects were set up, one in the City of Aberdeen and the other in rural Ayrshire, to test out the Scottish Disclosure Scheme for Domestic Abuse, known colloquially as ‘Claire’s Law’, which enables individuals to seek information from Police Scotland about a partner’s violent past.⁴³

III CHILDREN AND YOUNG PEOPLE

Commenting on the bill that became the Children and Young People (Scotland) Act 2014, Aileen Campbell, the Minister for Children and Young People,⁴⁴ expressed the view that, ‘With the bill, we have set out our ambition to make Scotland the best place in the world to grow up in’.⁴⁵ The phrase ‘best place in the world to grow up in’ is repeated with (irritating) regularity in government publications, presumably on the basis that, if one says something often enough, its veracity will be accepted. In truth, there is a very long way to go before this ambition is realised.

While not providing a separate ranking for Scotland, some indication of the relative well-being of Scottish children can be gleaned from the 2013 UNICEF Office of Research *Innocenti Report Card 11* which offers a comparative overview of the well-being of children in 29 of the world’s advanced economies. The United Kingdom ranked 16th overall, securing 10th place on housing, 16th on health and safety and a shocking 24th on education.⁴⁶ *Report Card 11* also provided results on children’s subjective well-being – what the young people themselves had to say – and overall, the United Kingdom ranked 14th.

There is abundant evidence that significant numbers of children live in poverty in Scotland.⁴⁷ While this affects their overall well-being, it leads to social

⁴² ‘City court’s domestic abuse backlog’, *The Herald*, 1 September 2014: www.heraldsotland.com/news/home-news/city-courts-domestic-abuse-cases-backlog.25212017.

⁴³ ‘Scottish “Clare’s Law” pilot areas announced’, 18 August 2014, Police Scotland website: www.scotland.police.uk/whats-happening/news/2014/august/scottish-clares-law-pilot-areas-announced.

⁴⁴ While Ms Campbell is on maternity leave, her post will be filled by Fiona McLeod. Women in Scotland are entitled to statutory paid leave and employment protection during pregnancy and for a period of time thereafter under legislation applying throughout the whole of the United Kingdom. There is provision for parental leave to enable fathers and other second parents to participate more fully in early child rearing.

⁴⁵ *Official Report, Education and Culture Committee*, 8 October 2013, col 2944, at: www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9319&mode=pdf.

⁴⁶ *Innocenti Report Card 11: Child Wellbeing in Rich Countries: A comparative overview* (UNICEF Office of Research, Florence, 2013): www.unicef.org/media/files/RC11-ENG-embargo.pdf.

⁴⁷ Hannah Aldridge, Peter Kenway and Tom MacInnes, *Monitoring Poverty and Social Exclusion in Scotland 2013* (Joseph Rowntree Trust, 2013): www.jrf.org.uk/publications/monitoring-poverty-scotland-2013; Jim McCormick, *A Review of Devolved Approaches to Child Poverty* (Joseph Rowntree Trust, 2013): www.jrf.org.uk/publications/devolved-approaches-child-poverty. See also the Child Poverty Action Group in Scotland website: www.cpag.org.uk/scotland.

exclusion, poorer academic achievement,⁴⁸ something of a sense of hopelessness amongst impoverished young people⁴⁹ and the continuation of the cycle of poverty.⁵⁰ The extent to which children and their families experience food insecurity was highlighted recently in a report on the extent of reliance on food banks,⁵¹ albeit, the phenomenon has been known to government for some time.⁵² Tackling child (and adult) poverty presents a massive challenge, of course, but strategies are available and government, both in Scotland and the UK, has expressed commitment to do so.⁵³

The picture is not wholly negative, however, and considerable support is available to children, young people and their families in Scotland. All children are entitled to free medical treatment⁵⁴ and education⁵⁵ and a range of state benefits, including those aimed at securing housing, are designed to help families to stay together and meet their basic needs. Extensive legislation governs the responsibilities parents owe to their children and the resolution of disputes between parting and never-together parents (and other family members).⁵⁶ A sophisticated system aims to protect all children and young

⁴⁸ Edward Sosu and Sue Ellis, *Closing the attainment gap in Scottish education* (Joseph Rowntree Trust, 2013): www.jrf.org.uk/publications/closing-attainment-gap-scottish-education, reporting that the gap between children from low-income and high-income households starts early. By age 5, it is 10–13 months. Lower attainment in literacy and numeracy is linked to deprivation throughout primary school. By age 12–14 (S2), pupils from better-off areas are more than twice as likely as those from the most deprived areas to do well in numeracy. Attainment at 16 (the end of S4) has risen overall, but a significant and persistent gap remains between groups.

⁴⁹ A report, based on interviews with 2,311 16-to-24-year-olds from across the UK, found that one in four of those from deprived homes believe that ‘few’ or ‘none’ of their career goals to be achievable, compared to just 7 per cent of those from affluent families; one-quarter of young people from poor homes (26 per cent) felt that ‘people like them don’t succeed in life’; and young people growing up in poverty are significantly less likely to imagine themselves buying a nice house or even finding a job in the future. See, *Broke, not broken* (The Prince’s Trust and RBS, Edinburgh, 2011): www.princes-trust.org.uk/about_the_trust/what_we_do/research/broke_not_broken.aspx.

⁵⁰ Kerris Cooper and Kitty Stewart, *Does Money Affect Children’s Outcomes?* (Joseph Rowntree Trust, 2013): www.jrf.org.uk/publications/does-money-affect-childrens-outcomes (meta study of 34 others exploring the range of ways in which poverty affects children adversely).

⁵¹ Marc Ellison, ‘Record numbers use Scottish food banks’ BBC News, 16 January 2015: www.bbc.co.uk/news/uk-scotland-30832524.

⁵² Filip Sosenko, Nicola Livingstone and Suzanne Fitzpatrick, *Overview of Food Provision in Scotland* (Scottish Government Social Research, Edinburgh, 2013): www.scotland.gov.uk/Resource/0044/00440458.pdf.

⁵³ *Child Poverty Strategy for Scotland – Our Approach – 2014–2017* (Scottish Government, Edinburgh, 2014): www.scotland.gov.uk/Resource/0044/00445863.pdf and *Child poverty strategy 2014 to 2017* (Department of Education, London, 2014): www.gov.uk/government/publications/child-poverty-strategy-2014-to-2017. See also, Lindsay Judge, *Ending Child Poverty by 2020: Progress made and lessons learned* (Child Poverty Action Group, London, 2012).

⁵⁴ For adults, medical treatment is also ‘free at the point of service’ but, of course, many of the adults pay substantial taxes to fund the system.

⁵⁵ State-funded education continues beyond childhood and, for example, students in Scotland do not pay fees for their first university degree.

⁵⁶ See, primarily, the Children (Scotland) Act 1995, Part I.

people from abuse and neglect and to ensure that, when it occurs, it is addressed timeously and appropriately.⁵⁷

Numerous state-funded initiatives were introduced or expanded in 2014, many of them by the Children and Young People (Scotland) Act 2014,⁵⁸ and they are discussed below. Other steps have been taken to address a range of problems that affect children directly or indirectly, including homelessness,⁵⁹ drug and alcohol misuse⁶⁰ and human trafficking.⁶¹ The estimated 10,000 young carers in Scotland – defined as ‘a child or young person aged under 18 who has a significant role in looking after someone else who is experiencing illness or disability’⁶² – are receiving greater recognition and support.⁶³ Considerable effort has gone into developing strategies to help combat bullying⁶⁴ and parents are being offered online classes to enhance their ability to protect their children from threats posed by the internet.⁶⁵ New regulations, designed to protect children and young people who participate in public performances, are in place.⁶⁶

In the remainder of this section, we will explore the impact (or lack thereof) of the Children and Young People (Scotland) Act 2014 on various aspects of child law alongside other legislative and case law developments.

(a) Children’s rights

(i) *The United Nations Convention on the Rights of the Child*

A turning point in international recognition of children’s rights came in 1989 when the Convention on the Rights of the Child was adopted unanimously by the General Assembly of the United Nations. The United Kingdom ratified the Convention in 1991 and has ratified two of the three optional protocols to it,

⁵⁷ See, below, Section III(b).

⁵⁸ For further details, see, the Scottish Family Information Service: www.scottishfamilies.gov.uk.

⁵⁹ See, generally, www.scotland.gov.uk/Topics/Built-Environment/Housing/homeless.

⁶⁰ See, generally, www.scotland.gov.uk/Topics/Justice/policies/drugs-alcohol.

⁶¹ The Criminal Justice (Scotland) Act 2003 (offences relating to trafficking for the purposes of exploitation by way of prostitution), the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (offences of trafficking for labour and other forms of exploitation) and the Criminal Justice and Licensing (Scotland) Act 2010 (offences relating to holding someone in slavery or servitude, or requiring a person to perform forced or compulsory labour). See, generally, www.scotland.gov.uk/Topics/Justice/policies/reducing-crime/human-trafficking.

⁶² *Getting it Right for Young Carers: Young Carers Strategy for Scotland 2010-2015*, Scottish Government, Edinburgh, 2010): www.scotland.gov.uk/Resource/Doc/319441/0102105.pdf, p 6.

⁶³ *Ibid.* The Scottish Government has been consulting on its plans for legislation designed to support all carers, including those at the younger end of the scale. See further the ‘Unpaid carers’ section of the Scottish Government website: www.scotland.gov.uk/Topics/Health/Support-Social-Care/Unpaid-Carers.

⁶⁴ *A National Approach to Anti-Bullying for Scotland’s Children and Young people* (Scottish Government, Edinburgh, 2010): www.scotland.gov.uk/Resource/Doc/330753/0107302.pdf.

⁶⁵ ‘Parents get cyber-savvy in 2015’, Scottish Government website, 29 December 2014: <http://news.scotland.gov.uk/News/Parents-get-cyber-savvy-in-2015-1405.aspx>.

⁶⁶ Children (Performances and Activities) (Scotland) Regulations 2014, SSI 2014/372.

those on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography. It is unlikely to ratify the third optional protocol on the communications procedure, which, essentially, gives children the right to make complaints directly to the UN Committee on the Rights of the Child. 2014 marked the submission by the United Kingdom of its Fifth Periodic Report to the United Nations Committee on the Rights of the Child.⁶⁷

When the Children and Young People (Scotland) Act 2014 was making its way through the Scottish Parliament, there were calls to incorporate the Convention on the Rights of the Child into Scots law, just as the European Convention on Human Rights was incorporated into the law of the various parts of the United Kingdom by the Human Rights Act 1998. In the event, those of us advocating for incorporation did not prevail and, instead, rather feeble, lacklustre provisions place the Scottish Ministers under statutory obligations to promote awareness of children's rights, to 'keep under consideration' whether there is more they could do to give effect to the UN Convention and to report on their progress every 3 years.⁶⁸ Public authorities are subject to a similar reporting requirement in respect of the steps they have taken, within their areas of responsibility, to 'secure better or further effect' of the UN Convention.⁶⁹ This was the first of the missed opportunities in the 2014 Act and it reflects poorly on the Scottish Government's much publicised claims of serious commitment to children's rights.

(ii) Scotland's Commissioner for Children and Young People (SCCYP)

The Commissioner for Children and Young People in Scotland (SCCYP) plays a key role in ensuring respect for children's rights in Scotland since the SCCYP has a statutory obligation to promote and safeguard the rights of children and young people, including the duty to foster awareness of children's rights; review law, policy and practice; and support research.⁷⁰ One of the crucial tools in the SCCYP's arsenal is the power to investigate whether a service provider has had regard to the rights, interests and views of children and young people in making a decision that affects them.⁷¹ It was a shortcoming of the original legislation that this power was confined to cases affecting groups of children and, in a welcome move, the 2014 Act has extended that power to allow the SCCYP to investigate individual complaints.

⁶⁷ CRC/C/GBR/5.

⁶⁸ Children and Young People (Scotland) Act 2014, s 1. The awkward phraseology is found in the statute.

⁶⁹ 2014 Act, s 2 and Sch 1.

⁷⁰ Commissioner for Children and Young People (Scotland) Act 2003, ss 4 and 6.

⁷¹ 2003 Act, s 7.

(iii) Votes for 16- and 17-year-olds

The referendum on Scottish independence was the first time that 16- and 17-year-olds had the opportunity to vote in a country-wide election and even cynics were impressed by their level of engagement with the democratic process.⁷² As a result, there is considerable support for extending the franchise to these young people in all future Scottish elections. The Smith Commission recommended reform to that effect⁷³ and the most recent draft of legislative proposals contains the relevant provision.⁷⁴ This development has had a knock-on effect throughout the United Kingdom, of course, and the Prime Minister, David Cameron, has indicated a willingness to discuss the matter in a wider United Kingdom context.⁷⁵

(b) Child protection

Scotland has long had a sophisticated system in place aimed at protecting children from abuse and neglect⁷⁶ and it has been overhauled on numerous occasions, often in response to shortcomings identified when the system failed.⁷⁷ That the system continues to fail, on occasion, is illustrated by the findings of a fatal accident inquiry (FAI) into the preventable death of Declan Hainey who lived for a little over a year.⁷⁸ His mother and sole carer, whose history of drug and alcohol abuse and mental health issues was known to the authorities, was convicted of his murder initially, but her conviction was overturned on appeal. The precise cause of Declan's death remains unascertained because it was some time before his body was discovered at home in what can only be described as deplorable conditions. Finding that his mother's neglect of him undoubtedly contributed to his death, the FAI highlighted a catalogue of failures in the operation of the system designed to protect children like Declan, including inadequate information gathering and poor inter- and intra-agency communication. As a result, intervention was not triggered at crucial stages. What is so frustrating is that the findings of the FAI read like so many other reports into the avoidable deaths of children at the hands of family members that have gone before. Yet again, there were claims

⁷² Scottish Independence Referendum (Franchise) Act 2013, s 2.

⁷³ *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (Edinburgh, the Smith Commission, 2014), p 5.

⁷⁴ Scotland Office, *Scotland in the United Kingdom: An enduring settlement*, Cm 8990, 2015, Annex A: Draft Clauses, clause 5.

⁷⁵ David Maddox, 'PM open to under-18 debate', *The Scotsman*, 8 January 2015, p 8.

⁷⁶ See particularly, the Children (Scotland) Act 1995, Part II, the Children's Hearings (Scotland) Act 2011 and the Children and Young People (Scotland) Act 2014. Revised guidance on implementing the system was published in 2014: *National Guidance – Child Protection in Scotland 2014* (Scottish Government, Edinburgh, 2014): www.scotland.gov.uk/Publications/2014/05/3052/0.

⁷⁷ See, eg, *The Report of the Inquiry into the Removal of Children from Orkney in February 1991* HC Paper No 195, Session 1992-93, leading to the Children (Scotland) Act 1995, Part II.

⁷⁸ *Fatal Accident Inquiry into the death of Declan Hainey*, 2014 FAI25. The full report is available at: www.scotcourts.gov.uk/search-judgments/judgment?id=bc1a7a6-8980-69d2-b500-ff0000d74aa7, with a summary being available at: www.scotland-judiciary.org.uk/10/1308/Fatal-Accident-Inquiry-into-the-death-of-Declan-Hainey.

that the agencies involved had learned from their mistakes and improved procedures – and we all moved on until the next time.

(i) Providing services for children

Most of the Children and Young People (Scotland) Act 2014 is devoted to the provision of services to children and their families and child protection and much of it builds on and amends existing legislation – yet another example of the need for codification of the law. One feature of the 2014 Act is its fondness for jargon with new terminology, like ‘wellbeing’,⁷⁹ ‘child with a wellbeing need’⁸⁰ and ‘corporate parent’.⁸¹ ‘Wellbeing’ has a respectable pedigree, not least because it features, in hyphenated form, in art 3(2) of the United Nations Convention on the Rights of the Child. It has its roots in the social sciences, yet social scientists admit that it is notoriously difficult to define,⁸² making it questionable that it has a place in legislation. The Scottish attempt at definition simply layers on the ambiguity since it defines well-being by reference to what are known as the SHANARRI indicators, being the extent to which the child is safe, healthy, achieving, nurtured, active, respected, responsible and included.⁸³ Perhaps the real point is that Scots law has long experience of interpreting the term ‘welfare’, itself sometimes criticised for its ambiguity, and there really was no need to add another term to the mix.⁸⁴

The Act does, however, have some excellent features, particularly in terms of services. There is provision for 600 hours per year of early learning and day care for all 3- and 4-year-olds⁸⁵ and free lunches for all children in P1–P3 (5 to 7 year-olds) attending state schools.⁸⁶ A whole range of provisions address local authority obligations to children, information-sharing between agencies and inter-agency cooperation.⁸⁷ Kinship care, whereby a child is looked after by relatives other than the child’s parents, will receive greater recognition and support.⁸⁸ Young people who are being looked after by the state at the age of

⁷⁹ 2014 Act, s 96.

⁸⁰ 2014 Act, s 33(2).

⁸¹ 2014 Act, s 56 and Sch 4.

⁸² See, eg, Gaëlle Amerijckx and Perrine Claire Humblet ‘Child Wellbeing: What Does it Mean?’ (2014) 28 *Children and Society* 404 and Asher Ben-Arieh ‘Social Policy and the Changing Concept of Child Wellbeing: The role of international studies and children as active participants’ (2014) 60(4) *Zeitschrift Für Pädagogik* 569.

⁸³ 2014 Act, s 96.

⁸⁴ Interpretation of the term ‘relevant person’ (broadly a parent or parent-like person) continues to present a challenge despite the fact that it was first introduced in the Children (Scotland) Act 1995. See, most recently, *MT & AG v Gerry* [2014] CSIH 108.

⁸⁵ Two-year-olds are also eligible where their parents are in receipt of certain state benefits, they are ‘looked after’ (in state care), in kinship care or have a parent appointed guardian.

⁸⁶ Education (Scotland) Act 1980, s 53, as amended by the 2014 Act, s 93. See further, ‘Free school meals’, Scottish Government website, 5 December 2014: <http://news.scotland.gov.uk/News/Free-school-meals-12f6.aspx>.

⁸⁷ 2014 Act, ss 33–45. Many of the obligations were previously contained in guidance and they are now given greater authority by virtue of being included in legislation.

⁸⁸ Children and Young People (Scotland) Act 2014, ss 71–74. See further, *In the family way: Five*

16 or thereafter are now entitled to have that care continue until they are 21, with further assistance being available until they reach 26.⁸⁹

Possibly the most controversial of the innovations in the 2014 Act is the provision of a ‘named person’ for almost every child and young person in Scotland.⁹⁰ The named person is an identified individual (usually a health care professional for pre-school children or schoolteacher for older children) whose function it is to advise, inform or support the child or young person or his or her parent; help the child or young person or his or her parent to access services; or discuss or raise a matter about the child or young person with a service provider or relevant authority.⁹¹ The perceived benefit of the innovation is that it will provide a single contact point for children and parents and should ensure that no child ‘falls through the cracks’. However, there has been widespread opposition to the whole notion of such an office and to specific aspects of the scheme, with opponents ranging from (often religious) conservative parents, who see it as an interference with their right to raise their children as they see fit, to human rights activists who view it as a violation of Art 8 of the European Convention on Human Rights, guaranteeing the right to respect for private and family life. In addition, there are concerns over whether named persons are sufficiently independent of the local authority to advocate for children effectively in respect of local authority obligations and the fact that the scheme dissipates resources by applying to all children, rather than focusing on those where there is a demonstrable need for intervention. At the time of writing, a petition for judicial review, challenging the named person provisions was refused in the Court of Session⁹² in what most probably marks only the beginning of protracted litigation.

(ii) Misconceptions, inertia and omissions

Attempts to protect children from the vast array of dangers they may face are well intentioned, but good intentions alone are not enough, as the first two examples below illustrate. The third example demonstrates the fact that, when it comes to children, other interests sometimes prevail.

In the attempt to discourage 13- to 15-year-olds from engaging with each other in what would be consensual sexual activity but for their age, the Scottish Parliament has rendered the conduct of the young people themselves criminal.⁹³ While most children will have their case referred to a children’s hearing, the fact of having committed a sexual offence is something that must be reported later in life and may have serious adverse consequences for the individual.

years of caring for kinship carers in Scotland (Citizens Advice Scotland, 2014), at: www.cas.org.uk/system/files/publications/kinship%20care.pdf.

⁸⁹ Children (Scotland) Act 1995, Part II, as amended by the Children and Young People (Scotland) Act 2014, ss 66 and 67.

⁹⁰ 2014 Act, ss 19–32. Young people serving in the reserve or regular armed forces are excluded: 2014 Act, s 21(4).

⁹¹ 2014 Act, s 19(5).

⁹² *Christian Institute & Others, Petitioners* [2015] CSOH 7 (Lord Penrose).

⁹³ Sexual Offences (Scotland) Act 2009, s 37.

While female genital mutilation (FGM) has been a crime in the United Kingdom since 1985 and there has been specific Scottish legislation rendering it illegal since 2005,⁹⁴ it was not until 2014 that the first prosecution took place in England⁹⁵ and there have, as yet, been no proceedings in Scotland.⁹⁶ Yet it is widely accepted that the practice is carried out across the country and, following the publication of a report highlighting the problem,⁹⁷ a more proactive official response can be anticipated in the future.

It remains the case that parents in Scotland are free to hit their children provided they stick within the permitted limits.⁹⁸ Politicians are remarkably reluctant to address this issue, largely due to a fear of offending their (adult) constituents and in its most recent report to the United Nations Committee on the Rights of the Child, in 2014, the United Kingdom Government was unapologetic about its stand.⁹⁹ As more countries around the world acknowledge that all violence against children is unacceptable and outlaw parental chastisement, it is disappointing that this was not done in Scotland in the course of passing the Children and Young People (Scotland) Act 2014. Campaigners will take the opportunity presented by the Criminal Justice (Scotland) Bill,¹⁰⁰ currently making its way through the Scottish Parliament, to seek to bring Scots law on this issue into line with that in the civilised nations of the world.

(iii) The ultimate authority

In disputed cases in Scotland, it is the courts that make the final decision about who may see a child and when. That is so whether the dispute is between the child's parents or between a parent and the state agencies charged with child protection. Officials of the state, like everyone else, are bound by these determinations and it is prima facie contempt of court for them to ignore court orders. Yet social workers have an obligation to protect the children for whom they are responsible and the dilemma they can face was highlighted in a recent

⁹⁴ Prohibition of Female Circumcision Act 1985, repealed and replaced, in England and Wales, by the Female Genital Mutilation Act 2003 and, in Scotland, by the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

⁹⁵ 'First prosecutions for female genital mutilation', Crown Prosecution Service website, 21 March 2014: www.cps.gov.uk/news/latest_news/first_prosecutions_for_female_genital_mutilation.

⁹⁶ Kevan Christie 'No FGM prosecutions, police admit' *The Scotsman*, 8 August 2014, p 20.

⁹⁷ Julie Bindel *An Unpunished Crime: The lack of prosecutions for female genital mutilation in the UK* (The New Culture Forum, London, 2014).

⁹⁸ Criminal Justice (Scotland) Act, 2009, s 51.

⁹⁹ *The Fifth Periodic Report to the United Nations Committee on the Rights of the Child: United Kingdom*, CRC/C/GBR/5, chapter III, para 11 ('The UK Government does not condone any violence towards children and has clear laws to deal with it. Our view is that a mild smack does not constitute violence and that parents should not be criminalised for giving a mild smack.') Were that an accurate assessment, then everyone in the UK would be free to administer 'light smacks' to each other without fear of prosecution for assault.

¹⁰⁰ SP Bill 35 (2013).

case, *A and B Petitioners*.¹⁰¹ There, a children's hearing (a tribunal that deals with child protection cases) had reduced the amount of contact between a mother and her two sons who were in foster care from weekly to monthly. The mother appealed against that decision and a sheriff (a legally qualified judge) ordered weekly contact to be reinstated, a course of action that had been opposed by the social work department responsible for the boys' care. Weekly contact resumed for a period and was then terminated by the children's social worker because she believed that the distress caused to the boys was causing them emotional harm. She was supported in her decision by her supervisor and they referred the case back to a children's hearing. Had the children's hearing acted expeditiously, the matter might have gone no further. However, for reasons that need not detain us here, it did not.

When the sheriff learned that her decision was not being implemented – and amid considerable controversy¹⁰² – she found the social workers to 'have shown disrespect for and disregard for the decision of this court and interfered with the administration of justice' and to be in contempt of court, albeit she imposed no further penalty.¹⁰³ That finding of contempt was overturned when the social workers challenged it in the Court of Session.¹⁰⁴ The Court was at pains to emphasise the importance of obeying court orders. However, in the light of the social workers' obligation to protect the boys' welfare and the fact that they had sought to have the situation reviewed further by a children's hearing, it did not find that their conduct reflected the requisite 'deliberate lack of respect for or defiance of the authority of the court'¹⁰⁵ to constitute contempt.

It would be difficult to disagree with the Court's observation that 'there may be circumstances when a social worker requires to take immediate and decisive action on her own account'.¹⁰⁶ Similarly, it was reasonable to assert, as it did, that 'in the absence of some very good reason grounded in clear evidence and findings to the contrary [social workers] are entitled to the presumption that ... they were motivated and had the best interests of the children as their sole concern'.¹⁰⁷ Where does that leave parents who prevail in court but are thwarted by social workers who they believe are biased against them? Where does it leave a parent who is at loggerheads with the child's other parents and is convinced that acting in breach of a court orders is justified by his or her

¹⁰¹ [2015] CSIH 25. At the time of writing, the decision is available only at: www.scotcourts.gov.uk/search-judgments/judgment?id=63d8cea6-8980-69d2-b500-ff000d74aa7.

¹⁰² Kenneth Roy, 'The long ordeal', *The Scottish Review*, 30 March 2015: www.scottishreview.net/KennethRoy8a.html.

¹⁰³ *Contempt of court proceedings in respect of M and L* 2014 SLT (Sh Ct) 21, at [115].

¹⁰⁴ *A and B Petitioners* [2015] CSIH 25. The social workers' challenge was taken by means of petition to the *nobile officium*, the equitable jurisdiction of the Court of Session to provide a remedy where no other exists.

¹⁰⁵ [2015] CSIH 25, at [29].

¹⁰⁶ [2015] CSIH 25, at [31].

¹⁰⁷ [2015] CSIH 25, at [32].

perception of the child's best interests?¹⁰⁸ For the time being, the answer may well be that they are in a precariously ambiguous situation.

(c) Financial support for children

Parents in Scotland have always been obliged to support their children and most do. However, allocation of the responsibility for a child's financial support between separated or never-together parents can be a contentious issue and the most recent legislative response is less than helpful in resolving conflicts.

The long-running and sorry tale began, in 1991, when the traditional system of aliment,¹⁰⁹ applied by the courts, was replaced by a system of child support, administered by a succession of government or quasi-governmental agencies on a UK-wide basis.¹¹⁰ Vestiges of the old system of aliment remain,¹¹¹ but the thrust of the child support system is to remove the jurisdiction of the courts in support disputes between the child's parents.¹¹²

From the outset, the child support system was something of a disaster and there have been numerous attempts to salvage it. The main flaws were the complexity of the original system and the fact that it was expensive to administer – and administered badly. The first of these problems was addressed when the complicated set of interlocking formulae used to calculate the 'maintenance assessment' was replaced by the 'maintenance calculation', basing it on a percentage of the payer's gross income.¹¹³ The latest and, arguably, most radical reform came into effect in 2014 and it attempts to address administrative errors and cost, and reflects a change in philosophy since it 'encourages' parents to make their own arrangements for support of their children. Only if they are unable to do so is it anticipated that they will turn to the latest agency created to hold this poisoned chalice, the Child Maintenance Service (CMS). The incentive for parents to reach agreement lies in the cost of using the CMS. A

¹⁰⁸ Counsel for the mother raised the issue of parents who were in dispute and the Court simply dismissed the analogy: [2015] CSIH 25, at [32].

¹⁰⁹ Family Law (Scotland) Act 1985, s 1.

¹¹⁰ Child Support Act 1991. In *Child Maintenance and Enforcement Commission Child Support Agency v Roy* [2013] CSIH 105, a party litigant (self-represented) father was unsuccessful when he sought to challenge the validity of the Child Support Act 1991 on the basis that it was in breach of the Union with England Act 1707 and the European Convention on Human Rights 1950, Art 7.

¹¹¹ Aliment continues to apply to the liability of the child's parents for payments in excess of the formula, for additional educational expenses, relating to a child's disability, in respect of children over the age when child support applies (broadly, 16, but can be up to 20), where one of the parents is habitually resident abroad and in respect of the liability of the parent with whom the child lives: Child Support Act 1991, ss 8 and 44. The liability of persons other than the child's parent is also determined by the law on aliment: Family Law (Scotland) Act 1985, s 1.

¹¹² Child Support Act 1991, s 8.

¹¹³ Child Support, Pensions and Social Security Act 2000, amending the Child Support Act 1991. Since it is in the nature of families that they present a range of factual situations, there is also provision for special cases, variations and reviews: Child Support Maintenance Calculation Regulations 2012, SI 2012/2677.

new applicant for assessment will pay a flat fee of £20 to use the service. Thereafter, the CMS will charge the payer an additional 20 per cent, and the recipient 4 per cent, of the maintenance calculation.¹¹⁴

In just over 20 years the whole system for resolving parental disputes over financial support for children has been turned on its head. The jurisdiction of the previous court-based system, where many parents were assisted by a lawyer, often funded by legal aid, has been removed. It has been replaced by an administrative system which leaves parents to their own devices, regardless of their inequality of bargaining power, unless they are prepared to pay, in which case it takes a substantial amount of money from people who often have very limited resources. That may make sense to government accountants, but it makes none whatsoever in terms of serving the interests of the children involved.

IV CONCLUSIONS

Our views on the regulation of personal relationships are shaped by our individual moral, ethical, political, economic and, sometimes, religious beliefs. As a result, child and family law often generates fierce controversy and those seeking to reform it have learned that securing a particular advance is likely to require sustained effort and steely determination.

A degree of patience is also called for, since reaching the desired goal may only be possible through an incremental process that sometimes requires accepting temporary compromises. So it was with same-sex marriage. It took decades of campaigning and accepting the compromise of civil partnerships before the final goal was achieved. Yet that process of compromise can bring unforeseen benefits. Civil partnership may have been created as a compromise solution for same-sex couples but, now that it is on the statute book, there is the opportunity to make it available to all couples, offering an option to those who would like to formalise their relationship but find marriage unattractive.

The incremental process is at an earlier stage in respect of numerous other issues and many of the current compromises are far from satisfactory. It will take sustained effort if we are to achieve the goal of eradicating the so-called right of parents to hit their children and steely determination will be called for in securing the incorporation of the United Nations Convention on the Rights of the Child into Scots law. Like those seeking independence for Scotland, family law reformers have shown the requisite tenacity in the past and will continue to do so.

¹¹⁴ Child Support Fees Regulations 2014, SI 2014/612.

SERBIA

PROTECTION OF CHILDREN FROM ABUSE IN THE MODERN WORLD – SERBIAN EXPERIENCE

*Olga Cvejić Jančić**

Résumé

‘L’intérêt supérieur de l’enfant’ est un principe relativement récent. Il se trouve dans la Convention des Nations Unies sur les droits de l’enfant de 1989 et a depuis obtenu une reconnaissance mondiale. Sous l’ancien Code civil serbe, en vigueur depuis sa promulgation en 1844 et jusqu’à la fin de la Seconde Guerre mondiale, les enfants étaient soumis à l’autorité paternelle, et les mauvais traitements infligés qui leur étaient infligés étaient souvent cachés. La raison tenait probablement à la crainte des membres de la famille d’en parler et de la volonté de préserver l’intimité de la vie privée et familiale. Aujourd’hui, le bien-être des enfants est une réelle préoccupation de l’Etat. Le parent qui abuse de ses droits parentaux ou néglige grossièrement ses devoirs à l’égard de l’enfant peut se voir retirer l’intégralité de ses droits parentaux. De la même manière, la négligence dans l’exercice des droits parentaux peut conduire à sa privation partielle. La loi sur la famille serbe prescrit en détail les motifs de déchéance des droits parentaux. Le terme ‘Maltraitance’ comprend non seulement les mauvais traitements physiques, mais également les abus sexuels ou psychologiques de l’enfant. Dans ce chapitre, l’auteur analyse la définition juridique de la violence, la protection de l’enfant contre les abus, la privation des droits parentaux et ses conséquences ainsi que les cas des violences conjugales signalées à l’Autorité de tutelle à Novi Sad en 2012, dans lesquels les enfants, entre autres, ont été victimes.

I PROTECTION OF CHILDREN FROM ABUSE UNDER SERBIAN FAMILY LAW

Under the current Serbian Family Act (2005) protection of children against abuse is provided by twofold provisions regulating, on the one hand, protection against domestic violence and, on the other hand, deprivation of parental rights (parental responsibilities).

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(a) Protection from domestic violence

Protection from domestic violence was first regulated only by the Criminal Code of Serbia from 2002, which was amended in 2005 (criminal-law protection) and after that by the Family Act from 2005 (family-law protection).¹ Before 2002 the Criminal Code did not include any provision regarding protection against domestic violence and state authorities (police officers, courts) did not intervene in cases of violence toward the members of the family on the pretext that there was no legal basis for such intervention in any Serbian statute and that it is more important to protect family privacy and intimacy than accuse a family member and thus disturb family harmony. We will not deal here with the criminal-law but only family-law protection against domestic violence.

The Family Act² defines domestic violence as the behaviour of one family member by which that person endangers the physical integrity, mental health and tranquility of another family member (art 197, para 1). Domestic violence is considered, in particular the behaviour of one member of the family toward another member of the family who:

- (1) causes or attempts to cause bodily injury;
- (2) causes fear under threat of death or bodily injury to a family member or a person close to him or her;
- (3) forces a member of the family to have sexual intercourse;
- (4) induces a family member to have sex or who has sexual intercourse with a person under the age of 14 years or a helpless person;
- (5) imposes restriction of movement or communication with third parties;
- (6) insults a member of the family or behaves arrogantly, carelessly or maliciously.

Family members who enjoy family-law protection against domestic violence are the following persons (art 197, para 3):

- (1) spouses or former spouses;
- (2) children, parents and other blood, in-law and adoptive relatives as well as persons who are in the foster relationship;
- (3) persons who live or have lived in the same household;
- (4) cohabiting partners or former cohabiting partner;
- (5) persons who have been in an emotional or sexual relationship, or who still are in such relationships, or who have a common child, or a child is on its way to being born although they never lived in the same household.

¹ See more in O Cvejić Jančić, 'Protection from Domestic Violence', in B Atkin (ed) *The International Survey of Family Law 2008 Edition* (Jordan Publishing, Bristol, 2008) 317–335.

² The Family Act of Serbia was enacted in 2005 and published in the Official Herald no 18/2005.

As we can see from the above list, a victim of domestic violence may be a child, as well as any other adult person who is, according to the Family Act, deemed a member of the family. However, even if the violence is not directly executed towards the child, but towards another family member, a child is always an indirect victim of domestic violence as a witness of it. The court may order measures of protection against a perpetrator of domestic violence, temporarily prohibiting or restricting personal relationships with other family members.

(b) Protection measures

Protection measures against domestic violence are (art 198, para 2 FA):

- (1) warrant for the perpetrator to move out of the family apartment or house, regardless of ownership or leasehold;
- (2) warrant for the victim to move into the family home or house, regardless of ownership or leasehold;
- (3) prohibition of access to the victim within a certain distance;
- (4) prohibition of access to the place of residence or place of work of a victim;
- (5) prohibition of further harassment.

These measures are temporary and may last up to one year (art 198, para 3 FA). However, they may be extended as long as the reasons for imposing them exist (art 198 FA). On the other hand, any of the prescribed measures may be terminated before the end of the term if the reasons on which the measure was based no longer exist.

(c) Deprivation of parental rights

The second type of protection of children against abuse within the Family Act is deprivation of parental rights. A parent may be deprived of parental rights if the legally prescribed reasons are met. This deprivation may be full or partial.

The Government of Serbia in August 2005 adopted the General Protocol for the Prevention of Child Abuse and Neglect in which it is pointed out that ‘all forms of violence, abuse, misuse or neglect, endangering or damaging the physical, mental and moral integrity of the child represent a violation of the fundamental rights of the child enshrined in the Convention on the Rights of the Child, such as the right to life, survival and development’.³ In order to realise the right of the child to protection from abuse and neglect, it is necessary to establish a system that will prevent these phenomena, and at the same time provide a rapid and coordinated process to protect the child from further abuse or neglect.⁴

³ General Protocol for the Prevention of Child Abuse and Neglect, Part I – Introduction. Available in Serbian at: <http://inkluzivno-obrazovanje.rs/files/Opsti-protokol-za-zastitu-dece-od-zlostavljanja-i-zanemarivanja.pdf>. Accessed 12 September 2013.

⁴ Ibid, para 4.

This Protocol should improve the application process and registration of all forms of abuse and neglect, important for timely undertaking of measures to protect the child. Serbia's Family Act provides that quite a large circle of persons and institutions have the right and duty to inform the public prosecutor or the guardianship authority about the reasons for deprivation of parental rights (see more in the text below).

Without effective implementation of provisions regarding reporting of cases of abuse or negligent exercise of parental rights, disclosure of such cases would be very difficult because a centre for social work (ie guardianship authority) or a public prosecutor cannot obtain the necessary information if other entities do not perform their duty to notify them.

(i) Full deprivation of parental rights

The reasons for full deprivation exist in cases of the infringement by a parent of the proper exercise of parental rights. The Family Act prescribes that a parent who abuses the rights or grossly neglects the duties that are part of parental rights may be completely deprived of parental rights (art 81, para 1). The abuse of parental rights, according to the Family Act, exists in the following cases if the parent (art 81, para 2):

- (1) physically, sexually or emotionally abuses the child;
- (2) exploits the child by forcing that child to work excessively, or undertake work that endangers the morals, health or education of the child, or work that is prohibited by law;
- (3) encourages the child to commit criminal offences;
- (4) accustoms the child to bad habit; or
- (5) in any other way abuses the rights that compose parental rights.

The legally prescribed examples of a gross negligence neglect of duties, which are associated with parental rights, are, for example, if the parent:

- (1) leaves the child;
- (2) does not take care of the child with whom the parent lives;
- (3) avoids supporting the child or maintaining personal contact with the child when the parent does not live with him or her, and if the parent prevents the maintenance of personal contact between the child and the parent with whom the child does not live;
- (4) without justified reasons avoids creating conditions for living together with a child who is placed in an institution for social protection; or
- (5) otherwise grossly neglects the duties which are part of parental rights.

The General Protocol for the Prevention of Child Abuse and Neglect⁵ states that the abuse or molestation of a child includes all forms of physical or emotional abuse, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, endangering a child's development or dignity in the context of a relationship which includes responsibility, trust and power. The General Protocol provides definitions of physical abuse, sexual and emotional abuse, neglect and negligent treatment or exploitation of children. These are quoted because it is important to help to identify certain behaviour as deviant and unacceptable, and to recognise the need for intervention by the authorities and other entities.⁶

a) Physical abuse is defined as abuse

‘which results in actual or potential physical injury to a child caused by an act or omission that can reasonably be considered to fall within the control of the parent or person who is in a position to have the responsibility, power or trust as regards the child, but there is a difference between abuse and unintentional injuries or physical signs and symptoms that support the injury being deliberate but which are in fact the result of or are helped by the organic conditions from which the child suffers.

Acts of abuse can be single or repeated. Examples of physical abuse include: hitting, kicking, shaking, choking, throwing, poisoning, burning, pouring hot water over the child and the like, as well as intentionally causing symptoms of illness in a child by a parent, guardian or other adult responsible for the child (so called Munchausen syndrome by proxy).⁷

b) Sexual abuse

‘means the involvement of children in sexual activity that the child does not fully understand, which he or she has not consented to, or is not developmentally mature enough for and is not able to give consent, or by which the laws or social taboos will be violated. Sexual abuse of a child is expressed as an activity between a child and adult or another child who, because of the latter's age or development is in a position of responsibility, trust and power, where the activity is intended to provide enjoyment and satisfy the needs of others.

Sexual abuse is considered also to include forcing a child to engage in sexual activities, whether it is contact (sexual intercourse, sexual touching, etc.) or non-contact activities (the exposure, exhibitionism) and the exploitative use of children in prostitution or other unlawful sexual acts. It is not considered as sexual abuse if a child explores his or her own body, which corresponds to the age when,

⁵ General Protocol for the Prevention of Child Abuse and Neglect, Part III – Definitions of the child abuse and neglect.

⁶ Definitions of abuse and neglect of the child contained in the Protocol, according to the note given in the Protocol (Part III, point 6), are in accordance with the definitions adopted at the Consultation on the prevention of child abuse within the World Health Organization in Geneva in 1999, which was also accepted by the International Association for the Prevention of Child Abuse and Neglect (ISPCAN) in the document called ‘Intersectoral approach to child abuse’ (2003).

⁷ Part III of the Protocol, Definition 2 – Physical abuse.

especially in adolescents, children explore their own bodies and sexuality, not including activity between a child and an adult.’⁸

c) Emotional abuse refers to

‘the failure to provide a developmentally appropriate, supportive environment, including the availability of primary figures – figures of confidence, so that the child can develop stable emotional and social skills which are in accordance to child’s personal potential. Emotional abuse includes: acts of humiliation, vilification, blaming without reason, acts by which one threatens, intimidates, restricts the movement of children, discrimination, persiflage or practising of other forms of non-physical, hostile or rejecting treatment.

Emotional abuse involves the relationship between the primary caregiving person or persons and child which causes actual harm to the child or which could potentially be harmful to the child. This includes inappropriate development, inadequate or inconsistent contact with the child, including: exposure to confusing or traumatic events and circumstances (eg, domestic violence), the use of children to satisfy psychological needs of the caregiving person, actively “bribing” the child, as well as failure to improve the child’s social adaptation (including isolation of the child).’⁹

d) Negligence consists of

‘the omission by the caregiving parent or other person who has assumed the parental responsibility or duty to nurture a child even for a short time (eg, babysitter) to ensure the child’s development in all areas: health, education, emotional development, nutrition, shelter and safe living conditions, and within the resources reasonably available to the family or caregivers, which causes or is a high probability of causing harm to a child’s health or physical, mental, spiritual, moral or social development. This includes failure to properly supervise and protect the child from harm as much as is practicable.’¹⁰

e) Exploitation means

‘exploitation of a child for work or other activities, for the benefit of others. This includes child labour and child prostitution, child abduction and/or sale of children for labour and sexual exploitation, exploitative use of children in pornographic performances and materials and others. These activities have as a result the violation of the child’s physical or mental health, education, and moral, social and emotional development.’¹¹

Full deprivation of parental rights means that the parent loses all rights and duties which are part of parental rights, except for the obligation to maintain the child. A parent loses the right to take care of the child’s personality, and the child’s upkeep, upbringing and education. The parent also loses the right to

⁸ Part III of the Protocol, Definition 3 – Sexual abuse.

⁹ Part III of the Protocol, Definition 4 – Emotional abuse.

¹⁰ Part III of the Protocol, Definition 5 – Neglect and negligent treatment.

¹¹ Part III of the Protocol, Definition 6 – Exploitation.

represent their child, to change the child's name as well as all rights to the property of the child. A parent deprived of parental rights can no longer manage the child's property, nor are they entitled to maintenance from the earnings of the child or income from the child's property. The law expressly provides that the only obligation of a parent deprived of parental rights is to further contribute to child maintenance. Deprivation of parental rights does not lead to the release of the parental obligation to support the child, but the parent's right to maintenance from the child may be denied if it would cause an obvious injustice to the child (art 156, para 2).

If only one parent is deprived of parental rights, the other parent retains their parental rights. If the child has no other parent, or that parent has lost their parental rights, legal capacity, or is unknown or is missing, the child will be placed under guardianship and a guardian will be assigned. In addition, the child can be given for adoption, because adoption will be valid without the consent of a parent who is deprived of parental rights or the parent who is denied the right to decide on issues which significantly affect the life of the child (art 96). The child may be also placed in foster family (art 113, para 3).

If the parent is not deprived of parental rights toward all of the children, the effects will only apply to the child or children over whom the parent was deprived of parental rights. That parent will not be entitled to any contact with that child (visits, correspondence, etc).

For deprivation of parental rights, the competent agency is the basic court. A court decision on full deprivation of parental rights may include one or more measures to protect the child from domestic violence.

(ii) Partial deprivation of parental rights

The justification for the partial deprivation of parental rights is the unconscionable exercise of parental rights, ie parental responsibilities. What constitutes an 'unconscionable exercise of parental right ie parental responsibilities' is difficult to define precisely because it depends on the circumstances of each case. It is important to emphasise that actions and conduct or omissions which lead to the partial deprivation of parental rights include milder forms of the failure of parents to exercise parental rights than in the case of full deprivation of parental rights. The judge who deals with family-law matters must be a well-skilled expert to be able to discern, according to the specific facts, if there is a case for full or partial deprivation of parental rights.

A parent who is partially deprived of parental rights, and who exercises parental rights and lives with the child, may be deprived of the rights and duties of upkeep, upbringing, education and representation of the child, as well as the management and disposal of the child's property. On the other hand, a parent who does not exercise parental rights may be deprived of the right to maintain personal relations (contact) with the child and the right to decide on issues that

significantly affect the child's life. Such issues include the child's education, undertaking major medical treatment, change of residence of the child and disposal of the child's assets of great value.¹²

A court decision on partial deprivation of parental rights may also include one or more measures of protection of the child from domestic violence.

Bearing in mind that a child enjoys special constitutional protection, the Family Act provides that the child, the other parent, the guardianship authority and the public prosecutor may initiate a court proceeding for deprivation of parental rights (art 264, para 2). Thus, protection of the child is not only a private matter of that child's parents, but also of wider interest of the state, and therefore the guardianship authority (who has general supervision of the exercise of parental rights) and even the public prosecutor may also bring an action before the court for the protection of the child against abuse or gross neglect of parental rights. Both of these authorities may perform their duties only if they know about abuse, gross neglect or the unconscionable exercise of parental rights. To this end, the Family Act provides that all child protection institutions, health and educational institutions, institutions of social protection, judicial and other state institutions, associations of citizens and citizens have the right and duty to notify the public prosecutor or guardianship authority about existence of the grounds for deprivation of parental rights (art 264, para 4).

If there is a conflict of interest between the child and the child's legal representative, a temporary guardian will represent the child (art 265, para 1). A child who has reached 10 years of age, and who is capable of reasoning, can personally or through another person or institution ask the guardianship authority to appoint a temporary guardian, due to conflicting interests between the child and the legal representative (art 265, para 2).

Since the child in Serbian law acquired a completely new position as a result of which the child's status has been significantly improved, the court is under an obligation to take care about the rights of the child and to act in the child's best interests. To this end, the court has a duty to appoint a temporary representative of the child if it decides that a child is not adequately represented (art 266, paras 1 and 2).

If the court considers that a child is capable of forming an opinion, the court shall ensure that the child receives all information needed to allow the child to express such an opinion and view. The court is also obliged to give the child's opinion and view due weight, taking into account the age and maturity of the child. The court is then obliged to determine the child's opinion and view in a manner and in a location that is in accordance with the age and maturity of the child, unless this is obviously contrary to the child's best interests (art 266, para 3, point 3). That means that the judge need not bring the child to the court

¹² Article 78, para 4 of Family Act.

in order to establish the child's opinion but may hear the child in the premises of the school or guardianship authority, an institution for family counselling, or similar.

In addition, the temporary guardian or temporary representative who represents the child in the court proceedings for deprivation of parental rights is obliged to ensure that the child receives all the information needed and warn the child about the potential consequences of the child's acts. If the child is not capable of directly and personally expressing an opinion, a temporary guardian or temporary representative should convey the opinion of the child to the court, always taking into account the best interests of the child.

All proceedings for the protection of the child's rights and the proceedings for deprivation of parental rights are particularly urgent (art 269). The Family Act prescribes that the first hearing should take place within 8 days from the day the complaint was received by the court, while the appellate court shall render a decision within 15 days of the submission of the appeal. Usually, the courts are not as efficient as was intended by the legislator, but the Family Act does not provide for any consequences if the court fails to urgently complete the procedure for deprivation of parental rights.

Before deciding on deprivation of parental rights the judge shall obtain the findings and an expert opinion on the family situation and, especially whether the reasons for deprivation of parental rights are met. The court must obtain these findings and the expert opinion from the guardianship authority, an institution for family counselling or other institution specialising in mediation of family relations. The finding and expert opinion are not binding on the court, but it should help the court to better determine the family situation and render an appropriate decision.

If the reasons for deprivation of parental rights do no longer exist and a child has not been adopted, parental rights may be restored by the court's decision. Both proceedings (for deprivation of parental rights as well as proceedings for restoration of parental rights) are within the jurisdiction of civil (contentious) proceedings, while under the former Family Act it was within the jurisdiction of a non-contentious court. In addition, the court of first instance may, *ex officio*, in a marital dispute or a dispute between parents and children, decide to restore parental rights if it finds that conditions for restoration exist. A proposal for the restoration of parental rights may be submitted by the parent who is deprived of parental rights, the other parent, or the guardianship authority.

II PROTECTION OF CHILDREN ACCORDING TO THE PRACTICE OF THE GUARDIANSHIP AUTHORITY (CENTRE FOR SOCIAL WORK) IN NOVI SAD¹³

The data of the Centre for Social Work,¹⁴ which performs the functions of the guardianship authority, show that in 2012 there were 284 victims of violence, among whom:

- 183 victims were children;
- 14 victims were young people but older than 18 years;
- 81 victims were adult persons; and
- six victims were old people.

From the total number of victims of violence reported to the Centre for Social Work in Novi Sad (284) in 2012, 272 cases referred to domestic violence, while in the other 12 cases there were other types of violence, such as bullying between mates and similar. In 183 cases children were victims of violence, in 118 cases physical violence toward a child was committed, in 19 cases there was sexual violence and in 46 cases psychological violence against a child. As for who most frequently reports the existence of violence:

- violence was reported by members of family in 75 cases;
- the court acted *ex officio* in 69 instances, dealing with other civil lawsuits, such as divorce proceedings or proceedings regarding exercise of parental rights or similar;
- in 39 cases, violence was reported by the guardianship authority, which found out the existence of violent behaviour within a family, usually being informed about the matter by close relatives, neighbours or similar;
- in 38 cases the victim of violence reported violence;
- in 20 cases there was anonymous reporting; and
- in 12 cases violence was reported by an institution (school, health institution, kindergarten, etc).

However, these are only the cases that were reported in the Centre for Social Work: there are many other cases which have never been reported to any authority and which remain within the family.

In 2012 the basic courts of Novi Sad ordered 84 measures for protection against family violence:

- in four cases a warrant to vacate the family household was issued;
- in one case a warrant to move in a family household was issued;

¹³ Novi Sad has about 231,800 inhabitants.

¹⁴ Report of Centre for Social Work in Novi Sad for 2012, which was submitted to the Ministry of Labor, Employment and Social Policy of the Republic of Serbia.

- in 24 cases the court issued a restraining order preventing the approach of a perpetrator of violence to a victim up to a certain distance;
- in 26 cases the court issued a restraining order preventing access to or near the residence or place of work of the victim of violence; and
- in 29 cases the court issued an order for the prevention of further harassment of the victim of violence.

At a meeting with the Team for Children and Youth, of the Centre for Social Work in Novi Sad, concern about very slow proceedings for the protection of children was expressed and a complaint was made that the proceedings for the protection of children, even in the most severe cases of abuse (such as sexual abuse), last too long and children do not obtain appropriate care and protection in time. Furthermore (unfortunately, not rarely), an abused child is required to repeat on multiple occasions, the statement about stressful circumstances of violence, even some years down the track. A child's statement in court is often not given enough attention and weight, and skilled lawyers, defending the perpetrators, often manage to prolong the trial, which after several years loses all meaning for the child. It seems that public awareness should be much higher regarding the child protection and that more effort should be made in order to improve the situation of abused children and to provide them with better protection and a satisfactory future after the abuse. In particular, the media should pay more attention to these issues with a clear and strong condemnation of all acts of violence and especially those directed to children.

III CONCLUSION

Although Serbia has quite modern family law legislation in which the status of the child is significantly improved, with the child having acquired many new rights in accordance with the United Nations Convention on the Rights of the Child and many European conventions adopted within the Council of Europe, in practice this legislation is still not properly implemented or applied. There still exists resistance to protection against family violence as something that is 'imposed from abroad'. The traditional understanding of the family, which is still widespread in our society, significantly contributes to such a situation. Changes in society often occur very slowly and not always smoothly. Often, it takes a lot of courage and willingness, first of all by political leaders, to move forward and change deeply rooted understanding of some behaviour and a lot of effort to implement more modern and more advanced rules in everyday life. Even if the new rules are enacted into law, it takes time for them to be properly applied. Better understanding and substantial acceptance of the new position of the child is a process. Many factors may contribute to this process becoming faster, such as media, non-governmental organisations, the ombudsman, but first and foremost, the state authorities, courts, guardianship authorities, public prosecutor and, of course, political leaders with public support of the new rules.

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SLOVENIA

DEPRIVATION OF PARENTAL CARE IN THE LIGHT OF SLOVENIAN CONTEMPORARY CASE LAW

*Suzana Kraljić**

Résumé

La ‘privation de soins parentaux’ est une mesure conçue pour la protection de l’enfant contre l’un de ses père et mère ou contre ses deux parents. Elle constitue la mesure de protection la plus radicale dans le droit de la famille slovène et, corrélativement, n’est utilisée que dans des situations où de sérieuses violations des droits de l’enfant existent. Pour prévenir une telle privation de soins, la famille reçoit en règle générale une aide, une assistance et des conseils. Cependant, dans quelques cas, les violations sont si graves que l’enfant doit être retiré de ses parents et placé ailleurs.

Cette étude traite de la nature des soins parentaux, des causes et de la procédure de la mesure de privation, et des conséquences d’une telle décision judiciaire. Dans certains cas, il est possible que les soins de l’enfant soient à nouveau confiés aux parents.

I INTRODUCTION

‘Children are our biggest treasure’. This is a sentence we hear a lot. Based on this, one would conclude that everybody should handle their treasure carefully, especially, as it is about persons and not objects. It is about a person in need of care, supervision, direction, love and aid by adults, due to the age and inexperience. Here, the parents of a child, with certain duties and rights towards the children imposed upon them by the law, play a special role. From the introductory sentence, one would expect that the parents would exercise these rights and duties with self-understanding always in the best interest of the child. But, it is not always this way, as sometimes there are such severe violations of the child’s best interests on the part of the parents that the

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Slovenian court of justice files a decision on the deprivation of parental care¹ representing the worst measure against the parents.

II DEFINITION OF PARENTAL CARE IN SLOVENIAN LAW

(a) General

As derived from the Constitution of the Republic of Slovenia (CRS),² children enjoy special protection and care. Article 54 CRS defines that the parents have the right and duty to maintain, educate and raise up their children, whilst the children born in wedlock are equal to the children born outside of wedlock. The fundamental object following from this is to provide the children with a healthy growth, personal development and to prepare them for independent living. The care of the child is primarily the right and duty of the parents, and they may be deprived of it, but only, if there are reasons set by the law for the protection of the child's rights. By this, CRS sets the ground for parental care that is concretely defined in the Marriage and Family Relations Act (MFRA).³ So, the state follows up on exercising of parental care as a 'big brother' through its authorities, among which in Slovenia the primary role in the field of protection of children's rights is at the court of justice and the centre for social work (CSW). Thus, in Slovenia the jurisdiction for decision-making on measures for the protection of the child is shared between three different proceedings, ie administrative, contentious and non-contentious procedures. Under the Non-contentious Civil Procedure Act (NCCPA),⁴ the court of justice decides on the deprivation of the parental care in a non-contentious procedure. In the same way, it decides on the deprivation of capacity to contract, the consequences of which have an essential influence also on the exercising of parental care and the protection of the child's rights, in a non-contentious procedure.

As derived from Art 2 MFRA, the family is a living community of parents and children enjoying special protection for the benefit of the children. It is primarily the parents who have the duty to take care of their children. Children mentioned by the legal definition of the family are minor children. Slovenian MFRA, as the fundamental Act on family law, does not contain any definition of the child. Therefore, regarding the definition, we take it from Art 1 of the

¹ In spite of the fact that in Slovenia the expression 'parental rights' is still used, this contribution uses the term 'parental care' instead.

² Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*) (CRS): Uradni list RS (Official Gazette), no 33I/1991; 42/1997; 66/2000; 24/2003; 69/2004; 69/2004; 69/2004; 68/2006.

³ Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih*) (MFRA): Uradni list RS, no 69/2004 OCV-1 (officially consolidated version); 101/2007; 122/2007; 90/2011.

⁴ Non-contentious Civil Procedure Act (*Zakon o nepravdnem postopku*) (NCCPA): Uradni list SRS, no. 30/1986; 20/88; Uradni list RS, no 87/2002; 77/2008.

United Nations Convention on the Rights of the Child (CRC)⁵ determining: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.' As a rule, parental care lasts until the full age of the child (maturity). When the child reaches the age of 18 years the so-called 'legal emancipation' steps into force. The legal assumption that a child at the age of 18 years becomes 'mature' enough to take care of his or her own rights and duties alone from that time on steps into force. Independence appears based on the law and is assumed. The stepping into force is not dependent on the will of the parents. But, if they do not agree with this assumption, the parents have two possibilities:

- (a) either they make a move to prolong parental care;
- (b) or they move for the deprivation of the child's capacity to contract and consequently putting the now adult person under the guardianship applying to persons deprived of capacity to contract.

So, as a rule, a person is a child until reaching the age of 18 years. Slovenian law does know two exceptions, when a child obtains full business capacity before the age of 18 years.⁶

According to Slovenian law, the parents obtain parental care:

- (a) by birth, if the child is born in wedlock;
- (b) by recognition of fatherhood of a child born outside wedlock;
- (c) by establishment of fatherhood by a decision of the court of justice;
- (d) by adoption.

⁵ Convention on the Rights of the Child (Konvencija o otrokovih pravicah) (CRC): Uradni list RS – MP, no 9/1992.

⁶ As a minor reaches 18 years of age, parental care of the parents ends. By this, *ex lege*, he or she obtains full capacity to contract. A minor, exceptionally in two cases, may gain full capacity to contract also before the age of 18. If a minor, older than 15 years, but younger than 18, enters matrimony, he or she also gains full capacity to contract. Another exception providing for acquisition of full capacity to contract before the age of 18 years is given in a case of a minor (older than 15 years) becoming a parent. On matrimony, full capacity to contract is obtained. The reason lies within the fact that for a valid matrimony, permission of the CSW is needed, and CSW first verifies the subjective and objective circumstances of the individual case. CSW will grant permission only, if it will be convinced of the justification for matrimony of such a kind. In case of a minor parent, the fact of the child's birth alone does not mean automatic gaining of full capacity to contract. In order for a minor becoming a parent to gain full capacity to contract, non-contentious proceedings for the obtaining of full capacity to contract have to be started. Proceedings start based on the application of the minor being a parent, or with the minor's consent based on a proposal by the CSW (Art 61 NCCPA). A non-contentious court will grant the minor full capacity to contract, if it reaches the conclusion that the subjective and objective conditions for it are fulfilled. Gaining full capacity to contract enables the minor to independently take care of his or her child, as well as for himself or herself. If matrimony ends before the age of 18 (due to death, divorce, declaration of a missing person for dead) or is declared invalid, the minor retains full capacity to contract. So S Kraljič and V Rijavec *Slovenia (International Encyclopedia of Laws, Family and Succession Law – suppl. 68 (2014) (Wolters Kluwer Law & Business: Kluwer Law International, Alphen aan den Rijn, 2014) p 106.*

The parents, ie the father and the mother, have the right and duty to provide for a successful physical and mental development of their children by immediate care, their labour and activity. For the healthy growth, a balanced personal development and independent living and work, the parents have the rights and duties to care for the living, personal development, rights and benefits of their minor children (Art 4(1-2) MFRA in connection to Art 102 MFRA). These rights and duties involve parental care belonging to the father and the mother together (Art 4(3) MFRA). Parents are also obliged to maintain their children, care for their living and health, and raise them. They shall also, in line with their capacities, care for the education and vocational training of their children, having regard to their capabilities, affiliations and wishes (Art 103 MFRA). The parents are also legal representatives of their minor children (Art 107(1) MFRA). Further, the parents have the duty to manage the child's property up to maturity of the child and for the benefit of the child (Art 109 MFRA).

The parents exercise parental care in line with the best interests of the child based on an agreement reached expressly or impliedly. If they cannot reach consent on this, the CSW supports them in reaching an agreement. If the parents cannot agree on the questions relevantly influencing the development of the child even with support by the CSW, the court of justice decides on this based on the proposal of one or both parents in a non-contentious procedure. The proposal has to attach proof from the competent CSW that the parents tried to reach an agreement on the exercise of parental care with the help of the CSW. Before the non-contentious court decides, it has to get the opinion by the CSW on the best interests of the child and also respect the opinion of the child, if the child has expressed this alone or through a person of trust and chosen by the child, and if the child is capable of understanding the meaning and consequences. If one of the parents is hindered in exercising parental care, the other parent performs it alone (Art 113 MFRA). Parental care belongs only to one parent, if the other is no longer alive or is unknown, or has been deprived of the capacity to contract or deprived of parental care (Art 115 MFRA).

Since parental care belongs only to parents, they can exclude anyone else from exercising parental care. It is about the right of the parents to care for their child alone. This right also encompasses the duty of third persons to omit interfering with the exercise of parental care, of course until it becomes necessary for the protection of the child.⁷ Thus, the parents have to exercise parental care for the benefit of the child. If there are irregularities in the exercising by one or both parents, the best interests of the child have to be guaranteed. So, the state has always to guarantee the protection of minor children, when their healthy development is threatened and when other interests of children demand it (Art 6 MFRA).⁸ Based on the MFRA, measures

⁷ K Zupančič *Zakonska zveza in družinska razmerja, Zbirka predpisov z uvodom dr. Karla Zupančiča [Marriage and family relations with an introduction by dr Karla Zupančiča]* (3rd revised edn, ČZ Uradni list Republike Slovenije, Ljubljana, 1993) p 18.

⁸ See also the judgment of the Administrative Court of the RS III U 243/2011 of 29 February 2011.

for the protection of the child are either taken by the court of justice or the CSW. Thus, deprivation of parental care as a measure for the protection of the child is the most radical interference with the relationship between parents and children and the rights protected by the CRS. In proceedings for the deprivation of parental care, two constitutional human rights are weighed, ie the right and duty of the parents from Art 54 CRS, as well as the right of the child from Art 56 CRS.⁹

III DEPRIVATION OF PARENTAL CARE

(a) General

Parental care is the personal right of parents that cannot be transferred, inherited or passed to somebody else or disposed of by refusal, but it can be taken from them for reasons provided by the law. So, parental care is granted to the parents with the intention of providing for the benefit of the child. Thus, the duties step into the foreground, whilst the rights are given to the parents only for the purpose of providing a better and more complete protection of the child's best interests. As the child is the central subject in the family (society), the parents have to exercise all rights and duties exclusively for the benefit of the child. As in a family or as with parents, there might be violations of the rights of the children; Art 6 MFRA determines that the state always provides for the protection of minor children always, when their healthy development is threatened and when the welfare of the child demands it. The deprivation of parental care represents the most radical interference with parental care and is done exclusively for the protection of minor children, if a parent or both parents violate their duties of parental care. Therefore, it has to be about the severest forms of violations. Thus, it is essential that parental care is granted to the parents for the benefit of their children and not for their own benefit, and so it is the task of the state or on behalf of the state, the CSW and the court of justice to care for the best interests of the child in all fields. If there are violations, the state with its measures may interfere with the otherwise autonomous exercise of parental care for the protection of the child and the child's rights.

As mentioned, deprivation of parental care represents the most radical measure against parents. Because of this it is right that the reasons for the deprivation of parental care are expressly set out by law, under which the legal protection of parents is secured and it is provided that the child not be excluded from the family, if irregularities and negative consequences may be taken care of in another less radical way.¹⁰ But, this does not mean that we always have to use the 'softer measure' first. The state authorities have to have discretion regarding the use of the means of the protection of the child's best interests. In decision-making on the choice of protection measures, on the one hand the

⁹ Decree VSM III Cp 448/2005 of 27 March 2006.

¹⁰ See also S Bubić and N Traljić *Roditeljsko i starateljsko pravo* (Pravni fakultet Univerziteta u Sarajevu, Sarajevo, 2007) p 201.

fundamental guideline has to be the degree of disturbance in the relations between the parents and the child or the objective lack of upbringing.¹¹ On the other hand, the prognosis of further development has also to be respected, as in the case of the disturbance in the relationship between the parents and the children, as well in the further development of the relationship in case of the use of a certain measure for the protection of the child.¹² The basic purpose of the measure of deprivation of parental care is thus to prevent the parents from taking harmful actions against the child. As one or both parents might cause harmful actions, parental care is taken away from one or both parents.

‘The principle of the mildest measure’ is not immediately set by MFRA, but it can be found in the jurisprudence. According to this principle, in the choice of the measure for the protection of the child, there are two limitations: a measure shall be taken that will harm the child the least, if it provides for the child’s best interests, and the measure has to be one that the child is not taken from the parents, if provision for the child’s best interests can be obtained by another measure. The principle of the mildest interference is judged from the point of view of the parents’ interests, as well as from the point of view of providing for the child’s best interests. But, the meaning of this principle comes into force only in cases, when between the child and the parents, regarding whom the procedure of deprivation of parental care is running, besides the biological connection or the bloodline respectively, there is also a definite living or social relationship or correlation.¹³ The principle of the mildest interference is therefore applicable when, in spite of the irregularities in the exercise of parental care, there is the possibility that, with the milder measure, an improvement in the improper exercise of parental care can be achieved and there is a probability that it is still better for the child to stay in the family environment. Thus, a prompt separation of the child and the parents and the placement in a foster family because of bad living conditions cannot be a proper

¹¹ Where psychological violence is practised against a child (threats, extortion, manipulation, threats of punishment, etc) and when the father’s child rearing conduct is obviously wrong (transfer of responsibilities to the child, improper methods of upbringing, exaggerated protectionism, bribes, discrediting the mother), there is a reason for taking the child. The court completes its decision also by listing whether the mother of the child showed a lack of power and passivity in her role of motherhood and giving in to the pressure by the father of the child multiple times and not offering the child proper protection (in violent situations, she reacted with submission and retreat). The child shows psycho-somatic problems as a consequence of unregulated family relations and emotional problems. In situations of crisis, the child reacts on a psychologically lower level (eg the child uses unusual defence mechanisms). Regarding all these, it was established that the former family relations did not provide the child with proper psycho-physical development. From the reports of the offices handling the child and the family for a longer period of time it was clear that the level of danger for the child from the parents was high, and therefore, the decision by the CSW to temporarily move the child out of his or her domestic environment and provide the child with support in an appropriate institution and help in overcoming the emotional stress, learning of proper ways of conflict resolution, motivation at school, and mainly to provide the child with a basic sense of security was absolutely right. Taken from the judgment by the Administrative Court RS III U 243/2011 of 29 September 2011.

¹² A Lüderitz *Familienrecht* (27th edn, Verlag CH Beck, Munich, 1999) p 403.

¹³ Taken from Decree of VSL IV Cp 2731/2009 from 23 September 2009.

measure if the state did not try before to redress the bad living circumstances by other alternative and less drastic measures (eg supervision of living conditions and hygienic conditions).¹⁴

In taking measures for the protection of the child limiting parental care in line with Art 8(2) ECHR, one has to respect:

- (a) the legal basis of the intervention;
- (b) the legitimate goals to be achieved by the intervention;
- (c) and the necessity of the intervention in a democratic society.

Only in the case of the cumulative meeting of all three named pre-conditions may the measure for the protection of the child be decided. If this is demanded by the best interests of the child, the measure of deprivation of parental care may be taken and may also last for a longer time, in spite of the fact that the parents are unable to live with their child and care for the child, which is the basic element of family life.¹⁵

(b) Reasons for deprivation of parental care

Parents may be deprived of parental care only for reasons defined by law. But, the court of justice has to explain the specified reason in each case separately and individually.

(i) Abuse of parental care

Slovenian MFRA does not name the actions constituting abuse of parental care. Therefore, the court of justice has to define exactly and investigate whether there are actions to be defined in the concrete case as abuses of parental care, for each and every individual case. Therefore, the court of justice has to establish whether parental care is not being exercised for the purpose for which it is granted to the parents. But, not every action that otherwise is actually a violation of the child's best interests or an abuse of parental care respectively is a sufficient reason for deprivation. In spite of the fact that Slovenian MFRA does not expressly say it, an action that is an abuse of parental care has to be such that it seriously endangers the child's physical, moral and intellectual development.¹⁶ Such actions are present, if the parent: abuses the child physically, sexually or emotionally; if he or she forces the child to undertake exaggerated labour or labour threatening the moral, health or education of the child or labour prohibited by law; if he or she motivates the child to criminal actions; if he or she gets the child used to bad habits; and if he or she abuses the rights flowing from the concept of parental care in other ways. Abuse of parental care means the conscious and intended action of a parent and, as a

¹⁴ *Wallová and Walla v. the Czech Republic* (application no 23848/04) from 26 October 2006.

¹⁵ S Bubić and N Traljić *Roditeljsko i starateljsko pravo* (Pravni fakultet Univerziteta u Sarajevu, Sarajevo, 2007) p.203.

¹⁶ M Draškić *Porodično pravo i prava deteta* (Čigoja štampa, Beograd, 2005) p 305.

rule, means that the malicious procedures of the parents are repeated. But, we can also speak about abuse of parental care in the case of a single action so dangerous for the child that an eventual repetition cannot be waited for (eg attempt to kill the child, causing severe physical injuries, sexual abuse, etc).¹⁷

One should also warn that the conditions for deprivation of parental care are very similar to the conditions for the measure of removing the child as sanctioned by CSW (comp Art 120 MFRA). The border between both is very unclear. Besides the fundamental difference about the competent authority deciding both the measures and the procedure, the basic difference is supposed to be in the severity of the action or omission of the parent or in the intensity of the violation of parental care.¹⁸ Which measure is the most appropriate and best in a concrete case depends on whether the conditions on the side of the parents may improve in such a way that the children may return to the parents and the parents may continue their upbringing and custody in a way that there will no longer be severe forms of violations of the children's best interests.¹⁹ If it can be predicted that the situation and relationships in the family will be regulated in such a way that the child may be returned to the family, the better measure is the removal of the child from the parents. But, if the circumstances of the case show that there is no possibility for the parents to take over care of the child again in the future, the measure of deprivation of parental care should be adopted.²⁰ Thus, by deprivation from parental care, in such a case the lasting of the reserve care and emotional stability is provided for, and they relevantly express also in the mental and physical development of the child.²¹

The conditions that have to be met for the removal of the child from the parents in line with Art 120 MFRA and the conditions to be met for the deprivation of parental care in line with Art 117 MFRA are not absolutely separated in a very clear manner. The difference is supposed to be in the severity of action or omission of the parent, or in the intensity of the violation of parental care,²² but the border is very hard to set, when the reasons for removal of the child from the parents grow into reasons for the deprivation of parental care. In the choice of the one or the other measure, the most important is the judgement whether it is probable that the relations on the side of the parents will improve in a way that the children may return to the parents and they may continue their upbringing and custody. If a reunion or rehabilitation of the family is possible, the better measure is removal of the child from the parents, which is in the jurisdiction of CSW. The advantage of CSW is in the fact that besides the legal actions it also sets in place measures of social security enabling

¹⁷ M Draškić *Porodično pravo i prava deteta* (Čigoja štampa, Beograd, 2005) p 306.

¹⁸ K Zupančič *Družinsko pravo* (Uradni list Republike Slovenije, Ljubljana) pp 154 and 155.

¹⁹ So also L Hoyano and C Keenan *Child Abuse – Law and Policy Across Boundaries* (Oxford University Press, Oxford, 2007) p 36.

²⁰ M Končina Peternel *Pomoč otrokom, ko starši odpovedo* (Znanstveno in publicistično središče, Ljubljana, 1998) pp 161 and 162.

²¹ Decree II Ips 161/2013 of 11 July 2013.

²² K Zupančič *Družinsko pravo* (Uradni list Republike Slovenije, Ljubljana, 1999) pp 154 and 155.

insight, follow-up and resolution of problems appearing in the family, and the successful protection of the child without separation from the family.²³ The measure of deprivation of parental care is proper in a case where from the circumstances it can be derived that there is no possibility or prospect for the parents to take over care of the child ever again.²⁴ By deprivation of parental care, namely, in such a case alternative care and emotional stability is provided for the child, which importantly also expresses itself in the mental and physical development of the child.²⁵

So, deprivation of parental care will be applicable only in a case of severe forms of abuse of parental care. Therefore, it is irrelevant whether it is about an intended active or passive action by the parent. Thus, the court of justice will deprive parents of parental care, for example, if they pour gasoline on and burn the child, throw the child from a bridge in a wild river or beat and shut the child up in the toilet completely injured and covered in blood at a railway station and walk away.²⁶

In the same way, a severe violation of parental care is considered to be the existence of a (not yet final) criminal verdict for a crime of sexual assault on a person younger than 15 years.²⁷ For deprivation of parental care due to a severe violation of parental care, it is not necessary to have a wrongful act by the parent, against whom the procedure for deprivation is taken. The measure of deprivation of parental care is intended to protect the threatened child and may also be exercised if there is no criminal procedure at all or before the end of criminal procedure. For the execution of the measure of deprivation of parental care, the non-contentious court of justice can establish solely that the child is threatened. This may also be done based on evidence in a criminal procedure, as well as by other evidence found by a non-contentious court of justice alone, even ex officio based on Art 5 NCCPA.²⁸

(ii) Abandoning of a child

Abandoning of the child we understand as the unjustified cancellation of the spatial and physical connection between the parent and the child. By such an act, therefore, the parent obviously shows that he or she does not wish to care for the child, ends the exercise of the duties deriving from parental care and ends all contacts with the child. Abandoning of a child without any protection, care and supervision means a danger for the child's safety, health and morals.

²³ S Bubić and N Traljić *Roditeljsko i starateljsko pravo* (Pravni fakultet Univerziteta u Sarajevu, Sarajevo, 2007) p 193.

²⁴ M Končina Peternel *Pomoč otrokom, ko starši odpovedo* (Znanstveno in publicistično središče, Ljubljana) pp 161–162.

²⁵ Decree II Ips 161/2013 of 11 July 2013.

²⁶ B Novak *Družinsko pravo* (Uradni list, Ljubljana, 2014) p 242.

²⁷ Decree of VSL IV Cp 3796/2006 of 19 July 2006.

²⁸ Decree of VSL IV Cp 3796/2006 of 19 July 2006.

For this reason, it is necessary to take the measure of deprivation of parental care and to provide for protection and safety of the child in another way (eg foster care, adoption).²⁹

(iii) Obvious situation by the parent that there is no intention to care for the child

The Slovenian court of justice dealt with the question whether the long-term omission of personal contact by a parent should be defined as a reason for deprivation of parental care. The higher court of justice, disregarding the circumstances of the case, came to the conclusion that the best interests of the child are threatened due to the omission by the other contact person. That is, the latter had already omitted to provide due care for the child for 8 years. Due to this, the mother as applicant for the procedure of deprivation of parental care had to take over the complete care for their common minor child. Further, the court of justice stressed that, by nature, one parent alone may not satisfy the child's needs as the presence of both parents in the child's development process would do. This fact is also sufficient to establish that a child's successful development is threatened in such relationships. Therefore, the court of justice summed up that, in the case it was handling, there was reason for the deprivation of parental care from Art 116(1) MFRA (even two), ie that the opposite participant left his minor child and by this act obviously showed that he would not care for the child.³⁰

In another case, the court of justice stressed that there is a threat to the child's best interests is not justified by the protection of the parents' rights, if they are not prepared or, for various circumstances, capable of taking responsibility for the regular and continuous care of the child. The court of justice also mentioned that the competent authorities, if there is no real possibility of the parents' taking over custody and upbringing of the child again, have to provide for permanent foster care for the safety and upbringing of the child, so long as the children are affiliated to the foster parents by a long-term placement with them.³¹

(iv) Other severe neglect of duties

Another severe example of neglect of duties is when a parent does not care for the child and does not meet the child's basic living needs (does not take care of nutrition and hygiene, does not take care of the child's health and healing, etc). The Slovenian MFRA does not mention anything concrete here.

Therefore, it is also difficult to draw the line between acts meaning abuse, and acts meaning neglect of parental care. So, Draškić mentions that actions meaning abuse of parental care usually are active acts of the parents, whilst acts

²⁹ S Bubić and N Traljić *Roditeljsko i starateljsko pravo* (Pravni fakultet Univerziteta u Sarajevu, Sarajevo, 2007) p 210.

³⁰ Decree VSL IV Cp 2731/2009 of 23 September 2009.

³¹ Decree II Ips 161/2013 of 11 July 2013.

representing severe neglect of duties usually mean omissions either partly or totally. What both kinds of actions have in common is that they have to represent a wrongful act of a parent.³² Thus, the position prevailed that neglect of the child's upbringing and custody has to be conscious, but also negligence is sufficient, and it has to influence the upbringing and care.³³

So, the court of justice decided that the fact that contact with the father was not advisable at the moment does not mean that there is a reason for the deprivation of parental care.³⁴ The court of justice, specifically, found that the relations between the mother and the father, in spite of the temporary prohibition of contact, had improved and that deprivation of parental care, as the most radical measure, may wait. Also neglect or abuse of the child's property, as a rule, does not represent a reason for deprivation of parental care, except if this neglect and abuse are of such a nature that the child's person is also endangered, and not only the child's property.³⁵ Further, partial lack of fulfilment of the obligation to maintain is also no reason for the deprivation of parental care.³⁶ But, when the lack of fulfilment of obligations to maintain endangers the best interests of the child, one surely has to confirm that such an act can be defined as a severe neglect of duties.

In the same way, improper housing for a big family cannot be regarded as a reason for deprivation of parental care and for separation of the children from their parents, without a prior attempt to carry out efforts for the improvement of their position. So, the state must not cancel efforts only because of the lack of alternatives that might help the family.³⁷

(c) Participants in the procedure for deprivation of parental care

A non-contentious procedure may start by an application or ex officio (Art 2 NCCPA). As the procedure for the deprivation of parental care is a non-contentious one, there are no parties, but participants. The filing of an application for the deprivation of parental care is legitimate only if brought by persons expressly named (ie applicants for procedure), ie one of the parents, CSW, a child older than 15 years, the state attorney and the court of justice ex officio. The participants in the procedure are also the persons against whom the procedure is taken (ie the opposite participant), the person, to whom the judgment immediately refers (the child), as well as the person whose legal interest might be affected by the judgment.³⁸

³² M Draškić *Porodično pravo i prava deteta* (Čigoja štampa, Beograd, 2005) p 306.

³³ S Rupel *Družinsko pravo, Tožbe in predlogi, komentar, sodna praksa* (Gospodarski vestnik, Ljubljana, 1994) p 172.

³⁴ Decree VSC Cp 399/2009 of 22 April 2009.

³⁵ See B Novak *Družinsko pravo* (Uradni list, Ljubljana, 2014) p 243.

³⁶ Decree VSC Cp 399/2009 of 22 April 2009.

³⁷ *Wallová and Walla v. the Czech Republic* (application no 23848/04) of 26 October 2006.

³⁸ For more about this, see D Wedam-Lukić and A Polajnar-Pavčnik *Nepravdni postopek, Zakon s komentarjem* (ČZ Uradni list RS, Ljubljana, 1991) pp 27–29.

If the application is filed by a person without a legitimate right to do so, the court will refuse the application. However, the court has to start the procedure anyway, if it finds that there are reasons for the deprivation of parental care.³⁹

The application for deprivation of parental care may be filed by:

- (a) one of the parents having parental care;
- (b) CSW, which, in line with Art 119 MFRA, is obliged to take necessary measures requested for the upbringing and protection of the child or the protection of the child's property and other rights and benefits. Among such measures, we also count the filing of the application for the deprivation of parental care;
- (c) a child older than 15 years and capable of understanding the meaning and consequences of the application for deprivation of parental care – based on the application by the child, the procedure may start only if the child is more than 15 years old and capable of understanding the meaning of the application and its consequences. In this situation, the child is recognised as having the capacity to appear independently in a procedure and perform procedural actions. In line with Slovenian law, a minor obtains partial capacity to contract in civil procedural law on reaching the age of 15 years and then by the age of 18 full capacity to contract. Procedural law does not know any limitation of procedural capacity. This means that procedural actions may be conducted only by the party with procedural capacity. The NCCPA, adopted in 1986, has already regulated this. This was followed also by Slovenian CPA regulating procedural capacities of the child older than 15 years in its Art 409.⁴⁰ Under the NCCPA the non-contentious court of justice also accepts procedural actions taken by persons who are procedurally incapable. Such a regulation is in line with non-contentious procedures having an official character and where the rights of persons unable to protect their own rights are protected.⁴¹ In our case, this is a minor older than 15, who may file an application for the deprivation of parental care. A minor does regularly obtain procedural capacity by 18, but the NCCPA recognises procedural capacity with the intention of being able to conduct procedural actions in the procedure for

³⁹ D Wedam-Lukić and A Polajnar-Pavčnik *Nepravdni postopek, Zakon s komentarjem* (ČZ Uradni list RS, Ljubljana, 1991) p 62.

⁴⁰ See Art 409 CPA: '(1) A child who has attained the age of fifteen and is capable of understanding the meaning and legal consequences of the acts he performs shall be enabled by the court to execute the acts of procedure independently as a party. (2) The statutory representative of the child referred to in the preceding paragraph may execute acts of procedure unless and until the child declares that he is taking over the litigation. (3) A child who has not yet attained the age of fifteen and who is considered by the court as incapable of understanding the meaning and legal consequences of the acts he performs shall be represented by his statutory representative. (4) In the event that the interests of the child and those of his statutory representative collide, the court shall appoint to the child a special representative. Such representative shall also be appointed in all other cases where the court deems it necessary for the protection of the child's interests.'

⁴¹ J Juhart *Civilno nepravdno pravo – splošni del (Univerza v Ljubljani – Pravna fakulteta, Ljubljana, 1970)* p 63.

the deprivation of parental care alone. In this way the child can represent the child's own rights and interests against the parents, who do not exercise proper parental care according to the child's opinion and by this also violate the child's rights. So, in a non-contentious procedure, the child is recognised as having procedural capacity, in spite of the fact that usually in contentious procedures this right is obtained only at 18. The procedure for deprivation of parental care is an official procedure and, therefore, the non-contentious court of justice has ex officio to watch persons who have no capacity of their own to contract – ie in our case the child older than 15. Procedural capacity as a fundamental procedural pre-condition has to be watched ex officio by a non-contentious court of justice throughout the procedure;

- (d) the state attorney may start the procedure for deprivation of parental care, if needed, against the parents in cases of criminal proceedings for the inappropriate handling of the child;⁴²
- (e) the court of justice begins the procedure for deprivation of parental care, also ex officio, if it obtains information that there are well-founded reasons for doing so (Art 64 NCCPA). The court of justice and CSW are most frequently informed of violations by: the police, school, kindergarten, relatives, medical doctors or the other parent. Reasons for the introduction of a procedure for deprivation of parental care ex officio, according to the opinion of the court of justice, were not present in a case where the father did not want to make contact to the child in a period of time, against the will of the girl. In the same way, the father did not endanger the girl during this period of time by any other action. Therefore, the court of justice reached the conclusion that the conditions for depriving the father of parental care were not present nor were there reasons for the introduction of the procedure for the deprivation of parental care ex officio, as in the choice of the measure the principle of the least measure has to be followed.⁴³

The opposite participant is the parent, against whom the procedure for deprivation of parental care is taken.

In the procedure deciding whether the measure of deprivation of parental care is well founded, it is not relevant whether the parent, against whom the procedure of deprivation is taken, is guilty of the apparent situation or not, as the purpose of the measure being taken is not punishment of the parents.⁴⁴ Its purpose is to protect the child and the child's best interests. Unfortunately, the court of justice cannot also consider how much the measure emotionally hurts the opposite participant. As was stressed in the beginning, the only thing that is relevant is what is best for the child now in the matter being handled by the court, having regard to all the established relevant circumstances.

⁴² D Wedam-Lukić and A Polajnar-Pavčnik *Nepravdni postopek, Zakon s komentarjem* (ČZ Uradni list RS, Ljubljana, 1991) p 62.

⁴³ More about this: Decree of VSL IV Cp 3796/2006 of 19 July 2006.

⁴⁴ Conclusion II Ips 161/2013 of 11 July 2013.

(d) Consequences of deprivation of parental care

The strictest measure foreseen by Slovenian law for the worst violations of parental care is deprivation of parental care. It is used when the relations in the family are shattered in a way where it is no longer possible to expect a return to normal family life. Deprivation of parental care radically interferes with the relations between parents and children, as it significantly reduces the range of their rights and duties. So, the parents are not the legal representatives of the children and the children no longer live together with them. By deprivation of parental care the parents' duty to maintain the child does not end. The duty of maintenance will end only if the child is adopted. In the same way, after deprivation of parental care contact between the parents and the child may still be continued. The exercise of contact will have an important purpose, namely, if there is a chance of return of parental care to the parent. In the decision-making on contact, of course, the reasons, because of which the deprivation of parental care occurred in the first place, are to be considered. The importance of contact becomes clear in a case where there is the option of reversing the reasons that led to deprivation of parental care and re-establishing family life. The exercise of contact, therefore, will prevent the alienation of the child from the parents. When the weight of the reasons leading to deprivation of parental care is so high that they still represent a danger for the child or threaten the child's welfare, it is impossible to allow the exercise of contact.

If there are more children whose rights are violated, parental care may be taken for each child, but procedures for deprivation of parental care have to be taken for each child separately. The NCCPA does not foresee the possibility of a collective deprivation of parental care. Parental care, thus, is individual and represents a relationship, rights and duties between a concrete parent and a concrete child. Each such relationship is individual and marked by characteristics having their base in various circumstances (eg the age of a child, personal characteristics of a child, affiliation of the parent, etc).

In spite of the fact that deprivation of parental care is the severest measure against the parents, one must not dedicate to it a special place in the system of measures of protection of the child's best interests in society.⁴⁵ In the decision-making of the measure, it is irrelevant, whether the opposite participant is guilty for the appeared situation or not, as the purpose of the taken measure is not in the punishing of the parents. It is also not important, whether the competent authorities really did everything that could be done in the handled case for the rehabilitation of the family, and in the same way the decision cannot be influenced by the fact that the procedure took too much time, which was also stressed with good reason in a handled matter also by a case before the European Court of Human Rights (ECtHR).⁴⁶ If the fact that for the child the preservation of the emotional connection with the foster parent and the stability of this relationship without constant fear of being torn out of

⁴⁵ K Zupančič *Družinsko pravo* (Uradni list Republike Slovenije, Ljubljana) pp 154 and 155.

⁴⁶ *Case of X v Slovenia*, Appl. no 40245/10, 28 June 2012.

this environment is important for the child's development, and there is no real possibility that the parent might take over custody and upbringing again, then the measure of deprivation of parental care is well-founded.⁴⁷

In all procedures, especially in the non-contentious procedure for deprivation of parental care, the 'principle of an economic and quick procedure' has an important role. Therefore, one has to stress that speed must never harm the quality of the protection of the child's rights. Long-term procedures, thus, influence the provision of good quality protection of the child's rights. The latter happened in a case of deprivation of parental care in 2010 in front of the District Court of Maribor. In the case, it took almost 7 years from the moment when children were taken from the original family to their placement into a foster family.⁴⁸ In regard to the speed or slow running of the procedure of deprivation of parental care, the procedure was also subject to decision-making in front of the ECtHR in the case of *X v Slovenia*.⁴⁹ The ECtHR established in its ruling that the complainant's (father's) right to respect for privacy and family life from Art 8 ECHR was violated. The ECtHR especially emphasised that there were no reasons for such a long procedure, where the decision of the court of justice is decisive for the complainant's enjoyment of a family life.⁵⁰ Further, the ECtHR emphasised that, in a case of taking away of the child from the parents and the placement of the child into foster care, one cannot automatically rely on the point that the parent omitted to care for the child and no longer wanted to do so. It is a fact that children are taken from their parents and placed into a foster family, and by this the parents are unable to care for their children. As a result, they cannot exercise parental care, but in the same way it also means that the children cannot be neglected or abused.⁵¹

The court of justice files decisions in the form of a decree (Art 29 NCCPA). A final decree on deprivation of parental care is sent to the registrar of the jurisdiction for entering into the register, and, if the child has real estate, it records the registration of the deprivation of parental care in the land register (Art 66 NCCPA).

The costs of the procedure have to be carried by the person deprived of parental care. If the application for deprivation is rejected, the costs are to be borne by the applicant (Art 67 NCCPA). Such a regulation represents an exception from Art 35 NCCPA determining that, as a rule, all participants of a non-contentious

⁴⁷ Decree II Ips 161/2013 of 11 July 2013.

⁴⁸ Ombudsman (Varuh človekovih pravic), Dolgotrajnost postopka odvzema roditeljske pravice: www.varuh-rs.si/medijsko-sredisce/aktualni-primeri/novice/detajl/dolgotrajnost-postopka-odvzema-roditeljske-pravice/?cHash=03a72dff34 (24 December 2014).

⁴⁹ *Case X v Slovenija*, no. 40245/10, judgment of 28 June 2012.

⁵⁰ State Attorney of the Republic of Slovenia, *Poročilo o delu za leto 2012* (Ljubljana, 2013) p 134. Accessible: www.dp-rs.si/fileadmin/dp.gov.si/pageuploads/LETNO_POROCILO/Letno_porocilo_2012_splet.pdf (9 November 2014).

⁵¹ *Odvzem roditeljske pravice – koristi otroka*, Pravna praksa from 26 September 2013, p 21. That is a case accessible under: http://sodnapraksa.si/?q=odlo%C4%8Dbe%20&database%5BBOVS%5D=SOVS&database%5BUPRS%5D=UPRS&_submit=i%C5%A1%C4%8Di&order=date&direction=asc&page=1452&id=2012032113057337.

procedure bear their own costs. The regulation of Art 67 NCCPA follows a contentious procedure, where the person losing the procedure covers the costs (principle of success).

(e) Return of parental care

Deprivation of parental care is not seen as an absolute and final measure. If the reasons for which parental care was deprived end, the court of justice will decide about the return of parental care (Art 68 NCCPA). By this, the NCCPA took the position that a parent deprived of parental care can reverse the reasons and circumstances which led to the deprivation. If the court of justice establishes that the reason for which deprivation of parental care was ordered no longer exists, it is returned to the parent in a non-contentious procedure. The procedure for return of parental care may be started by the parent deprived of parental care, the CSW and the court of justice *ex officio*. We note that a child with procedural capacity in this case has no legitimate right to bring an application.

Modern methods of handling cases of endangered children depart from the fundamental principle that the family is the environment of the highest quality for the upbringing and protection of a child. If the competent authorities establish that, for the protection of the child, separation from the family is necessary, the competent authorities have to try to rehabilitate the family, so the child might return with professional help to the family members (consultation in upbringing and protection of children, help in taking care of children, programmes for treatment of various forms of addictions, professional help for mental disturbances and diseases). If it appears that the child will never be able to return to the parents, the child has to be provided with a stable and permanent protection and upbringing as soon as possible.

IV CONCLUSION

The non-contentious procedure for deprivation of parental care represents a measure for the child's protection against a parent or both parents. It is the most radical protection measure in Slovenian family law and therefore should be only used in cases where serious violations of children's rights are found. The family where the violation occurs as a rule receives help, support and guidance which should normalise relations and prevent the deprivation of parental care, as the most radical measure.

SOUTH AFRICA

THE EXTENSION OF MEDIATION AND PIERCING THE TRUST VENEER ON DIVORCE IN SOUTH AFRICA

*Jacqueline Heaton**

Résumé

Même si le débat contradictoire est encore la voie privilégiée dans le contentieux familial en Afrique du Sud, on constate un intérêt grandissant de la part du législateur et du monde judiciaire pour les modes alternatifs de règlement des conflits, particulièrement pour la médiation. Dans certains cas celle-ci est même devenue obligatoire. Le sujet principal de notre présentation porte sur la médiation. L'espoir est qu'elle devienne de plus en plus populaire dans les affaires relevant des *Magistrates' Courts* et que cette croissance soit rapide. Le deuxième sujet retenu est celui de la levée du voile fiduciaire dans le cadre du partage des biens au moment du divorce. En 2014, deux tribunaux de même palier en sont arrivés à des conclusions contradictoires à ce sujet, comme nous le verrons dans ce texte.

I INTRODUCTION

It is well known that family law matters involve not only legal but also social and psychological aspects. For this reason, the adversarial (accusatorial) procedure is widely regarded as inappropriate for dealing with these matters.¹ Although the adversarial system remains the main procedural method for dealing with family law matters in South Africa, there is growing support from legislative and judicial quarters for alternative dispute resolution, especially mediation.² In some situations, mediation has even been made compulsory.³ For

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¹ See, eg, Madelene de Jong 'Mediation and Other Appropriate Forms of Dispute Resolution upon Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 577–581 and the sources cited there. On the instances where mediation might be inappropriate (eg when there is domestic violence or a risk of child abuse, substance abuse or mental health problems, or a substantial power imbalance between the parties which the mediator is unable to address), see De Jong in Heaton (ed) at 586–587 and the sources cited there.

² Mediation is a process in which an impartial third party who has no decision-making powers facilitates negotiations/discussions between parties with the object of helping them to make

instance, the High Court⁴ has occasionally used its power as upper guardian of all minors to compel parties to engage in mediation before approaching the court again.⁵ The legislature has also provided for mediation in some family law matters.

As this volume of the *Survey* deals with developments during 2014, the focus of the discussion on mediation falls on the most recent development, which occurred at the end of 2014. Older family mediation schemes are mentioned solely in order to show that, and how, the various parallel systems of mediation that are operating in South Africa came about.

The latest mediation scheme provides for voluntary private, but court-annexed, mediation in civil cases in certain Magistrates' Courts. Although the scheme is not restricted to family law matters, it has the potential to increase awareness of and access to mediation in family law matters. The scheme adds yet another layer to the parallel systems of mediation that operate in South Africa. It is discussed in Part II below.

The other topic that is considered in this chapter is the courts' approach towards taking trust property into account for purposes of dividing matrimonial property on divorce. In South African law, the property of a trust vests in the trustees in their official capacity as trustees.⁶ Conventionally, the trustees control the trust property on behalf of and in the interests of the trust

their own decisions on some or all of the aspects of the dispute between them and, if possible, to reach a mutually satisfactory settlement agreement: see, eg, JM Black, T Bond and J Bridge *A Practical Approach to Family Law* (8th edn, Oxford University Press, Oxford, 2007) 49–50; Madelene de Jong 'Mediation and Other Appropriate Forms of Dispute Resolution upon Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 582. Parenting coordination (facilitation, case management) and collaborative divorce are other forms of alternative dispute resolution which are employed in family matters in South Africa: see De Jong in Heaton (ed) 615–629. Arbitration cannot be used in any marriage or divorce-related disputes, as s 2 of the Arbitration Act 42 of 1965 prohibits arbitration in respect of matrimonial issues.

³ South African law recognises civil marriages and customary marriages. Civil unions between parties of the same or the opposite sex are also fully recognised and have the same consequences as civil marriages: Civil Union Act 17 of 2006, s 13. Consequently, the same mediation provisions apply in respect of civil marriages, customary marriages and civil unions. In addition, s 8(5) of the Recognition of Customary Marriages Act 120 of 1998 expressly recognises the role that persons (including traditional leaders) play in the traditional, customary mediation of disputes before a customary marriage is dissolved by the court.

⁴ The South African court structure is divided into superior and lower courts. The superior courts are the Constitutional Court, the Supreme Court of Appeal, the High Court, and specialised courts such as the Labour Court: Constitution of the Republic of South Africa, 1996, s 166; Labour Relations Act 66 of 1995, s 151(1). The lower courts are the Magistrate's Courts, and specialised lower courts such as the Maintenance Courts and the Children's Courts: Constitution of the Republic of South Africa, 1996, s 166; Maintenance Act 99 of 1998, s 3; Children's Act 38 of 2005, s 42(1). The Magistrate's Courts are divided into District Courts and Regional Courts.

⁵ *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC); *Townsend-Turner and Another v Morrow* 2004 (2) SA 32 (C).

⁶ See, eg, *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA).

beneficiaries, and control of the trust property is separate from enjoyment of the trust property.⁷ However, as the Supreme Court of Appeal pointed out in *Land and Agricultural Bank of South Africa v Parker and Others*,⁸ in the past few decades some trusts have developed ‘in which functional separation between control and enjoyment is entirely lacking’.⁹ This has particularly been the case in respect of family trusts,¹⁰ that is, trusts that are designed to secure the interests and protect the property of a family or some of its members. In the case of family trusts, some of the trustees are frequently also the beneficiaries of the trust. Such trusts are often created for purposes of estate planning, tax avoidance, or to protect assets from creditors, including the founder’s spouse. Even if the founder did not initially intend to defeat the matrimonial property claims of his or her spouse, a family trust may turn out to be a handy vehicle for ‘divorce planning’ because transferring property to the trust reduces the scope of a person’s estate and consequently limits (or even eliminates) any claim the person’s spouse may have against him or her on divorce.

Against this background, the question whether trust property can be considered for purposes of division of matrimonial property on divorce has arisen in several reported judgments in recent years. In 2014, two divisions of the High Court that have equal jurisdiction arrived at conflicting conclusions in this regard. These decisions are discussed in Part III below.

II MEDIATION

The Mediation in Certain Divorce Matters Act 24 of 1987, which came into operation in 1990, was the first step in the direction of state-funded, public mediation in family law matters in South Africa. Although the title creates the impression that the Act is concerned with the provision of mediation services in all divorce matters, the Act fails to meet this ostensible objective, as it applies only to child-related matters and only limited mediation occurs under the Act.¹¹ In terms of the Act, a public official,¹² called the ‘family advocate’, undertakes an enquiry in matters relating to the children of divorced or divorcing parents, children born of unmarried parents, children in maintenance proceedings, and children who are affected by domestic violence proceedings¹³ with a view to furnishing the particular division of the High Court or the Magistrate’s Court that has jurisdiction in the matter with a report and recommendations on the

⁷ Ibid.

⁸ 2005 (2) SA 77 (SCA).

⁹ At para 25.

¹⁰ *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA).

¹¹ See, eg, Madelene de Jong ‘Mediation and Other Appropriate Forms of Dispute Resolution upon Divorce’ in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 607; JG Mowatt ‘The Mediation in Certain Divorce Matters Act 1987: News, but Nothing New’ 1987 De Rebus 611 at 612.

¹² Mediation in Certain Divorce Matters Act 24 of 1987, s 2(1).

¹³ Mediation in Certain Divorce Matters Act 24 of 1987, s 4(1)(a) and (b) read with Recognition of Customary Marriages Act 120 of 1998, s 8(3); Maintenance Act 99 of 1998, s 10(1A); Domestic Violence Act 116 of 1998, s 5(1A).

welfare of the minor or dependent children who are affected by the proceedings.¹⁴ Even though the Act and the regulations under the Act do not expressly make provision for mediation,¹⁵ the family advocate's role at the enquiry has three components in practice: monitoring, evaluation, and mediation.¹⁶ Although the monitoring and evaluation functions are dominant, some type of mediation does take place when the family advocate attempts to get the parties to agree on the arrangements for the children whose welfare is at stake.¹⁷

The Children's Act 38 of 2005 provides for compulsory private or public mediation in some child-related matters.¹⁸ The Act compels unmarried parents who cannot agree on whether the father meets the requirements for obtaining full parental responsibilities and rights to refer their dispute for mediation by a family advocate, social worker, social service professional or other suitably qualified person.¹⁹ It further obliges co-holders of parental responsibilities and rights who experience difficulties in exercising their responsibilities and rights to seek either the assistance of a family advocate, social worker or psychologist, or mediation through a social worker or other suitably qualified person in order to try to agree on a parenting plan before they turn to the division of the High Court or the Magistrate's Court that has jurisdiction in the particular matter.²⁰ The Act further grants the court the discretion to order a parent or care-giver to participate in mediation if his or her child has been found to be in need of care and protection.²¹ The mediation envisaged in the Act is public (and

¹⁴ Mediation in Certain Divorce Matters Act 24 of 1987, s 4(1).

¹⁵ For this reason the Act and regulations obviously do not define mediation.

¹⁶ Felicity Kaganas and Debbie Budlender *Family Advocate* (Law, Race and Gender Research Unit University of Cape Town, Cape Town, 1996) 4; Madelene de Jong 'Mediation and Other Appropriate Forms of Dispute Resolution upon Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 607; GJ van Zyl 'The Family Advocate: 10 Years Later' (2000) 21 *Obiter* 372 at 376.

¹⁷ Felicity Kaganas and Debbie Budlender *Family Advocate* (Law, Race and Gender Research Unit University of Cape Town, Cape Town, 1996) 4; Madelene de Jong 'Mediation and Other Appropriate Forms of Dispute Resolution upon Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 607.

¹⁸ The Act and the regulations under the Act do not define mediation.

¹⁹ Children's Act 38 of 2005, s 21(3). This section came into operation on 1 July 2007: Proc 13 GG 30030 of 29 June 2007.

²⁰ Children's Act 38 of 2005, s 33(2) read with s 33(5). This section came into operation on 1 April 2010: Proc R12 GG 33076 of 1 April 2010. If attempts to agree on a parenting plan fail, any of the co-holders may approach the High Court in its capacity as upper guardian of all minors for an order, and the court may compel an unwilling party to enter into a parenting plan: *M v V (Born N)* [2011] JOL 27045 (WCC). See also *PD v MD* 2013 (1) SA 366 (ECP), where the court held that the parties need simply make 'a reasonable effort' to reach an agreement.

²¹ Children's Act 38 of 2005, s 46(1)(h)(iii) read with ss 155(7) and 156. These sections came into operation on 1 April 2010: Proc R12 GG 33076 of 1 April 2010. Section 6(4) and (5) of the Act (which came into operation on 1 July 2007: Proc 13 GG 30030 of 29 June 2007) further provide that a confrontational approach must be avoided and that an approach which is conducive to conciliation and problem-solving must be adopted in any matter concerning a child. The latter approach could include mediation. Several provisions of the Act encourage parties to reach agreement on issues such as the conferment of parental responsibilities and rights on third parties (ss 22(1) and 30(3)), post-adoption agreements (s 234(1)) and surrogate

therefore state-funded) if it is provided by the family advocate. If the parties choose to use a private mediator (such as a lawyer, social worker or psychologist), they have to pay for the mediation.

Another public mediation scheme operates by way of a pilot scheme at certain Maintenance Courts. Although the Strategic Plan of the Department of Justice and Constitutional Development for 2011 to 2016 envisaged the introduction of mediation services for maintenance matters,²² the pilot scheme is much more limited in scope: it is restricted to teaching maintenance officers at Maintenance Courts mediation skills for purposes of conducting their maintenance investigations.

On 1 December 2014, voluntary, private, court-annexed mediation in all civil disputes²³ was introduced in 12 of the approximately 400 Magistrates' Courts in South Africa by way of an amendment to the rules regulating the conduct of proceedings in Magistrates' Courts.²⁴ This was the first step in a gradual nation-wide roll-out of the mediation scheme to all Magistrates' Courts.²⁵ The new mediation scheme forms part of the government's effort to enhance access to justice.²⁶ The new scheme does not address the call that has been made for the development of a comprehensive South African approach to mediation in

motherhood agreements (s 292 read with ss 293 and 295). Although mediation is not pertinently mentioned in respect of these matters, it could play a role in facilitating negotiations between the parties: Madelene de Jong 'Child-focused Mediation' in Trynie Boezaart (ed) *Child Law in South Africa* (Juta, Cape Town, 2009) 112 at 123–124.

²² South African Law Reform Commission Issue Paper 28 Review of the Maintenance Act 99 of 1998 Project 100 (Pretoria, 2014) at 13.

²³ As the rules apply to all types of civil cases and are not specifically geared towards family law matters, they do not provide for any exclusions or special arrangements relating to, for instance, substance or child abuse matters. Compare n 1 above where it was indicated that some cases may not be suitable for mediation.

²⁴ Government Notice 855 in Government Gazette 38164 of 31 October 2014 read with Rule 72. The rules were published in Government Notice R183 in Government Gazette 37448 of 18 March 2014 and were initially scheduled to come into operation on 1 August 2014: Item 5 of the Schedule set out in the latter Government Notice. The Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991 also provides for mediation in civil Magistrates' Court cases. However, it appears that the procedure provided for in this Act has never been used in family law matters: Madelene de Jong 'Mediation and Other Appropriate Forms of Dispute Resolution upon Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 609 n 274.

²⁵ Deputy Chief State Law Adviser Jacob Skosana in an interview with Phindile Chauke 'Obtaining a Court Order Made Easier' *The Citizen* 29 March 2014, available at <http://citizen.co.za/151585/obtaining-a-court-order-made-easier> (accessed 11 February 2015); South African Government 'Justice and Constitutional Development on Court-annexed Mediation Service', 1 December 2014, available at www.gov.za/court-annexed-mediation-service-increase-access-justice-all (accessed 11 February 2015).

²⁶ Foreword by the Minister of Justice and Constitutional Development in the booklet on court-annexed mediation which was published by the Department of Justice and Constitutional Development in 2014. The booklet is available at www.joasa.org.za/Mediation%20Rules%20Booklet_print-ready%20FIN.pdf (accessed 12 February 2015).

family law matters.²⁷ It simply affords official sanction and a degree of facilitation by a court official to voluntary private mediation in the lower courts.²⁸

For purposes of the new mediation rules, mediation is defined as ‘the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute’.²⁹

The mediation rules provide that, either before or after the commencement of litigation but before judgment, a party may request that the dispute be referred to mediation.³⁰ For example, parties who intend to get divorced and are unable to agree on whether one of them should pay post-divorce maintenance to the other or which parent should have day-to-day care of the children born of the marriage can seek court-annexed mediation relating to the dispute even prior to the institution of divorce proceedings. If, at the time of the trial, the parties have not already referred their dispute to mediation, the court may at any time before judgment enquire into the possibility of mediation and give the parties an opportunity to refer their dispute to mediation.³¹

As the mediation is voluntary, any party may refuse to participate in it. If the parties agree to mediation, they must enter into a written mediation agreement which must inter alia state that they have agreed to mediation; identify the mediator; stipulate the date, time and venue of the mediation; indicate the period that will be allocated for each mediation session; indicate the time within which the mediation will be concluded; and stipulate the consequences if any party fails to abide by the agreement to mediate.³²

If a request for mediation is made, the clerk or registrar of the court must explain the purpose, meaning, objectives and benefits of mediation to the parties.³³ He or she also assists the parties in concluding their agreement to mediate, facilitates the mediation, and files mediation agreements and reports.³⁴ However, the clerk or registrar does not conduct the actual mediation.³⁵ The

²⁷ See, eg, Madelene de Jong ‘A Pragmatic Look at Mediation as an Alternative to Divorce Litigation’ 2010 *Tydskrif vir die Suid-Afrikaanse Reg* (Journal for South African Law) 515 at 529.

²⁸ The Minister has asked the Department Justice and Constitutional Development to investigate the desirability of compulsory court-annexed mediation and to prepare a draft Bill in this regard: Foreword by the Minister of Justice and Constitutional Development in the booklet on court-annexed mediation (Department of Justice and Constitutional Development, 2014), available at www.joasa.org.za/Mediation%20Rules%20Booklet_print-ready%20FIN.pdf (accessed 12 February 2015).

²⁹ Rule 73.

³⁰ Rule 75(1)(a) and (b); see also Rule 74(1).

³¹ Rules 75(2) and 79(1).

³² Rule 77(4)(c).

³³ Rule 76(1)(a).

³⁴ See eg Rules 76(2), 77(3)–(6), 78(1)(b), 80(2) and 82(1).

³⁵ Because of the increase in workload caused by the implementation of the mediation scheme,

mediation is conducted by accredited mediators who are members of the panel of mediators approved by the Department of Justice and Constitutional Development.³⁶ The parties, the clerk or registrar selects the mediator for each case from the panel of accredited mediators.³⁷ Unfortunately, no distinction is made between accreditation of commercial mediators and accreditation of family mediators; mediators receive blanket accreditation to mediate all civil matters. However, their areas of speciality are indicated in the list of accreditation.³⁸ It is hoped that when a mediator is appointed for a specific case the differences between commercial disputes and family law disputes³⁹ will be borne in mind and that a mediator with appropriate skills will be selected from the panel.

The parties must attend the mediation in person.⁴⁰ They may be assisted by legal or other practitioners of their choice, at their own expense.⁴¹ They are also liable for the mediator's fees and receive no state-aid in this regard.⁴² The fees that mediators may charge are determined by the Minister.⁴³

At the start of the mediation, the mediator must inform the parties of the purposes of mediation; the fact that the objective of mediation is to facilitate settlement; the facilitative role of the mediator as an impartial person who may

dedicated mediation clerks have been employed by the Department of Justice and Constitutional Development in addition to the existing clerks of the court: Nomfundo Manyathi-Jele 'Court-annexed Mediation Rolled Out' January/February 2015 De Rebus 20 at 20; Phindile Chauke 'Obtaining a Court Order Made Easier' *The Citizen* 29 March 2014, available at <http://citizen.co.za/151585/obtaining-a-court-order-made-easier> (accessed 11 February 2015). More than 30 mediation clerks have been trained for employment in the 12 courts where the mediation scheme has been implemented: South African Government 'Justice and Constitutional Development on Court-annexed Mediation Service', 1 December 2014, available at www.gov.za/court-annexed-mediation-service-increase-access-justice-all (accessed 11 February 2015).

³⁶ Rule 86(2). The accreditation norms and standards for mediators are determined by the Minister of Justice and Constitutional Development on advice of the Mediation Advisory Committee: Rule 86(1) read with the Invitation to Submit Comments on the Accreditation Norms and Standards for Mediators published in General Notice 598 in Government Gazette 37883 of 1 August 2014, and the Foreword by the Minister in the booklet on court-annexed mediation (Department of Justice and Constitutional Development, 2014), available at www.joasa.org.za/Mediation%20Rules%20Booklet_print-ready%20FIN.pdf (accessed 12 February 2015). The norms and standards were published in Schedule 2 of Government Notice 854 in Government Gazette 38163 of 31 October 2014. By February 2014, 231 mediators had been accredited: www.justice.gov.za/mediation/MediatorsList.pdf available via a link at www.justice.gov.za/mediation/mediation.html (accessed 18 February 2014).

³⁷ Rule 73.

³⁸ See the list of accredited mediators available via a link at www.justice.gov.za/mediation/mediation.html (accessed 18 February 2014).

³⁹ These differences include the fact that family law matters usually involve more emotional issues than commercial disputes do and that, in family matters, the parties frequently need to continue to have a relationship after the dispute has been resolved (especially, where children are involved).

⁴⁰ Rule 85(1).

⁴¹ Rules 76(2)(a) and 85(4).

⁴² Rule 84(1) and (2).

⁴³ Rule 84(3). The fees were published in Schedule 1 of Government Notice 854 in Government Gazette 38163 of 31 October 2014.

not make any decisions of fact or law or determine the credibility of any person participating in the mediation; the inquisitorial nature of mediation proceedings; and the rules applicable to the mediation.⁴⁴ The mediator must also inform the parties that all discussions and disclosures made during mediation are confidential and inadmissible as evidence, unless they are recorded in a settlement agreement signed by the parties or are otherwise discoverable in terms of the rules of court or any other law.⁴⁵

If the dispute between the parties is resolved by mediation, the mediator must, within 5 days of the conclusion of the mediation, submit a report to the clerk or registrar of the court informing him or her of the outcome of the mediation.⁴⁶ The mediator must assist the parties in drafting a written settlement agreement, which he or she must transmit to the clerk or registrar.⁴⁷ The agreement must be signed by the parties.⁴⁸ If the settlement agreement relates to a dispute which is not the subject of litigation, the clerk or registrar of the court must simply file the agreement.⁴⁹ If litigation is already in progress, the clerk or registrar must, at the parties' request, place the settlement agreement before a judicial officer in chambers either for noting that the dispute has been resolved or for purposes of making the settlement agreement an order of court.⁵⁰ If the settlement agreement is not made an order of court, it is enforceable as a contract between the parties. If the dispute is not resolved, the mediator must, within 5 days of the conclusion of the mediation, report to the clerk or registrar and refer the dispute back to him or her.⁵¹ The clerk or registrar must file the report.⁵² If litigation is pending, the filing of the report enables the litigation to continue.⁵³

The court-annexed mediation scheme has not brought about a momentous change in dispute resolution in family law matters; nor will it do so in the near future. However, it is a step in the right direction. Clearly, the speedy extension of the mediation scheme to all Magistrates' Courts is required. And, of course, state funding of mediation or, at the very least, some sort of financial assistance in respect of mediation is indispensable. The present system is limited to those who can afford to pay for private mediation. Consequently, the new scheme may make mediation more accessible but it does not make it more affordable. Furthermore, before the scheme is extended, the state would, by some means or another, need to convince accredited mediators to work in rural areas. The 12 courts where the scheme has been implemented are mainly situated in cities or major towns, where private mediators are more readily available than in rural areas. It is doubted whether, under the present scheme, sufficient numbers of private, trained mediators would be willing to situate themselves in rural areas

⁴⁴ Rule 80(1)(a)–(d).

⁴⁵ Rule 80(1)(e).

⁴⁶ Rule 80(2).

⁴⁷ Rules 80(1)(h), 82(1) and 82(6).

⁴⁸ Rule 82(6).

⁴⁹ Rule 82(2).

⁵⁰ Rule 82(4).

⁵¹ Rules 80(1)(i) and 80(2).

⁵² Rule 82(3).

⁵³ Rule 82(5).

– especially since the mediation rules currently require the parties to bear the costs of the mediation and the inhabitants of rural areas in South Africa are generally poor.⁵⁴ Some non-governmental organisations and government/private donor partnerships offer mediation services, but they are not located in all parts of the country.⁵⁵ Ultimately, the solution probably lies in changing the system from court-annexed private mediation to court-annexed public mediation. Furthermore, all divisions of the High Court would have to be encompassed in the scheme. Finally, the scheme should be refined in order to differentiate between commercial and family matters.

III TRUST PROPERTY

In South Africa, the proprietary system that operates in a civil marriage not only governs the position during the subsistence of the marriage, but also is the basis for determining the proprietary consequences of divorce. Unless, on divorce, the spouses enter into a settlement agreement that provides otherwise, the court is obliged to divide the spouses' property in accordance with the matrimonial property system that operated in their marriage, for the court does not have a general judicial discretion to redistribute matrimonial property on divorce. Consequently, the proprietary consequences of divorce differ considerably depending on the spouses' matrimonial property system.

The three main matrimonial property systems that operate in civil marriages are community of property, complete separation of property and the accrual system. Marriage in community of property is governed mainly by the common law (Roman-Dutch law). Community of property is the default matrimonial property system.⁵⁶ If prospective spouses do not want to be married in community of property, they must enter into an antenuptial contract. The matrimonial property systems most commonly encountered in antenuptial contracts are the accrual system and complete separation of property. The accrual system (which is similar to the German system of *Zugewinnngemeinschaft*) was introduced into South African law by the Matrimonial Property Act 88 of 1984. In terms of the accrual system, the marriage is out of

⁵⁴ Around 23 million people live below the poverty line: Statistics South Africa 'Poverty Trends in South Africa', available at <http://beta2.statssa.gov.za/?p=2591> (accessed 11 February 2014). For a detailed analysis of poverty in the various provinces, see Human Sciences Research Council State of Poverty and Its Manifestation in the Nine Provinces of South Africa (HSRC, Pretoria, 2014).

⁵⁵ On a government/private donor partnership in Cape Town which offers the services of specialised paralegals and a mediation panel consisting of a psychologist and two qualified attorneys, see Sandra Burman and Nichola Glasser 'Giving Effect to the Constitution: Helping Families to Help Themselves' (2003) 19 *South African Journal on Human Rights* 486.

⁵⁶ *Edelstein v Edelstein* 1952 (3) SA 1 (A). On marriage in community of property, see, eg. Jacqueline Heaton *South African Family Law* (3rd edn, LexisNexis, Durban, 2010) 65–74; Ann Skelton and Marita Carnelley (eds) *Family Law in South Africa* (Oxford University Press, Cape Town, 2010) 81–88; Jacqueline Heaton 'The Proprietary Consequences of Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 57 at 59–63, 80–82, 84–85.

community of property, but upon divorce the parties share the growth their separate estates have shown since the beginning of the marriage.⁵⁷

In contrast, spouses who are married subject to complete separation of property (which, like marriage in community of property, is governed mainly by the common law) do not share in each other's property on divorce. However, in certain 'old' marriages subject to complete separation of property the court has a limited discretion to transfer assets from one spouse to the other on divorce. This is the only instance in which the court has a discretion to redistribute the spouses' matrimonial property on divorce. This redistributive power was conferred on the court by s 7(3) to (6) of the Divorce Act 70 of 1979. In terms of s 7(3) to (6), the court may order that the assets or part of the assets of one spouse be transferred to the other spouse on divorce if the marriage was concluded subject to complete separation of property prior to 1 November 1984 (in the case of white, 'coloured' or Asian persons) or prior to 2 December 1988 (in the case of black persons). It is further required that the spouses must not have entered into a settlement agreement and that the spouse who seeks redistribution must have contributed to the maintenance or increase of the other spouse's estate during the subsistence of the marriage. The court may only order transfer of assets if this would be just and equitable.⁵⁸

In two 2014 cases, *MM v JM*⁵⁹ and *RP v DP*,⁶⁰ the question arose whether trust property can be considered for purposes of division of spouses' matrimonial property on divorce. In both cases, the spouses had married subject to the accrual system. Earlier decisions had dealt with the value of trust property in the context of redistribution orders in terms of s 7(3) to (6) of the Divorce Act. As indicated above, the court does not have the power to redistribute the parties' property on divorce if the marriage is subject to the accrual system. Unless the parties are able to agree on a different division in a settlement agreement, the court is compelled to divide the accrual in accordance with the rules relating to the accrual system that are set out in the Matrimonial Property Act.

In *MM v JM*, the court held that the difference between the provisions of the Matrimonial Property Act in respect of the accrual system and the Divorce Act

⁵⁷ Matrimonial Property Act 88 of 1984, ss 2 and 3. On the accrual system and determining the accrual in a spouse's estate, see, eg, Jacqueline Heaton *South African Family Law* (3rd edn, LexisNexis, Durban, 2010) 93–100; Ann Skelton and Marita Carnelley (eds) *Family Law in South Africa* (Oxford University Press Southern Africa, Cape Town, 2010) 108–116; Jacqueline Heaton 'The Proprietary Consequences of Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 57 at 63–66, 82–83, 85–86.

⁵⁸ On the court's power to order redistribution of assets on divorce, see, eg, Jacqueline Heaton *South African Family Law* (3rd edn, LexisNexis, Durban, 2010) 132–148; Ann Skelton and Marita Carnelley (eds) *Family Law in South Africa* (Oxford University Press Southern Africa, Cape Town, 2010) 159–164; Jacqueline Heaton 'The Proprietary Consequences of Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) 57 at 100–107.

⁵⁹ *MM v JM* 2014 (4) SA 384 (KZP).

⁶⁰ *RP v DP* 2014 (6) SA 243 (ECP).

in respect of the court's power to redistribute assets entailed that the value of trust property cannot be taken into account for purposes of the accrual system even though it can be taken into account for purposes of a redistribution order in terms of s 7(3) to (6) of the Divorce Act.

In this case, the wife alleged that a family trust was her husband's *alter ego*. She stated that the property of the trust should be deemed to be part of her husband's estate for purposes of determining the accrual of his estate because he exercised full and exclusive actual control over the trust; he conducted the affairs of the trust without drawing any distinction between its interests and his own; he used trust funds to meet his personal obligations; and, but for the trust, ownership of the trust property would have vested in him. In support of the wife's contention that the trust property should be deemed to be part of her husband's estate, she relied on *Badenhorst v Badenhorst*.⁶¹ *Badenhorst* dealt with a claim for redistribution of assets in terms of the Divorce Act. In that case, the court had held that trust property may be taken into account in respect of determining the value of the estate of one of the spouses if the trust was merely the *alter ego* of the particular spouse. The court had added the value of the trust property to the value of the husband's estate in calculating the amount to be transferred by the husband to the wife in terms of the redistribution order.⁶²

In *MM v JM*, the court held that the wife's reliance on *Badenhorst* was misplaced as there is a fundamental difference between a redistribution order in terms of the Divorce Act and an accrual claim in terms of the Matrimonial Property Act. This difference is that the Divorce Act specifically empowers the court to order that such assets or part of the assets of one spouse 'as the court may deem just' must be transferred to the other spouse, while in the case of an accrual claim 'the court is not required to make an assessment of what it deems to be "just"'.⁶³ In the case of the accrual system, the court merely determines the amount that is equal to half the difference between the accrual of the spouses' respective estates because this is what s 3 of the Matrimonial Property Act compels it to do.⁶⁴ Furthermore, in determining the accrual in each spouse's estate, the court is obliged to apply the provisions of s 4(1)(a) of the Matrimonial Act. This section states that the accrual of a spouse's estate is the amount by which the net value of his or her estate at the dissolution of the marriage exceeds the net value of the estate at the commencement of the marriage. The court held that in this determination only the personal property of the spouses can be considered because the wording of the Act does not permit the court to exercise a discretion to take the value of trust property into account.

⁶¹ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA).

⁶² See also *Jordaan v Jordaan* 2001 (3) SA 288 (C); *Grobbelaar v Grobbelaar* (unreported, TPD case no 26600/98); *Smith v Smith* (unreported, SECLD case no 619/2006).

⁶³ At para 12; see also at para 19.

⁶⁴ Section 3 provides that the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse has a claim against the other spouse for an amount equal to half the difference between the accrual of the respective estates. The claim arises on divorce.

The court in *MM v JM* further considered and rejected *BC v CC and Others*,⁶⁵ where the court was prepared to take trust property into account in the context of accrual sharing. In *BC v CC*, it was held that determining which assets are to be considered in calculating the accrual in a spouse's estate 'is ... the same in both the Matrimonial Property Act and the Divorce Act'.⁶⁶ In *MM v JM*, the court rejected this view. It reiterated that the amount of an accrual claim is determined on a factual, mathematical basis and is not a matter of exercising a discretion which allows the court to take into account property which does not form part of a spouse's estate because it considers it just to do so. Consequently, the court held that the allegations made in support of the wife's claim that the property of the family trust should be deemed to form part of her husband's estate for the purposes of determining the accrual did not support her claim.

In view of the express wording of the provisions, the interpretation of ss 3 and 4 of the Matrimonial Property Act in *MM v JM* is correct in so far as the absence of a discretion to take trust property into account for purposes of determining the accrual is concerned. However, as the next case shows, this is not the end of the matter, for the court may pierce the trust veneer or trust veil if the trust is being used as the *alter ego* of one of the trustees. Piercing of the trust veneer was expressly envisaged by the Supreme Court of Appeal in *Land and Agricultural Bank of South Africa v Parker and Others*⁶⁷ for suitable cases in which functional separation between control and enjoyment of the trust and trust property is entirely lacking. The Supreme Court of Appeal specifically mentioned family trusts as examples where piercing might be required.⁶⁸

As in *MM v JM*, the spouses in *RP v DP*⁶⁹ were married subject to the accrual system. During the subsistence of their marriage, the husband established a discretionary family trust. He was one of the trustees of the trust. Some years later, he sued his wife for divorce, and she counterclaimed half the difference between the accrual in her estate and the estate of her husband in terms of the Matrimonial Property Act. Her husband replied that his estate did not have a larger accrual than his wife's and that she consequently did not have an accrual claim against him. His wife then brought an application in which she sought to join the trustees in their official capacity as trustees as parties to the divorce action. She also applied for leave to amend her particulars of counterclaim in the divorce action to claim that, for purposes of calculating the accrual, the value of the trust property should be taken into account in determining the value of her husband's personal estate. She alleged that her husband had actual control of the trust and used it as his *alter ego*. But for the existence of the trust, the trust property would have vested in him. She also alleged that many transactions which allegedly concerned trust property in truth related to her husband's personal property.

⁶⁵ *BC v CC and Others* 2012 (5) SA 562 (ECP).

⁶⁶ At para 9.

⁶⁷ 2005 (2) SA 77 (SCA).

⁶⁸ At para 37.3.

⁶⁹ *RP v DP* 2014 (6) SA 243 (ECP).

Her husband opposed her application. Although her husband did not refer to the judgment in *MM v JM*, the reasons he advanced for opposing the application echo the court's findings in that case. He stated that the trustees should not be joined as they do not have a direct and substantial interest in the relief claimed in the divorce action since trust property may not be taken into account when the accrual is calculated. He further submitted that, unlike the Divorce Act, which confers a discretion on the court to redistribute assets in certain marriages and therefore enables the court to take trust property into account, the Matrimonial Property Act does not empower the court to exercise a discretion to consider trust property for purposes of calculating the accrual. He argued that, because of the absence of such a discretion in respect of the accrual calculation, his wife's application for leave to amend her particulars of counterclaim should also be dismissed.

The court rejected the husband's contentions. It pointed out that trustees must keep trust property separate from their personal property and not use and enjoy trust property as if it were their personal property. It held that, if the trust structure is abused and a trustee treats the trust as his or her *alter ego*, the court may pierce the trust veneer.⁷⁰ When it does so, it looks behind transactions relating to the trust to decide whether or not they concern assets which were truly separate from the trustee's personal assets or whether 'the separateness of trust property was simulated to hide the personal assets of the trustee'.⁷¹ In deciding whether particular assets were in trust or personal assets, the court considers the terms of the trust deed; the extent of actual control by the trustee over the trust; the nature of the assets; the liabilities of the trust; and the management of the affairs of the trust.⁷² The trust veneer is pierced only in respect of the particular assets which are under consideration in each particular case. In respect of all other assets the separation of trust property and the trustee's personal assets is maintained, unless the entire trust is a sham and is to be set aside as a whole.

The court correctly emphasised that the abovementioned principles imply that, when a court pierces the trust veneer, it applies neither the Divorce Act nor the Matrimonial Property Act. Instead, it exercises a common-law function.⁷³ Therefore, the fact that the Divorce Act affords a discretion to the court to redistribute assets on divorce in certain marriages that are subject to complete separation while the provisions of the Matrimonial Property Act relating to

⁷⁰ See also *Rees and Others v Harris and Others* 2012 (1) SA 583 (GSJ); *VZ v VZ* [2014] ZAGPJHC 42, 14 February 2014; *Van Zyl NNO v Kaye NO* 2014 (4) SA 452 (WCC).

⁷¹ *RP v DP* 2014 (6) SA 243 (ECP) at para 24.

⁷² See also *Jordaan v Jordaan* 2001 (3) SA 288 (C); *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA); *BC v CC* 2012 (5) SA 562 (ECP); *VZ v VZ* [2014] ZAGPJHC 42, 14 February 2014; *MM v JM* 2014 (4) SA 384 (KZP).

⁷³ See also *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) para 37, where the Supreme Court of Appeal held that the courts have the power and the duty to develop the law of trusts by adapting the trust idea to the principles of our law. At para 37.3 the court specifically stated that 'well-established principles' might have to be extended to trusts in the case of a family trust which is a veneer that 'should be pierced in the interests of creditors'. The 'well-established' principles are to be found in the common law.

calculation of the accrual do not afford a discretion to the court is irrelevant. The function of piercing the trust veneer relates to determining which assets are in truth the trustee's personal assets. It is only after this function has been performed that the second function, namely calculating the amount that is to be redistributed in terms of the Divorce Act or calculating the amount of the accrual claim in terms of the Matrimonial Property Act, comes into play. The court warned that these two functions must not be conflated or confused. It pointed out that in the present case the opposition of the husband to the amendment of his wife's counterclaim was based on precisely such conflation. Inter alia for this reason, the court rejected the husband's opposition to the application for leave to amend the counterclaim. The court did, however, agree with counsel for the husband (and also with the court in *MM v JM*) that the provisions of the Matrimonial Property Act which govern the calculation of the accrual claim of the spouse whose estate shows no accrual or the smaller accrual do not leave room for exercising a discretion, and that the calculation involves a purely factual mathematical exercise.

The judgment in *RP v DP* sets out the correct approach in respect of the issue of whether trust property is to be considered for purposes of division of matrimonial property on divorce – if the particular trust property is in truth being controlled and used as if it is the personal property of a particular spouse, the trust veneer should be pierced and the property should be taken into consideration when the spouses' matrimonial property is divided (be it in terms of the accrual system or the court's discretion to redistribute property).⁷⁴

Fortunately, it seems that the encouragement in *Land and Agricultural Bank of South Africa v Parker and Others*⁷⁵ of judicial piercing of the trust veneer in suitable cases involving family trusts is being heeded in other family law contexts, too. In February 2014, a court pierced the trust veneer in a matter relating to enforcement of interim maintenance pending the finalisation of divorce proceedings.⁷⁶ In this case, a husband alleged that he could not comply with an interim maintenance order that had been made against him, because he owned nothing. He had transferred all his assets (including his sunglasses, wallet, bath towels and toiletries!) to trusts. The court found that the trusts were the husband's *alter ego*. It convicted him of contempt of court for failing to comply with a maintenance order, ordered him to pay arrears of maintenance plus default interest, ordered him to continue paying interim maintenance, and imposed a suspended prison sentence on him.

⁷⁴ Obviously, the position should be the same if the spouses are married in community of property and (some of) the assets of the joint estate or (some of) the separate assets of one of the spouses were transferred to a trust.

⁷⁵ 2005 (2) SA 77 (SCA).

⁷⁶ *VZ v VZ* [2014] ZAGPJHC 42, 14 February 2014.

IV CONCLUSION

The two developments discussed above relate to very different aspects of the law – one is formal, the other substantive. Both of them are encouraging and have a potentially salutary effect in South African family law. As regards the formal development, it is hoped that mediation will be pursued in many family law cases in the Magistrates' Courts in future and that the mediation scheme will be expanded speedily. As regards the substantive development of trust-piercing, it is hoped that the courts will, in future, steadfastly send the message that persons who attempt to prejudice their spouses' proprietary and maintenance claims on divorce by placing their assets in trusts that are no more than a veneer will not be successful in their attempts.

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SWITZERLAND

SURROGACY AND INTERNATIONAL PRIVATE LAW IN SWITZERLAND

*Andrea Büchler and Luca Maranta**

Résumé

En regard des standards internationaux, la législation suisse sur la procréation médicalement assistée est plutôt restrictive. Les couples de même sexe et les célibataires sont exclus de manière générale et seuls les couples mariés peuvent bénéficier d'un don de sperme; certaines méthodes de procréation sont totalement prohibées, comme la gestation pour autrui; des mécanismes sont en place visant à reconnaître le droit de l'enfant de connaître ses origines génétiques. Toutes ces raisons expliquent que de nombreuses personnes vont à l'étranger pour réaliser leur projet de procréation. La gestation pour autrui est une des méthodes choisies. Le présent texte fait état de la position suisse en matière de reconnaissance des décisions étrangères et il analyse la jurisprudence sur le lien de filiation entre l'enfant issu de la gestation pour autrui et les parents d'intention. Certains aspects de la question ayant sans doute un intérêt international plus marqué font l'objet ici d'une analyse critique.

I INTRODUCTION

One of the guiding principles of Swiss law on reproductive medicine is the well-being of the child (cf Art 3, para 1 of the RMA).¹ To protect that

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¹ For a discussion of the problems arising from this approach to assessing the well-being of the

well-being, legislators have availed themselves of a number of regulations, not all of which are entirely convincing. First, access to reproductive-medicine procedures is restricted, with same-sex couples and single persons generally being excluded and only married couples being entitled to receive donated sperm cells (cf Art 3 of the RMA). Second, there is a total ban on certain types of reproductive-medicine methods, such as surrogacy (Art 119, para 2, subparagraph of the FC and Art 4 RMA) and ovum and embryo donation (cf Art 4 of the RMA). Finally, the RMA has put in place a number of mechanisms designed to guarantee a child's right to knowledge of his or her origins.² By international standards, the Swiss legislation governing reproductive medicine is restrictive.³ It is therefore not surprising that many people fulfil their wish for children in other countries. Surrogacy is one of the methods they use.⁴

Surrogacy involves a woman (hereinafter the surrogate mother⁵) declaring herself willing to carry and bear a child for a heterosexual or same-sex couple or for a single person (hereinafter the intended parents) and then to hand the child over permanently to the intended parents.⁶ If the semen of the intended father is used in this process, or fertilised egg cells are transferred from the intended mother to the surrogate mother, one of the intended parents is genetically related to the child. It is also possible for both intended parents to be genetically related to the child.⁷ There is, however, no medical need for either of the intended parents to be genetically related to the child. It is equally unnecessary for the surrogate mother to be genetically related to the child. Typically, the surrogate mother is 'only' the child's biological mother.

There are significant differences in the ways the law deals with surrogacy in different jurisdictions.⁸ As a result, countries with liberal regulations in this area are experiencing a boom in 'surrogacy tourism'. These notably include the United States and India,⁹ but also Ukraine and Russia. Conversely, surrogacy is

child and of alternative approaches, see Büchler and Clausen 'Fortpflanzungsmedizin und Kindeswohl! Kindeswohl und Fortpflanzungsmedizin' *Die Praxis des Familienrechts* (FamPra.ch) (Stämpfli Verlag, Berne, 2014) 231, 264 et seq.

² For more on this entire question, see Büchler and Michel *Medizin – Mensch – Recht, Eine Einführung in das Medizinrecht der Schweiz* (Schulthess, Zurich/Basel/Geneva, 2014) 320.

³ There are however plans to authorise pre-implantation diagnosis and ovum donation.

⁴ In autumn 2014, for the first time ever, a woman apparently gave birth to a healthy child from a placenta she had previously received from another woman, cf www.nzz.ch/panorama/alltagsgeschichten/erste-frau-bekommt-ein-baby-mit-fremder-gebaermutter-1.18397501 (accessed 13 October 2014). It is possible that this procedure will provide an alternative to surrogacy in some circumstances.

⁵ For a critical appraisal of this term, see Christensen 'Schwangerschaft als Dienstleistung – Kinde als Ware? Eine rechtliche Annäherung an das komplexe Phänomen der sogenannten Leihmutterchaft' *bill* (Schulthess, Zurich, 2013 No 86) n 8.

⁶ Cf Cottier 'Elternschaft im Zeitalter der globalisierten Biotechnologie: Leihmutterchaft, Eizell- und Embryonenspende im Rechtsvergleich' in Schwenzer, Büchler and Fankhauser (eds) *Siebte Schweizer Familienrechtstage* (Schulthess, Berne, 2014) 7 et seq.

⁷ Surrogacy arrangements are sometimes also made for reasons other than sterility or infertility – in order, for example, to avert the risks associated with pregnancy for the intended mother.

⁸ According to Cottier (above n 6) 19.

⁹ For a comparison of the legislation in Switzerland, the USA and India, see Bertschi *Leihmutterchaft – Theorien, Praxis und rechtliche Perspektiven in der Schweiz, den USA und*

prohibited in most European countries,¹⁰ including Switzerland. Originally, these prohibitions were justified on the grounds that divided motherhood was unsettling for the child and therefore impinged upon the development of his or her personality. A further argument was that surrogacy resulted in the surrogate mother being instrumentalised.¹¹

While surrogacy cases regularly attract public attention,¹² the fact that a surrogate mother gave birth to a child in another country is probably generally kept dark.¹³ That in turn means that in the intended parents' country of residence (Switzerland, for example) there are no legal complications to having the child registered as the offspring of the intended mother and intended father. In practice, it is only in cases where the authorities have reason to believe that the child was born to a surrogate mother (eg if a same-sex couple want to be recognised as the child's legal parents, or if the intended mother is already quite old) that the question arises as to the extent to which the child can be recognised as the offspring of the intended parents.¹⁴ In such cases, a key issue on which the authorities regularly focus their attention is whether recognition of a parent-child relationship would violate substantive *ordre public*. In Switzerland, debate on this matter was enriched by a number of decisions made by courts and administrative authorities in 2014. It is those decisions that have prompted this contribution.

The following sections begin with a general analysis of whether and when Swiss law recognises decisions made in other countries and documents from other countries. In a second step, an account is given both of the general common

Indien (Stämpfli, Berne, 2014).; for more extensive comparative-law references, see Trimmings and Beaumont (eds) *International Surrogacy Arrangements* (Hart, Oxford/Portland, 2013).

¹⁰ For an appraisal of the geographic extent of surrogacy, see Permanent Bureau of the Hague Conference on Private International Law *A Study of Legal Parentage and The Issues Arising from International Surrogacy Arrangements* (Hcch, The Hague, 2014) 36 et seq, available at: www.hcch.net/upload/wop/gap2015pd03c_en.pdf, 61 et seq (accessed 6 October 2014) and also Brunet, Carruthers, Davaki, Derek King, Marzo and McCandless *A comparative study on the regime of surrogacy in EU member states: study PE 474.403* (European Parliament, Brussels, 2013).

¹¹ RMA Message, Bundesblatt 1996 III 205, 253 et seq.

¹² One example being the case of Baby Gammy, whose Australian intended parents left him with her surrogate mother, because he had Downs Syndrome and suffered from a heart defect, cf www.faz.net/aktuell/gesellschaft/kriminalitaet/australisches-paar-laesst-behindertes-baby-bei-leihmutter-zurueck-13078199.html (accessed 13 October 2014); another being that of a baby left with the surrogate mother because the baby was 'the wrong sex', cf www.spiegel.de/panorama/wie-baby-gammy-australische-eltern-lassen-leihmutter-im-stich-a-996164.html (accessed 13 October 2014).

¹³ Cf Büchler and Bertschi 'Gewünschtes Kind, geliehene Mutter, zurückgewiesene Eltern?' *Die Praxis des Familienrechts* (FamPra.ch) (Stämpfli, Berne, 2013) 33, 34.

¹⁴ More precisely, the question is whether the foreign decision on the status of the child or a foreign document stating the child's legal parenthood can be recognised. For simplicity's sake this procedure is described here as recognition of the parent-child relationship. For an appreciation of the numerous different approaches taken in addressing cross-border surrogate motherhood relationships, see Permanent Bureau of the Hague Conference on Private International Law (above n 10) 68 et seq, and Schweizerisches Institut für Rechtsvergleichung *Gutachten zur Modernisierung des Familienrechts in der Schweiz, Avis 13-057* (Lausanne, 2013) 27 et seq.

trends, and of the differences, in recent Swiss jurisprudence regarding the recognition of a parent-child relationship between a child born to a surrogate mother and the child's intended parents. Aspects likely to be of particular international relevance are identified and critically examined.

II RECOGNITION OF FOREIGN DECISIONS AND DOCUMENTS UNDER SWISS LAW

(a) General considerations

At present, there is no international convention on surrogacy.¹⁵ Accordingly, in Switzerland, the circumstances under which a parent-child relationship can be recognised between a child and the intended parents are in principle¹⁶ determined by the Swiss Federal Code on Private International Law of 18 December 1987 (hereinafter CPIL). Article 32 of the CPIL states that registration of a foreign decision or document relating to a person's civil status requires a decree by the relevant cantonal supervisory authority. Registration of foreign decisions and documents is governed by the general recognition requirements set out in Arts 25 et seq of the CPIL and by those set out in the specific provisions of the CPIL. A foreign decision will be recognised in Switzerland if the court or authority in the country in which the decision was made has the appropriate authority (according to the principle of so-called indirect authority under Art 25, subpara a and Art 26 of the CPIL). Article 25, subpara b of the CPIL further requires that the foreign decision be final, in other words that there are no longer any grounds on which an ordinary appeal can be lodged against it. Finally, Art 27 of the CPIL requires that neither the content of the decision nor the process which led to it contravene Swiss *ordre public*.

While the formal requirements are unlikely to prove problematical, the concept of substantive *ordre public*, as it is understood under Swiss law, does require further examination.

(b) Substantive *ordre public*

Each sovereign state has its own legislation. In principle, sovereignty and the status associated with being a nation state require equality between national legislation. When the international community recognises a state, that recognition includes its sovereign right to formulate its own laws, and thus to

¹⁵ The Hague Conference on Private International Law has started work in this direction, cf Cottier (above n 6) 37 et seq. Cf also the proposal put forward by Bertschi (above n 9) 227 et seq for such a convention.

¹⁶ The exception concerns Iranian nationals, to which the Niederlassungsabkommen zwischen der Schweizerischen Eidgenossenschaft und dem Kaiserreich Persien vom 25.04.1934 is applicable, see Schwander in Honsell, Vogt, Schnyder and Berti (eds) *Basler Kommentar Internationales Privatrecht* (3rd edn, Helbing Lichtenhahn, Basel, 2013) Article 73 n 6.

establish its own rules for assigning children to their parents. For that reason, decisions and documents in one country are generally recognised in another.

Nevertheless, all nations are likely to have rules which enable them, where necessary, to refuse recognition to a particular foreign decision or document on the basis of its content. That is also the case with Swiss law, which is required, under Art 27, para 1 of the CPIL, to examine whether such recognition would be ‘manifestly incompatible’ with substantive *ordre public* in Switzerland. This requirement of manifest incompatibility requires that an *ordre public* objection be subject to stricter criteria in the case of foreign decisions or documents than would be applied in questions relating to the application of foreign law by the Swiss authorities.¹⁷ After all, in cases involving recognition a foreign court will already have decided the case or the legal status will already have been established. It is also important to avoid so-called limping legal circumstances. Such limping circumstances would arise in a situation where a decision or legal status is regarded as valid in one jurisdiction but invalid in another.¹⁸ For example, motherhood status which exists only in the United States and not in Switzerland is hardly in the interests of the parties concerned or their family life. It also places restrictions on their freedom of movement. For a foreign decision to be deemed to contravene substantive *ordre public* in Switzerland, it is therefore not sufficient for the foreign decision to deviate from that which would have resulted from the application of Swiss law. Rather, according to Swiss Federal Supreme Court jurisprudence, recognition of the foreign decision would have to violate the Swiss sense of legal propriety to such an intolerable extent that it contravened fundamental rules of Swiss law.¹⁹ Each such case must be assessed on its individual merits,²⁰ with consideration being given not to the law in the foreign jurisdiction, but only to the effect of upholding the foreign legal position in each particular case in the light of the fundamental values of Swiss law.²¹ Furthermore, no examination may be made as to whether the foreign authority concerned had made an erroneous determination of the facts in the case or had erroneously applied the law to it.²²

Compelling legislative norms in Switzerland cannot automatically be taken to constitute fundamental principles of Swiss law as far as the *ordre public* ramifications of recognising foreign decisions or documents are concerned.²³ For that reason the prohibition of surrogacy under Swiss law cannot, in and of itself, provide sufficient grounds for refusing recognition of a foreign decision

¹⁷ In lieu of many such SFCD 131 III 182, 185 E. 4.1 and the jurisprudence cited therein.

¹⁸ Cf Volken in *Zürcher Kommentar zum IPRG* (2nd edn, Schulthess, Zurich, 2004), Article 27 n 46.

¹⁹ Eg FSCD 4A_8/2008, E. 3.1.

²⁰ Cf Volken in *Zürcher Kommentar zum IPRG* (2nd edn, Schulthess, Zurich, 2004), Article 27 n 48.

²¹ Cf Volken in *Zürcher Kommentar zum IPRG* (2nd edn, Schulthess, Zurich, 2004), Article 27 n 57 et seq.

²² Cf FSC 4A_228/2010, E. 5.

²³ Cf FSC 4P.12/2004, E. 2.1.

or a foreign document, because the relevant provision of the Swiss Federal Constitution (Art 119, para 2, subpara d) ‘only’ governs reproductive-medicine procedures in Switzerland.²⁴

In Swiss child law, a violation of substantive *ordre public* is assumed to have occurred when a decision is made which takes no account of the well-being of the child, since the child’s well-being is the key principle guiding child law in Switzerland.²⁵ It is however unclear how the well-being of the child should be measured. A further point which is relevant to child law is the importance of avoiding limping legal circumstances, particularly with regard to personal status.

Finally, as far as surrogacy is concerned, it is relevant to note that circumvention of the law can also violate substantive *ordre public*, since it falls within the scope of the prohibition of the abuse of rights.²⁶

III CURRENT TRENDS IN THE RECOGNITION OF PARENT–CHILD RELATIONSHIPS IN SURROGACY CASES

(a) Approach adopted by the Swiss authorities to date

The first decisions on the recognition of parent-child relationships for children born to surrogate mothers outside Switzerland were made public in 2014. Earlier decisions in cases of this type had of course been made, but the practice applied in those cases is largely unknown, particularly since there are no directives on this matter from the relevant authorities.²⁷ Official statements by the authorities indicate that intended parents should generally²⁸ or regularly²⁹ be denied recognition as the legal parents of a child born to a surrogate mother abroad, because this would be injurious to substantive *ordre public*. This contrasts with the conclusion reached by Bertschi, whose examination of Swiss practice in such cases identifies four distinct constellations. In cases where both intended parents were genetically related to the child, she found that the parent-child relationship was generally ‘directly recognised’. Where only the

²⁴ As rightly pointed out by the Federal Office of Justice, cf legal opinion of 15 May 2013 by the Federal Office of Justice, Public Law division, Legislation Unit I, available at www.bj.admin.ch/dam/data/bj/aktuell/news/2013/2013-11-29/ber-br-d.pdf (accessed 29 October 2014), 8 et seq.

²⁵ Cf FSCD 129 III 250.

²⁶ Mächler-Erne/Wolf-Mettier in Honsell, Vogt, Schnyder and Berti (eds) *Basler Kommentar Internationales Privatrecht* (3rd edn, Helbing Lichtenhahn Basel, 2013) Article 17 n 8.

²⁷ Cf. Bertschi (above n 9) 101. As far as can be determined no such directives currently exist either.

²⁸ Federal Civil Status Office *Bericht über die Tätigkeit des Eidgenössischen Amtes für das Zivilstandswesen EAZW in den Jahren 2013 und 2014*, available at: www.bj.admin.ch/dam/data/bj/gesellschaft/zivilstand/dokumentation/berichte/jb-eazw-2013-2014-d.pdf (accessed 30 June 2015), 8.

²⁹ Swiss Federal Council *Bericht des Bundesrates zur Leihmutterchaft vom 29. November 2013*, available at: www.bj.admin.ch/dam/data/bj/aktuell/news/2013/2013-11-29/ber-br-d.pdf (accessed 30 June 2015), 23.

intended father was genetically related to the child, she found that only he was recognised as the child's legal parent. In order for the other intended parent to be recognised as the child's legal parent in such cases, it was necessary for the child to be adopted as a stepchild, which was not always possible. In cases where conception involved neither the ovum of the intended mother nor the semen of the intended father, she found that the parent-child relationship was generally not recognised. Her research shows that in these cases, other approaches had to be taken to establish a parent-child relationship, notably either a recognition of the child within Switzerland under Swiss law on descent or the adoption of the child by the intended parents, neither of which was however always possible in each case.³⁰

(b) The legal-scholarship position

Legal scholarship takes a different view. The vast majority of opinion here is in favour of recognising a parent-child relationship established outside Switzerland which is based either on a contractual agreement between the intended parents and the surrogate mother of the child or on a court decision attributing legal parenthood to the intended parents. The arguments cited in support of this view are the well-being of the child and the enduring nature of a parent-child relationship once it has been established.³¹

(c) The government position

Switzerland's Government, the Swiss Federal Council, has also concluded, based on a legal opinion in this matter, that a parent-child relationship established outside Switzerland between a child born to a surrogate mother and the intended parents does not, either in principle or as a matter of course, contravene substantive *ordre public*. The Federal Council has taken the view that, if the well-being of the child requires this, then either recognition of the parent-child relationship established abroad must be possible or it must be possible for such a relationship to be established in Switzerland.³² A general refusal to recognise the relationship, without taking the well-being of the child concerned into account, would, in the Federal Council's view, contravene Art 3, para 1 of the United Nations Convention on the Rights of the Child (hereinafter UN-CRC).³³ Finally, the Swiss Federal Office of Justice has expressed the view that a systematic refusal to recognise parent-child relationships of this kind established in other countries could constitute discrimination against children born to surrogate mothers.³⁴

³⁰ Cf Bertschi (above n 9), 102 et seq.

³¹ According to Büchler and Bertschi (above n 13), 48 with other references.

³² Cf Swiss Federal Council report (above n 29), 31.

³³ Cf Swiss Federal Council report (above n 29), 30 et seq.

³⁴ Federal Office of Justice legal opinion dated 15 May 2013 *Anerkennung ausländischer Entscheide durch die gestützt auf eine Leihmutterchaft ein Kindesverhältnis erstellt wird:*

(d) Recent jurisprudence

(i) *Decisions made in 2014*

In 2014, substantial media attention was attracted by two court judgments and one decision by the relevant authorities all relating to the recognition of parent-child relationships established outside Switzerland with children born to surrogate mothers. These involved a judgment by the Cantonal Court of St Gallen³⁵ of 19 August 2014, a judgment by the Administrative Court of the Canton of Zug of 10 November 2014³⁶ and a decision by the Civil Status and Citizenship Service of the Canton of Zug (hereinafter the Zug authorities) dated 12 September 2014.³⁷ The facts relating to the St Gallen judgment and the decision by the Zug authorities were largely comparable. In both cases, the intended parents were a male homosexual couple. In each case, semen was donated by one of the intended parents and the ovum was donated by an anonymous woman. In both cases, the surrogate mother was married. In the Zug judgment, conversely, the intended parents were a heterosexual couple. Here, too, semen was donated by the intended father, the ovum was donated by an anonymous woman and the surrogate mother was married.

In all three cases, the key question was whether recognition of a parent-child relationship between the child and the intended parents would be injurious to substantive *ordre public*. In the case of the St Gallen judgment of 19 August 2014 and the decision by the Zug authorities on 12 September 2014 it was determined that it would not. In the case of the judgment of 10 November 2014 by the Administrative of the Canton of Zug, procedure did not require a conclusive determination on this point. Since then, the St Gallen Cantonal Court judgment has been referred to the Federal Supreme Court, which will review the judgment in the course of 2015.

In determining whether recognition of the parent-child relationship would be injurious to substantive *ordre public*, the St Gallen and Zug courts and the Zug authorities were guided partly by the same considerations but partly also by differing ones. These considerations are examined below.

Verfassungsmässigkeit und Vereinbarkeit mit dem Abkommen über die Rechte des Kindes, available at www.bj.admin.ch/dam/data/bj/aktuell/news/2013/2013-11-29/ber-br-d.pdf (accessed 20 October 2014), 13 et seq.

³⁵ The higher court in the canton of St Gallen. Decision available at: www.gerichte.sg.ch/home/dienstleistungen/rechtsprechung/verwaltungsgericht/entscheide-2014/b-2013-158.html (accessed 30 June 2015).

³⁶ The higher court in the canton of Zug. Decision available at: www.zg.ch/behoerden/verwaltungsrechtspflege/verwaltungsgericht/aktuelle-entscheide-1 (accessed 8 December 2014).

³⁷ This body has first-instance authority in matters relating to the recognition of parent-child relationships to intended parents in the canton of Zug. While the decision in this case was not published, it has been seen by the authors of this article.

(ii) An appreciation of recent jurisprudence

No general assumption of ordre public violation

The two courts and the Zug authorities each considered whether, in the specific case presented to them, recognition of the parent-child relationship between the child and the intended parents would be injurious to substantive *ordre public*.

A child's right to knowledge of his or her own origin

It follows from Art 7 of the UN-CRC that, as far as possible, children have the right to know their own origins. In the surrogacy context, origins must not only encompass the genetic 'parents' but also the surrogate mother, as the child's 'biological' mother. Accordingly, the Cantonal Court of St Gallen decreed that the genetic father of the child (ie the semen donor) and the surrogate mother both be registered on the child's civil-status birth records and that these should also state that the genetic mother of the child (ie the ovum donor) is not known. The 10 November 2014 judgment by the Administrative Court of the Canton of Zug and the decision by the Zug authorities on 12 September 2014 both went further in that they each also required that the name of the surrogate mother's husband be recorded in the child's civil-status records. This is surprising, both because Art 7 of the UN-CRC does not confer upon a child the right to know the spouses of his or her 'parents' as defined in the Convention, and because it is also not apparent that the child would derive any psychological or social benefit from such knowledge.

Differentiation based on possible differences in genetic origin?

In assessing whether or not recognition of a parent-child relationship between the intended parents and the child would be injurious to *ordre public*, the Cantonal Court of St Gallen did not draw any distinction between whether each of the intended parents was or was not genetically related to the child. The Zug authorities did however draw this distinction in their 12 September 2014 decision.³⁸ They determined that the donation of semen by the intended father was equivalent, from a court point of view, to the establishment of a parent-child relationship in Switzerland and that recognition of a parent-child relationship between him and the child would not therefore be injurious to *ordre public*. Conversely, in the case of the intended parent who was not genetically related to the child, the Zug authorities undertook a more detailed evaluation of whether the *ordre public* would be contravened by such recognition.

This differentiation lacks a convincing justification. It suggests that recognition of a parental relationship when the child is not genetically related to the parent automatically jeopardises the child's well-being and is thus necessarily injurious to *ordre public*, which is clearly not the case. The parenthood of the child's

³⁸ For procedural reasons, it was not necessary for the Administrative Court of the Canton of Zug to consider this aspect in making its 10 November 2014 judgment.

genetically unrelated parent is the result of a decision made by a foreign jurisdiction on a matter relating to the laws on descent, and is thus a normative attribution of children to parents which should be recognised as such in Switzerland unless there are compelling reasons for not doing so. In that sense, legal parenthood is a construction which may, but need not, be congruent with genetic parenthood, as is also clearly illustrated, for example, by Swiss laws on semen donation, which also accord priority to the intentions of those involved over any genetic relationship.³⁹

Declaration by the surrogate mother after the birth of the child

In the Zug judgment of 10 November 2014 and the Zug decision of 12 September 2014 recognition of the parent-child relationship was made explicitly contingent upon the surrogate mother making a declaration 6 weeks after the child was born (whether this repeated an earlier such declaration or not) that she renounced her rights as a mother. This 6-week period is based on the fact that under Swiss law the parents of a child cannot grant approval for their child to be adopted until 6 weeks after the child is born (Art 265b, para 1 of the CC). Conversely, the Cantonal Court of St Gallen, in its judgment, simply noted that the surrogate mother of the child had declared that she neither wished to assume the role of the child's mother nor to assume any legal, financial, child-custody or social responsibility for the child. The St Gallen judgment does not specify more precisely when 'renouncement of the child' must have occurred.

In Swiss adoption law, the requirement of a specific time interval between birth and an adoption declaration is justified on the grounds that the mother needs protection before and immediately after birth.⁴⁰ It can certainly be convincingly argued that adoption and surrogacy are closely related in this regard. It may also be well worth considering whether any future substantive law on surrogacy should include a provision that the surrogate mother cannot declare her willingness to give up the child until a certain period of time has elapsed following the child's birth. However, in the cases under review here, which relate to the recognition of a decision made in another jurisdiction, the point at issue cannot be whether a particular period of time has elapsed, but rather, and indeed solely, whether recognition of the decision, in the specific cases concerned, would be injurious either to the dignity of the surrogate mother or to the well-being of the child. It should also be remembered that any violation of the dignity of the surrogate mother which could take place will already have occurred, and occurred irreversibly,⁴¹ when the question of recognition of the

³⁹ Under Swiss law, the legal father of the child is the husband of the woman who gave birth to the child, cf Art 255 of the CC. Neither the semen donor nor the child can contest legal fatherhood, cf Art 256 of the CC and Article 23, para 1 of the RMA.

⁴⁰ Breitschmid in Honsell, Vogt and Geiser (eds) *Basler Kommentar Zivilgesetzbuch* (5th edn, Schulthess, Basel, 2014) Article 265b n 1.

⁴¹ Article 25, subpara b of the CPIL states that a foreign decision or foreign document can be recognised in Switzerland only if there are no longer any grounds on which an ordinary appeal can be lodged against it or if the decision is final.

parent-child relationship in Switzerland is being examined. After all, if any violation of the surrogate mother's dignity has occurred, it will have already occurred abroad. Future possible violations of the dignity of surrogate mothers could perhaps be prevented if recognition in Switzerland of parent-child relationships were to be refused in cases where no post-natal declaration by the surrogate mother is presented. Ultimately, however, such a course of action would involve pursuing a preventive legal-policy objective which can only fall within the duties of the cantonal authorities and the courts to a very limited extent. Finally, under Swiss adoption law, the 6-week requirement does not fall within the scope of substantive *ordre public*.⁴²

Assessing the suitability of the parents

In their 12 September 2014 decision, the Zug authorities regarded it as necessary that the foreign instrument (be it a decision or a document) on whose recognition they were called upon to decide would have to include 'considerations of the well-being of the child, particularly as far as the suitability of the intended parents to assume parental duties was concerned'. If such considerations were lacking, *ordre public* would prevent recognition from being granted, because this would mean that no account whatsoever would then have been taken of 'the child's entitlement to the *best possible*⁴³ development'. The Cantonal Court of St Gallen, conversely, made its own assessment of the intended parents' suitability, having first concluded that it was unlikely that the authorities abroad had done this. The court also concluded that the probable failure to assess the suitability of the intended parents when the parent-child relationship was originally established had not been detrimental to the child's well-being. The court further determined that a parent-child relationship between the child and the intended parents could be recognised 'if this is beneficial to the child's well-being'.⁴⁴

A requirement that the authorities in another country assess the suitability of the intended parents would in fact be contrary to the general principles of Swiss international private law. This is because the effect of such a requirement would be that, in assessing whether to recognise the parent-child relationship established abroad, the Swiss court or authority would also be making an unwarranted assessment of the laws and legal practice in the country concerned, rather than 'only' considering the outcome of those laws and that legal practice in the specific case at hand.⁴⁵ Conversely, it is self-evident that, if the intended parents are not suitable, this will be disadvantageous to the well-being of the child. For that reason, further consideration should be given to whether the suitability of the intended parents should always be assessed by the Swiss authorities charged with determining whether to grant recognition to the parent-child relationship. An assessment of the intended parents' suitability

⁴² Cf FSCD 120 II 87, 88.

⁴³ Authors' italics.

⁴⁴ For procedural reasons, it was not necessary for the Administrative Court of the Canton of Zug to consider this aspect in making its 10 November 2014 judgment.

⁴⁵ Cf figure II. 2.

by the Swiss authorities would be very much at odds with the prohibition of any *révision au fond*⁴⁶ if the decision submitted for recognition or the documents concerned already contained any assessment of the well-being of the child.⁴⁷ However, it is not always possible to draw a clear distinction between a (prohibited) evaluation of the underlying facts and a (permitted) assessment of whether the result of a foreign decision is injurious to substantive *ordre public*.

From a material standpoint, determination of the role of the child's well-being for the purpose of deciding whether or not to recognise a parent-child relationship established abroad will depend on what standards are required with regard to the intended parents' suitability and to the well-being of the child. One possible approach would be to recognise the parent-child relationship only in those cases where it best corresponds to the child's well-being (the so-called 'ideal scenario'⁴⁸). Applying this standard, as the Zug authorities decided to do, would indicate that the suitability of the intended parents would have to be evaluated in each individual case. Alternatively, it would also be possible, following the example of the Cantonal Court of St Gallen, to opt for a 'good-enough scenario'. This approach does not require that recognition of the parent-child relationship result in an optimal outcome as far as the child's well-being is concerned. Instead, it is sufficient if recognition of the parent-child relationship results in a set of circumstances which are favourable to the child and his or her development. If that yardstick is applied, it is no longer entirely clear that the suitability of the intended parents must be evaluated in each individual case. In addition to the 'ideal scenario' and the 'good-enough scenario', two further standards can be applied to measure the suitability of the intended parents and the well-being of the child, the 'jeopardy scenario' and the 'rescindment scenario'. Under the 'jeopardy scenario', the parent-child relationship should be recognised provided that this does not place the well-being of the child in significant jeopardy. Finally, under the 'rescindment scenario', recognition of the parent-child relationship should be refused only in cases where it is clear that it would then immediately have to be rescinded.⁴⁹ In cases where these last two scenarios were applied, there would have to be substantive grounds for the intended parents' suitability to be evaluated and it could not simply be a matter of routine.

In Switzerland, adoptions are approved only if they create the best possible circumstances for the child.⁵⁰ This strict requirement is justified in the case of adoption because the process involves children being assigned *new* parents with the state's cooperation. That constellation evidently does not apply in cases involving the recognition of a parent-child relationship which has been established in another country through a process which also involves a

⁴⁶ Cf figure II. 2.

⁴⁷ Cf FCJ, decision dated 10 December 2014 – XII ZB 463/13, figure 70 f.

⁴⁸ Terminology based on Dettenborn *Kindeswohl und Kindeswille* (4th edn, Reinhardt, Munich, 2014) 54 et seq and on Büchler and Clausen (above n 1) 236 et seq.

⁴⁹ By releasing the child for adoption without the parents' consent, cf Art 265c of the CC.

⁵⁰ Cf Büchler and Clausen (above n 1) 237.

surrogate mother. In such cases the state is not involved in assigning new legal parents to a child but instead the foreign country has developed its own set of rules to apply to the original assignment of legal parenthood. This parenthood thus established should also be recognised in Switzerland. It would be contrary to the principles of Swiss law to make the recognition of the legal assignment of a child to particular parents dependent on an evaluation of those parents' suitability. It is certainly the case that the Swiss authorities do not carry out such evaluations as a matter of routine when determining whether the recognition of paternity by a non-married father in a foreign country can be recognised in Switzerland.⁵¹

Based on these considerations, it might be argued that with regard to the question of whether the authorities have to assess the suitability of the intended parents, the 'rescindment scenario' would be a tenable approach. A consideration which argues against this view, however, is that, according to the principles of Swiss law, the 'rescindment scenario' is generally applicable in cases where the suitability of a child's legal parents is being evaluated *after* the child has been born. Here, the law states that, if the well-being of the child is in substantial and specific jeopardy, appropriate measures under the civil-law provisions of child-protection legislation should be considered (cf Arts 307 et seq of the CC). However, given the objective of avoiding the creation of limping legal circumstances and, more generally, given that objections on *ordre public* grounds are generally only justified in exceptional circumstances, it would seem appropriate that recognition of the parent-child relationship between a child born to a surrogate mother and the intended parents should be denied only in cases where it would place the well-being of the child in such substantial jeopardy as to require material restrictions to be placed on the rights of the intended parents (in their parental-care role), for example in cases where the removal of the child from the custody of the parents would be necessary. This approach is effectively a modified version of the 'jeopardy scenario'.

It follows from the above that requiring the authorities charged with determining whether or not to recognise a parent-child relationship to evaluate the suitability of the intended parents as a matter of routine would be acceptable only if the fact of surrogacy in and of itself were seen as providing sufficient grounds for suspecting that the well-being of the child was in substantial and specific jeopardy, thus making a material restriction on the rights of the intended parents necessary. It is clearly not the case that surrogacy itself automatically creates any such jeopardy.⁵² In particular, there can be no grounds for arguing that simply because the parents were prepared to engage the services of a surrogate mother this necessarily places the well-being of the

⁵¹ Legal scholarship holds that in such cases there is essentially only one reason why foreign recognition of a parent-child relationship should not be upheld in Switzerland, to wit that a parent-child relationship already exists in Switzerland between the child and another man, cf Siehr in *Zürcher Kommentar zum IPRG* (2nd edn, Schulthess, Zurich, 2004), Article 73 n 12.

⁵² For more detailed analysis, see Büchler and Bertschi (above n 13), 49 et seq; for a differing view, see the RMA Message, cf figure I.

child at risk.⁵³ Furthermore, as the Cantonal Court of St Gallen and the Zug authorities both noted, whether the intended parents are a heterosexual or a homosexual couple is also not a determining factor. Long-term evaluations carried out both in the United States and the United Kingdom are unanimous in documenting that the children of homosexual parents are not different from those brought up in ‘conventional’ families as far as their intellectual, emotional and social development is concerned. There is also no evidence of any significant differences between the children of homosexual and heterosexual couples with regard to such aspects as gender-role behaviour, psychological well-being or social integration.⁵⁴

Appeal on the grounds of circumvention of the law

A potentially objectionable aspect of the cases presented here is that there is every indication that the intended parents deliberately exempted themselves from the prohibition of surrogacy which applies in Switzerland. On that basis, it could be argued that decisions made in other countries to recognise parent-child relationships in such cases cannot be recognised in Switzerland because this would afford protection to a circumvention of Swiss law.⁵⁵ Rightly, however, no consideration was given to this aspect of the matter in any of the decisions cited above. An appeal against these decisions on the basis that they allowed the law to be circumvented would be justified only if all those who would be disadvantaged by the non-recognition of the parent-child relationship had played an active part in circumventing the law.⁵⁶ In these cases a refusal to recognise the relationship would primarily be disadvantageous to the child, since it would result in the child having one set of legal parents in the country in which his or her intended parents have been recognised as legal parents and another set of legal parents in Switzerland. That would result in the risk of there being nobody who is able to assume legal responsibility for the child. That such a situation would not be in the best interests of the child requires no further explanation.

⁵³ According to the most recent jurisprudence of the ECtHR, the fact that the applicants had attempted to circumvent the prohibition of surrogacy according to Italian law could not take precedence over the best interests of the child, in spite of the absence of a biological relationship between the child and the intended parents. The removal of the child, said the Court, is an extreme measure that can only be justified when the child is in immediate danger, a condition that was not fulfilled, see ECtHR, 2nd Chamber, of 27 January 2015 No 25358/12 in *Paradiso and Campanelli v Italy*, N 78 seq.

⁵⁴ Schwenzer in Büchler (ed) FamKomm *Eingetragene Partnerschaft* (Stämpfli, Berne, 2006), Preliminary remarks on Articles 27 and 28 of the Federal Act on Registered Partnerships of Same-sex Couples n 7 et seq.

⁵⁵ Cf figure II.2.

⁵⁶ This is also the view taken by the (German) Federal Court of Justice, which held that a child has no influence on the circumstances of his or her genesis and cannot be made responsible for them, cf FCJ, decision dated 10 December 2014 – XII ZB 463/13, figure 62. The ECtHR has also determined that the behaviour of a child’s parents may not be permitted adversely to affect the child, cf ECtHR, 5th Chamber, of 26 June 2014 No 65192/11 in *Mennesson v France*, N 99.

(e) Obligations arising from the ECHR?

The jurisprudence of the European Court of Human Rights (hereinafter ECtHR) does not require the contracting states to the European Convention on Human Rights (hereinafter ECHR) to recognise an existing parent-child relationship in surrogacy cases. However, in two judgments handed down on 26 June 2014,⁵⁷ the ECtHR ruled that a child's right to respect for his or her private life (under Art 8 of the ECHR) had been violated when an (intended) parent was genetically related to the child and the parent-child relationship could not be recognised or (in the event of such recognition being refused) there were no other means available by which such a relationship could be established.⁵⁸

IV CONCLUSION

Parent-child relationships established in other countries with the help of a surrogate mother should, as a rule, be recognised, irrespective of whether the intended parents are genetically related to the child or not. Surrogate motherhood is a complex and multi-faceted relationship. Regular refusal to recognise parent-child relationships established in other countries does not adequately respond to that complexity. The task facing individual states is to contribute to the development of a multilateral solution governing the recognition of such parent-child relationships and the regulation of surrogate motherhood. Efforts must also be made to find domestic solutions within each jurisdiction. In working towards that end we must, in particular, abandon the traditional idea that only the woman whose metabolism has been existentially linked to that of a child can be the mother of that child from a legal point of view. In the age of reproductive medicine, the essential attribute, not only of fatherhood but also of motherhood, is identification with and recognition of the child.⁵⁹

⁵⁷ Cf the decisions of the ECtHR in *Mennesson v France* (Fn 58), N 100, and ECtHR, 5th Chamber, of 26 June 2014 No 65941/11 in *Labassée v France*, N 79. Reference should also be made to a decision by the (German) Federal Court of Justice which held that recognition of a child-parent relationship between a child born to a surrogate mother and his or her intended parents does not contravene *ordre public* in cases where one of the intended parents is genetically related to the child (FCJ, decision dated 10 December 2014 – XII ZB 563/13, figure 44).

⁵⁸ For a criticism of differentiation between a genetically related intended parent and one who is not genetically related to the child, see figure III 4.2.3. Cf also the critical appreciation of ECtHR decisions by Büchler in *Die Praxis des Familienrechts* (FamPra.ch) (Schulthess, Berne, 2014) 1084 et seq.

⁵⁹ Cf Büchler and Bleisch 'Ein respektables Unterfangen?' *Neue Zürcher Zeitung* (10 April 2014) www.nzz.ch/akuell/startseite/ein-respektables-unterfangen-1.18281110 (accessed 2 February 2015).

Addendum

On 21 May 2015, the Swiss Supreme Court issued its first judgment on this matter (54_748/2014). A male homosexual couple entered into a surrogacy agreement in California, with one of the intended fathers providing the sperm, which was used to fertilise an egg from an anonymous donor. The Supreme Court refused to register the non-biological intended father as a legal father of the child, overthrowing the decision of the Appellate Court of St Gallen. The Court decision has not been published yet; the press release stressed the prohibition of surrogacy being part of Swiss ordre public and the couple not having any connection to the US, thereby circumventing Swiss constitutional law. The Court, however, also mentioned that their ruling does not mean that recognition of child-parent relationships established abroad involving a surrogate mother is in every case excluded. It mentioned the necessity to decide the issues concerned on a case-by-case basis. This leaves us with more questions than answers and it is unclear where we will go from here. There are serious interests of the children involved at stake and the decision-makers will have to take these into consideration and hopefully also give them priority.

UNITED STATES

DEMYSTIFYING *HOBBY LOBBY*

*Robin Fretwell Wilson**

Résumé

La décision controversée de la Cour suprême des États-Unis dans l'affaire *Burwell c. Hobby Lobby Stores* a empêché l'Administration Obama d'imposer une couverture obligatoire dans le cadre de la Patient Protection and Affordable Care Act ('ACA') pour tous les contraceptifs approuvés. Le présent texte situe l'arrêt *Hobby Lobby* dans le contexte plus large de la liberté de religion en Amérique. La partie II revient sur la controverse autour de ce régime obligatoire et fait le lien avec la garantie que personne ne sera forcé à procéder à un avortement s'il a des objections morales ou religieuses. Cette garantie fait partie des concessions considérables que l'Administration Obama a faites aux organisations religieuses sans but lucratif qui s'objectaient à la couverture obligatoire des contraceptifs. La partie III fait état de l'adoption de la Religious Freedom Restoration Act qui procure une protection de la liberté de religion plus robuste encore que ne le fait la Constitution. La partie IV décortique l'arrêt *Hobby Lobby* et démontre comment les accommodements consentis par l'Administration au profit de ces organisations ont amené au résultat qu'une société fermée peut échapper à l'obligation de fournir la couverture controversée. Finalement, la partie V montre que le test exigeant de la Religious Freedom Restoration Act pourrait bien permettre d'éviter les pires conséquences annoncées par les critiques. Elle fait une présentation des recours post-*Hobby Lobby* intentés par des organisations religieuses et suggère que le sort de prochaines contestations n'est pas clair.

I INTRODUCTION

The United States Supreme Court's controversial decision in *Burwell v Hobby Lobby Stores*¹ ('*Hobby Lobby*') has caused great consternation for many and elation for others.² As badly misunderstood outside the United States as it is within, the decision interprets the federal Religious Freedom Restoration Act

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¹ 134 S Ct 2751 (2014) (Justice Anthony Kennedy concurred and Justice Ruth Bader Ginsburg wrote the principal dissent, with a separate dissent filed by Justices Stephen Breyer and Elena Kagan).

² Andrew Koppelman, *The Hobby Lobby Decision Was a Victory for Women's Rights, New Republic* (30 June 2014).

(RFRA),³ a statute enacted with overwhelming bipartisan support and signed into law by President Bill Clinton.⁴ RFRA and parallel laws in 21 states⁵ ‘test [] government-imposed burdens on religion against the necessity of imposing those burdens’⁶ – providing important protections to religious believers from the application of laws that burden religious practices.⁷

In *Hobby Lobby*, the United States Supreme Court prevented the Department of Health and Human Services from mandating coverage under the Patient Protection and Affordable Care Act (ACA)⁸ of all FDA-approved contraceptives (the ‘Mandate’) that, objectors contend, ‘cause the demise of an already conceived but not yet attached human embryo’.⁹

In a 5–4 decision with Justice Samuel Alito writing the majority opinion, the Court held that, so long as less restrictive means of achieving the same goal are available, RFRA prohibits the government from forcing closely held family-owned corporations to cover drugs and devices to which they are religiously opposed.¹⁰

The same day that the Court announced its decision, Stanford professor Richard Thompson Ford observed that ‘some religions advocate anti-gay bias,

³ 42 USC § 2000bb (2012).

⁴ See Katie Sanders, ‘Did Barack Obama vote for Religious Freedom Restoration Act with “very same” wording as Indiana’s?’, *Tampa Bay Times* PolitiFact (29 March 2015), www.politifact.com/truth-o-meter/statements/2015/mar/29/mike-pence/did-barack-obama-vote-religious-freedom-restoratio. (‘The 1993 federal Religious Freedom Restoration Act was signed by Clinton with overwhelming bipartisan support. The bill passed the House unanimously and 97-3 in the Senate.’)

⁵ See below Part III.

⁶ Douglas Laycock, ‘The Religious Freedom Act Worked the Way It Should’, *NY Times*, 1 July 2014, www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-act-worked-the-way-it-should (hereinafter ‘Worked the Way It Should’).

⁷ A typical example of such a law would be Kentucky’s statute requiring orange safety triangles on horse-drawn buggies. See Ky Rev Stat Ann § 189.820 (West 2015). In 2012, authorities jailed ten Amish men who would have gladly hung lanterns at night or used gray reflective tape since these measures do not ‘conflict with their pledge to live low-key and religious lives’ as the orange triangles do. Dylan Lovan, ‘Amish Buggy Drivers Jailed For Not Putting Orange Safety Reflectors On Carriages’, *The Huffington Post*, 13 January 2012, www.huffingtonpost.com/2012/01/13/amish-buggy-drivers-jailed_n_1204217.html?

⁸ See *Hobby Lobby*, 134 S Ct at 2777. See generally Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub L No 111-152, 124 Stat 1029.

⁹ See First Amended Verified Complaint at 9, *Conestoga Wood Specialties Corp v Sebelius*, 917 F Supp 2d 394 (ED Pa 2013) (No 5:12-CV-06744-MSG), 2013 WL 6181041 (further charging that the ‘taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which [the owners] are held accountable’). Importantly, there was ‘no material dispute’ that the contested drugs sometimes act after fertilisation, only whether to label a drug that does so as an abortifacient. See Part II(b) below.

¹⁰ *Hobby Lobby*, 134 S Ct at 2759–80 (finding that the Administration ‘has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases’ and concluding that the Mandate ‘is unlawful’).

anti-Semitism and racial hierarchy’ and pointedly asked, ‘[m]ust we carve out exceptions for those beliefs too?’¹¹ The *Los Angeles Times* editorial page predicted that the decision ‘could embolden employers to assert a ‘religious’ right to deny other health benefits to their employees ... or to discriminate in other ways’.¹²

The UK’s *Independent* echoed the concern: the decision ‘undermines women’s rights and places [religious] belief above scientific fact’, and ‘there is the possibility that all sorts of businesses will now start objecting to certain laws – especially if doing so undermines their political opponents’.¹³ The headlines of the BBC’s *Echo Chambers* simply read ‘Hobby Lobby: Court boosts corporations again’.¹⁴

Some European commentators bristled at the American approach. The European blog *Practical Ethics* claimed corporations like Hobby Lobby ‘operate on a flawed understanding of decision-making and moral responsibility’.¹⁵ Commentator Valentina Fiorillo contrasted this with a European approach:¹⁶

‘[F]rom my European perspective, it strikes me as an incomprehensible dogmatic assertion that a national company ... can be entitled to a constitutional freedom as if it were an individual. A European perspective also causes me to focus more on a positive right – the right to women’s health, one of the main social rights – than the Court’s majority does.’

¹¹ Richard Thompson Ford, ‘Hobby Lobby Decision Is Proof That Antidiscrimination Laws Often Discriminate’, *NY Times*, 30 June 2014, www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/hobby-lobby-decision-is-proof-that-antidiscrimination-laws-often-discriminate.

¹² Editorial, ‘Hobby Lobby Ruling: Bad for Women’s Rights, Bad for the Religious Freedom Restoration Act’, *LA Times*, 1 July 2014, www.latimes.com/opinion/editorials/la-ed-hobby-lobby-contraception-coverage-supreme-c-20140701-story.html.

¹³ James Vincent, ‘Supreme Court’s “Hobby Lobby” ruling explained: did the US really rule that religious beliefs are more important than the law?’, *The Independent* (1 July 2014), www.independent.co.uk/news/world/americas/supreme-courts-hobby-lobby-ruling-explained-did-the-us-really-rule-that-religious-beliefs-are-more-important-than-the-law-9575432.html.

¹⁴ Anthony Zurcher, ‘Hobby Lobby: Court boosts corporations again’, BBC News (30 June 2014), www.bbc.com/news/blogs-echochambers-28100921.

¹⁵ Kyle Edwards, ‘Complicity and Contraception: Rethinking Hobby Lobby’s Claim of “Substantial Burden on the Exercise of Religion”’, *Practical Ethics* (30 April 2014), <http://blog.practicaethics.ox.ac.uk/2014/04/complicity-and-contraception-rethinking-hobby-lobbys-claim-of-substantial-burden-on-the-exercise-of-religion>.

¹⁶ Valentina Fiorillo, ‘A European Observer’s View of Hobby Lobby, Hamilton and Griffin on Rights’ (15 September 2014), <http://hamilton-griffin.com/guest-blog-valentina-fiorillo-a-european-observers-view-of-hobby-lobby>. The author goes on to note: ‘Yet, to a European observer, Hobby Lobby signifies more than just a conflict between civil liberties, or a clash between religious freedom and privacy rights. For a European observer ... Hobby Lobby is, first of all, a case of conflict between a negative liberty (religious freedom) and a positive right (right to health, one of the main social rights)’. She predicted that a ‘European Constitutional Court ... would thus have likely struck a different balance. For example, in Italy, the right to health is strongly protected by the Constitutional Court, and it is considered as a fundamental right and a constitutionally protected primary good, even in private law and private relations’.

The outcome in *Hobby Lobby* stands in sharp contrast with the approaches in Europe, which are far less protective of religious liberties. For example, the same week *Hobby Lobby* came out, the European Court of Human Rights (ECtHR)¹⁷ upheld France's law banning the Muslim full-face veil, known as the niqab, in public.¹⁸ The ECtHR ruled that the 'barrier raised against others by a veil concealing the face in public could undermine the notion of "living together" and that "veiling makes people uncomfortable".¹⁹ American newspapers also noted the differing approaches to protecting religious liberties.²⁰

Hobby Lobby reverberates far beyond the marketplace. It intensified concerns about the Administration's ability to accomplish desirable social change on a slew of questions: would religious believers use it to 'get around [other] insurance mandate[s]?'²¹ Would it set a 'dangerous precedent',²² permitting

¹⁷ The ECtHR is an international court established by the European Convention on Human Rights composed of 47 member states.

¹⁸ Katie Halper, 'European Court upholds France's veil ban because covered faces make people uncomfortable', *Feministing* (1 July 2014), <http://feministing.com/2014/07/01/european-court-upholds-frances-veil-ban-because-covered-faces-make-people-uncomfortable>. The law imposes a fine of €150 (US\$205) and possibly citizenship instruction.

¹⁹ Ibid.

²⁰ Whereas France makes little or no accommodations for faiths, the US attempts to strike a balance. In the same month that the ECtHR handed down its decision – and the deadly Charlie Hebdo attacks took place in France – the US Supreme Court handed down a second RFRA decision, *Holt v Hobbs*, 135 S Ct 853 (2015). In *Holt*, an Arkansas prison denied a Muslim inmate's request to grow a half-inch beard, as his Muslim faith requires. Prison official contended that allowing the beard would be a security risk. Writing for the Court again, Justice Alito noted that the prison had not explained why it could not use a 'less restrictive alternative of having the prisoner run a comb through his beard'. Ibid at 864. In a pointed Editorial, the *New York Post* contrasted the countries' approaches:

'The principle here is the same one propounded by the court in its *Hobby Lobby* decision on the [Mandate]: The government isn't entitled to an assumption of unlimited deference, even on a legitimate issue like prison security, when religious rights are involved.

In the wake of the Charlie Hebdo massacres highlighting France's difficulty assimilating its Muslim minority, the court's decision also underscores a key difference between French and American secularism.

In France, the government makes little or no accommodation to faith. As the Supreme Court reminded Arkansas, in America the Constitution works the other way: it requires reasonable accommodation.

Every sane person appreciates we must discriminate between Islam and radical Islam. Strikes us that respecting the right of a Muslim prisoner to his religious observance is one good way to show we do'.

Editorial Board, 'Sticking Up for Muslim Rights', *NY Post* (25 January 2015), <http://nypost.com/2015/01/25/sticking-up-for-muslim-rights>.

²¹ Editorial, 'Hobby Lobby Ruling', *LA Times*, above n 12.

²² Emma Long, 'How Bad Is the Hobby Lobby Ruling?', History News Network (14 July 2014), <http://historynewsnetwork.org/article/156320> (quoting an ACLU email to members but arguing that in the rush to 'lambast the Justices for their apparent indifference to the rights of women, or predict the dire consequences for the future, some of the nuance of the Court's opinion has been overlooked' and labelling concerns 'premature').

‘large corporations, under the cover of religious freedom, not just to impede women’s exercise of their reproductive right but also to defy civil rights statutes with impunity?’.²³

This chapter places *Hobby Lobby* in the larger context of religious freedom in America. Part II recaps the controversy over the Mandate, connecting it to the US’s decades-old guarantees that no one will be forced to provide abortion against her moral or religious objections. This détente around abortion likely accounts for the considerable concessions the Obama Administration gave to religious nonprofit organisations that objected to the Mandate. Part III explains how a pivotal Supreme Court decision, *Employment Division v Smith*,²⁴ hastened the enactment of RFRA to provide more robust protection of religious liberty than that provided by the United States Constitution.

Part IV then unpacks the *Hobby Lobby* decision, which held that closely held corporations cannot be made to provide mandated coverage when a less restrictive alternative exists, and shows how the Administration’s accommodations for religious nonprofits drove the outcome. Finally, Part V shows that RFRA’s exacting test will likely prevent the parade of horrors forecasted by critics. This Part surveys post-*Hobby Lobby* lawsuits about the proffered accommodation brought by objecting religious nonprofits and suggests it is unclear how the next round of litigation will fare.

II THE ACA AND CONTROVERSY OVER THE MANDATE

The ACA ushered in an era of near-universal access to health care services – a goal that had long eluded policymakers in the United States.²⁵ The Obama administration’s controversial regulations to implement ACA have their genesis in statutory mandates requiring coverage of preventive services. No plan can be sold – and no employer can self-insure – unless it complies with coverage requirements.²⁶ The ACA itself exempted small employers and ‘grandfathered’ in the plans of certain employers, leaving more than a third of Americans

²³ Paul Horwitz, Op-Ed, ‘Hobby Lobby Is Only the Beginning’, *NY Times* (1 July 2014), www.nytimes.com/2014/07/02/opinion/for-the-supreme-court-hobby-lobby-is-only-the-beginning.html.

²⁴ 494 US 872 (1990).

²⁵ On 28 June 2012, in *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2608, the US Supreme Court upheld the ACA’s individual mandate as a constitutional exercise of Congress’s taxing power, while striking down a portion of the ACA’s Medicaid expansion as exceeding Congress’s authority under the Spending Clause; Barry R Furrow et al, *Health Care Reform: Supplementary Materials* (Eagan, MN: West, 2012).

²⁶ See 76 Fed Reg at 46622–23. The bulk of the ACA regulates the sale of qualified health plans through federal or state exchanges or marketplaces. A qualified plan must ‘provide [] the essential health benefits package’. ACA Sec 1303(b)(1)(A)(ii). Insurers may sell health plans outside of the exchanges if they so choose, but plans still must cover the essential health benefits and comply with other private market reforms. See CRS Report R42069, Private Health Insurance Market Reforms in the Patient Protection and Affordable Care Act (ACA), by Annie L Mach and Bernadette Fernandez (‘Effective for plan years beginning on or after September 23, 2010, health plans are required to provide coverage for preventive health

outside the ACA reforms²⁷ – a fact that figured prominently in the Court’s *Hobby Lobby* decision, as explained below.

Relying on guidance from the Institute of Medicine about what ‘preventive services are necessary for women’s health and well-being’,²⁸ the three executive branch agencies charged with implementing the law – the Departments of Health and Human Services (HHS), Labor, and Treasury (together, the ‘Departments’) – required coverage of the full range of ‘Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling’ in all plans – public or private, self-insured or commercial.²⁹ The Departments concluded that ‘[t]he contraceptive coverage requirement is ... designed to serve the compelling public health and gender equity goals’.³⁰

The Mandate proved controversial from the beginning. It sparked 56 separate cases by nonprofit litigants and 49 by for-profit companies—representing 140 nonprofit and 193 for-profit businesses.³¹

Although widely seen as a Catholic objection, many different faith groups, from Catholics to Muslims to evangelical Protestants, said that the Mandate placed the bulk of religious employers ‘in the untenable position of having to choose between violating the law and violating their consciences’.³²

services without cost-sharing. The preventive services include ... among other services, coverage for all FDA approved contraceptive methods and sterilization procedures’).

²⁷ 42 USC § 18011(a), (c)(2), (e) (2012); Cong Budget Office, *Small Firms, Employment, and Federal Policy* 2 tbl 1 (2012), available at www.cbo.gov/publication/43029; *Burwell v Hobby Lobby Stores, Inc.*, 134 S Ct 2751, 2764 (2014).

²⁸ *Women’s Preventive Services Guidelines, Affordable Care Act Expands Prevention Coverage for Women’s Health and Well-Being*, HRSA, available at www.hrsa.gov/womensguidelines/ (‘Contraceptive methods and counseling: All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity’).

²⁹ 76 Fed Reg 46621 (3 August 2011); Coverage of Preventive Services Under the ACA, 77 Fed Reg 8725, 8727–28 (15 February 2012) (to be codified at 29 CFR pt 54) (citing Inst of Med, *Clinical Preventive Services for Women: Closing the Gaps* 16 (2011)). See also CRS Report No R42069, *Private Health Insurance Market Reforms in the Patient Protection and Affordable Care Act (ACA)* by Annie L Mach and Bernadette Fernandez.

³⁰ Coverage of Preventive Services Under the ACA, 77 Fed Reg 8725, 8729 (15 February 2012) (to be codified at 29 CFR pt 54) (citing Inst of Med, *Clinical Preventive Services for Women: Closing the Gaps* 16 (2011)).

³¹ The Becket Fund For Religious Liberty, HHS Mandate Information Center (12 May 2015), www.becketfund.org/hhsinformationcentral.

³² Religious objections have come not only from Catholics, but also from representatives of numerous Muslim, mainline Christian, and ‘evangelical Christian’ universities; Timothy Dolan et al, ‘Unacceptable’, 28 February 2012, www.becketfund.org/wp-content/uploads/2012/02/Unacceptable-2-28-12pm.pdf; Matthew Larotonda, ‘Catholic Churches Distribute Letter Opposing Obama Healthcare Rule’, ABC News (29 January 2012), <http://abcnews.go.com/blogs/politics/2012/01/catholic-churches-distribute-letter-opposing-obama-healthcare-rule>.

(a) Objection to ‘abortion-inducing’ drugs

The ‘political maelstrom’ sparked by the Mandate tapped into deep resistance on two separate grounds.³³ Some objected to contraceptive coverage and sterilisation services alike because they believe that all sexual intercourse should have the potential for creating life – a view not widely shared by faith groups or the American public.³⁴

Others balked specifically at coverage of ‘abortion-inducing drugs and devices’, like emergency contraceptives (ECs).³⁵ The essence of this objection is that such drugs and devices ‘are designed to destroy human life after conception’, making provision of them an ‘abortion on demand’ – or, worse, ‘murder because it is the killing of an innocent person’.³⁶ This ground for resistance resonates with far more Americans. Decades after *Roe v Wade*,³⁷ many still believe that abortion is ‘wrong’, both within faith communities and outside them.³⁸ This is not to say that all Americans consider a drug that acts after fertilisation to be tantamount to abortion, although a significant number of women express qualms about using drugs that act after fertilisation.³⁹

³³ Timothy Stoltzfus Jost, *Analysis of the Obama Administration’s Updated Contraception Rule* (blog posting), <http://law.wlu.edu/faculty/facultydocuments/jost/contraception.pdf>.

³⁴ *Eternal Word Television Network, Inc, v Sebelius, Complaint*, Case No 2:12-cv-00501-SLB (ND Ala, 9 February 2012), www.becketfund.org/wp-content/uploads/2012/02/EWTN-Complaint-file-stamped.pdf; ‘The Birth Control Pill: 50 Years Later,’ CBS News Poll, 7 May 2010, www.cbsnews.com/htdocs/pdf/poll_Birth_Control_Pill_050710.pdf?tag=contentMain;contentBody.

³⁵ In this chapter, EC denotes all drugs taken after unprotected sex to avoid pregnancy, whatever the mechanism of action.

³⁶ *Complaint, The QC Group, Inc*, www.becketfund.org/wp-content/uploads/2013/08/1-Verified-Complaint-for-Declaratory-and-Injunctive-Relief-7-2-13.pdf; *Complaint, Sharpe Holding, Inc*, www.becketfund.org/wp-content/uploads/2013/04/Sharpe-Holdings-complaint.pdf; CatholicVote.org, ‘Catholic Entrepreneur and Family File Suit against Federal Employer Mandate,’ news release, 8 October 2012, www.catholicvote.org/discuss/wp-content/uploads/2012/10/autocampreleaseoct8.pdf; Sevil Omer and Stephanie Simon, ‘Franciscan University Drops Student Health Insurance Plan Over Birth Control Mandate, Costs,’ NBC News, http://usnews.nbcnews.com/_news/2012/05/15/11720706-franciscan-university-drops-student-health-insurance-plan-over-birth-control-mandate-costs; *Complaint, The QC Group, Inc*, ¶3, www.becketfund.org/wp-content/uploads/2013/08/1-Verified-Complaint-for-Declaratory-and-Injunctive-Relief-7-2-13.pdf.

³⁷ 410 US 113 (1973).

³⁸ Congregation for the Doctrine of the Faith, ‘Instruction Dignitas Personae on Certain Bioethical Questions’, § 23, 8 September 2008, www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html; Pontifical Council for the Family, ‘Vademecum for Confessors Concerning Some Aspects of the Morality of Conjugal Life’, 12 February 1997, www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_12021997_vademecum_en.html.

³⁹ Ryan Hrobak and Robin Fretwell Wilson, ‘Emergency Contraceptives or “Abortion-Inducing” Drugs? Empowering Women to Make Informed Decisions’ 71(2) *Washington & Lee Law Review* 1385 (2014). For the vast majority of Americans, earlier abortions are more acceptable than later ones. When Gallup asked a nationally representative sample in 2012, ‘do you think abortion should generally be legal or generally illegal during each of the following stages of pregnancy’, 61 per cent answered that abortion should be legal during the first 3 months of pregnancy. Polling: Abortion, Gallup (2012), www.gallup.com/poll/1576/abortion.aspx.

While abortion remains controversial in the United States,⁴⁰ laws protecting conscience concerns about abortion are not. For 40 years, abortion objectors have been able to count on two ironclad guarantees: first, that no one would ever have to assist with an abortion if doing so is ‘contrary to his religious beliefs or moral convictions’;⁴¹ and second, that federal tax dollars would not ‘be expended ... [for] abortion’ except when exceedingly good justifications exist – like saving the woman’s life.⁴² These guarantees – made in the Church Amendment months after *Roe v Wade* in 1973 and in the Hyde Amendment 3 years later in 1976 – appeared unassailable. Indeed, far from being under constant retreat, Congress expanded conscience guarantees in successive pieces of legislation since 1973 – acts that received bipartisan support and were signed into law by presidents from both parties.⁴³ In addition, Congress has renewed the Hyde Amendment every year since 1976, with strong bipartisan support.⁴⁴ Thus, even as abortion itself remains a deeply partisan, contested issue in the US,⁴⁵ conscience protections are not.

During the second 3 months, only 27 per cent said that abortion should be legal, and during the final 3 months of a woman’s pregnancy only 14 per cent thought it should be legal. Ibid.

⁴⁰ The persistent divide over abortion in the United States has only grown since the foundational decision establishing the right to abortion in the United States, *Roe v Wade* 410 US 113 (1973). At the time of *Roe*, 68 per cent of Americans in a national survey thought abortion should be approved ‘for the specified reasons’. Donald Granberg and Beth Wellman Granberg, ‘Abortion Attitudes, 1965-1980: Trends and Determinants’ 12(5) *Fam Pl Per* 250, 252; Tbl 1 (September/October 1980). Specifically, the National Opinion Research Center of the University of Chicago asked US adults about specific reasons for ‘approving of legal abortion in various circumstances’, and found that in 1973: 92 per cent approved ‘if the woman’s health is seriously endangered by the pregnancy’, 83 per cent approved ‘if she became pregnant as a result of rape’, 84 per cent approved ‘if there is a strong chance of a serious defect in the baby’, 53 per cent approved ‘if the family has a very low income and cannot afford any more children’, 49 per cent approved ‘if she is not married and does not want to marry the man’, and 48 per cent approved ‘if she is married and does not want any more children’. By 2009, only 47 per cent of Americans said they thought abortion should be legal in all or nearly all cases. Issue Ranks Lower on Agenda: Support for Abortion Slips, Results from the 2009 Annual Religion and Public Life Survey Pew Forum on Religion and Public Life (2009) (reporting results of two polls by ABC News/Washington Post and AP-Ipsos poll).

⁴¹ Church Amendment, Pub L No 93-45, §401 codified at 42 USC §300a-7(b)(1), www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect/42usc300a7.pdf.

⁴² Hyde Amendment, Pub L No 111-8, 123 Stat 524 §202, <http://www.gpo.gov/fdsys/pkg/PLAW-111publ8/html/PLAW-111publ8.htm>; see generally Robin Fretwell Wilson, ‘Matters of Conscience: Lessons for Same-Sex Marriage from the Health Care Context’ in Douglas Laycock, Anthony R Picarello, Jr, and Robin Fretwell Wilson (eds) *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Washington and Lee Legal Studies Paper No 2012-7, 2008), 77. Since 1998, the Hyde Amendment has remained the same; it restricts the use of federal funding for abortion services, ‘except in cases of rape or incest, or when the life of the woman would be endangered’. Omnibus Appropriations Act, 2009, PL 111-8, 123 Stat 524.

⁴³ 42 USC § 300a-7(c)(2); 42 USC § 300a-7(d); Danforth Amendment of 1988 within the Civil Rights Restoration Act, Pub L No 100-259, www.govtrack.us/congress/bills/100/s/557; Coats-Snowe Amendment to the 1996 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub L No 104-1344, www.govtrack.us/congress/bills/104/hr/3019; Weldon Amendment in the Consolidated Appropriations Act of 2005, Pub L No 108-447, www.govtrack.us/congress/bills/108/hr/4818.

⁴⁴ Pub L 94-439, 1976, <http://thomas.loc.gov/cgi-bin/bdquery/z?d094:HR14232:TOM:/bss/d094query.html>; <http://thomas.loc.gov/cgi-bin/bdquery/z?d094:HR14232:TOM:/bss/d094query.html>; Whose Choice? How the Hyde Amendment Harms Poor Women (New York:

This special solicitude for objections to abortion shows up in the ACA itself. The ACA bars the use of premium tax credits and cost-sharing subsidies for low-income Americans to purchase abortion coverage.⁴⁶ The ACA also does not require qualified health plans to cover *any* abortion as part of the essential health benefits.⁴⁷ Each health plan decides for itself.⁴⁸ States can enact laws to ban *all* abortion coverage by qualified health plans in any exchange established by the state.⁴⁹ A number of states have done just that.⁵⁰

Congress also included assurances in the ACA that existing conscience guarantees would not be rolled back.⁵¹ Even before the ACA became law, however, pro-life Democrats feared a rollback of the deeply ingrained conscience guarantees in the Church and Hyde Amendments. They asked the President for – and received – an Executive Order promising that that there would be strict compliance with the ACA's abortion funding restrictions.⁵²

Given this détente around abortion, many religious leaders and social commentators charged the Obama Administration with 'deliberately ... pick[ing] a fight with the Catholic Church by compelling both Catholic

Center for Reproductive Rights), 19, http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf.

⁴⁵ In the General Social Survey of 2008, 57.5 per cent of respondents did not 'support abortion for any reason', while 39.7 per cent did. See Association of Religion Data Archives (ARDA), 'Support Abortion for Any Reason', www.thearda.com/QuickStats/qs_110.asp. Among self-identified 'liberals', support for unrestricted abortion is 59.4 per cent, for 'moderates' it is 41.4 per cent, and for 'conservatives' it is 23.8 per cent; see ARDA, 'Support Abortion for Any Reason (Demographic Patterns)', www.thearda.com/QuickStats/qs_110_p.asp; see also ARDA, 'General Social Survey 2008 Cross-Section and Panel Combined', www.thearda.com/archive/files/Codebooks/GSS08PAN_CB.asp.

⁴⁶ 42 USC § 18023(b)(1) (2012) ('VOLUNTARY CHOICE OF COVERAGE OF ABORTION SERVICES.— (A) IN GENERAL.—Notwithstanding any other provision of this title (or any amendment made by this title)— (i) nothing in this title (or any amendment made by this title), shall be construed to require a qualified health plan to provide coverage of services described in subparagraph (B)(i) or (B)(ii) as part of its essential health benefits for any plan year').

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* § 18023(b)(1)(A)(ii) ('[T]he issuer of a qualified health plan shall determine whether or not the plan provides coverage of services [eligible and ineligible abortions] as part of such benefits for the plan year').

⁴⁹ *Ibid.* § 18023(a) ('STATE OPT-OUT OF ABORTION COVERAGE.— (1) IN GENERAL.—A State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State if such State enacts a law to provide for such prohibition').

⁵⁰ Charles Greenberg, 'An Analysis of State-Based Health Insurance Exchange Proposals After the Passage of the Affordable Care Act' (6 May 2011) (unpublished MPH thesis, Johns Hopkins School of Public Health), available at http://ocw.jhsph.edu/courses/capstone2011/PDFs/Greenberg_Charles_2011.pdf.

⁵¹ 42 USC § 18023(c)(2)(A) (2012) ('Nothing in this Act shall be construed to have any effect on Federal laws regarding ... conscience protection').

⁵² Executive Order 13535, 'Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act', section 2 (24 March 2010); Mimi Hall, 'Both Sides of Abortion Issue Quick to Dismiss Order', *USA Today*, 25 March 2010, www.usatoday.com/news/washington/2010-03-24-abortion_N.htm.

institutions and Catholic businessmen to cover abortifacients and contraceptives in the medical insurance they offer to their employees'.⁵³ The Mandate surprised even some legislators who voted for its passage after receiving the President Obama's Executive Order. For example, former US Representative Kathy Dahlkemper said: 'We worked hard to prevent abortion funding in health care and to include clear conscience protections for those with moral objections to abortion and contraceptive devices that cause abortion. I trust that the President will honor the commitment he made to those of us who supported final passage'.⁵⁴

Critics believe that for 'defend[ers] of religious freedom[,] these have become dark times indeed'.⁵⁵ They fear 'just how thin and equivocal the First Amendment might prove to be as a support for ... religious freedom'⁵⁶ – and with good reason. As Part III shows, religious objectors in America are not shielded from legal mandates that conflict with their faith as a matter of US constitutional right, meaning that objectors generally must secure protections in the political process. As the next sub-part explains, religious objectors secured robust protections in that political process.

(b) A decisive accommodation

The earliest proposed rules implementing the ACA did not exempt religious objectors – other than churches. The narrowness of protections prompted a slew of criticism that the Mandate would 'impinge upon their religious freedom'.⁵⁷

Later proposals would have exempted faith-based employers if they met an exacting four-part test: (1) that the group sees its mission as inculcating religious values; (2) primarily serves people who share its religious tenets; (3) hires primarily from its own faith; and (4) is a nonprofit church or religious organisation recognised by the Internal Revenue Service.⁵⁸ As one commentator quipped, 'not even Jesus and the apostles would qualify for' that

⁵³ Hadley Arks, 'Recasting Religious Freedoms', *First Things* (1 June 2014), www.firstthings.com/article/2014/06/recasting-religious-freedom.

⁵⁴ See 'Pro-life Democrats Predict Broad Religious Exemption from Contraception Mandate', Catholic News Agency (21 November 2011), www.catholicnewsagency.com/news/pro-life-democrats-predict-broad-religious-exemption-from-contraception-mandate.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ 'Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act', 75 FR 41726 (19 July 2010); 76 FR at 46621 (3 August 2012); 76 FR at 46623.

⁵⁸ 'Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act' 76 FR 46621 (3 August 2011) (discussing organisations described in s 6033(a)(1) and s 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code).

accommodation as drafted.⁵⁹ More to the point, that cramped definition provided no refuge for religiously affiliated universities, hospitals, and social services agencies like Catholic Charities or the Salvation Army.

Even supporters of the ACA found this definition to be too restrictive. The Catholic Health Association, which had supported the ACA, explained: ‘The impact of being told we do not fit into the new definition of religious employer and therefore cannot operate our ministries following our consciences has jolted us ... From President Thomas Jefferson to President Barack Obama, we have been promised a respect for appropriate religious freedom’.⁶⁰

The claim of religious groups to a special right to be exempted from the Mandate was met by equally vigorous claims that no exemptions should be given. ‘[A]ll women, regardless of their employer, should be able to access the birth control coverage benefit’.⁶¹ Women’s rights groups like the National Women’s Law Center praised the Obama Administration for establishing ‘a major milestone in protecting women’s health [because] ... [c]ontraception is critical preventive health care’.⁶² Others decried the inclusion of even a limited exemption for churches, and encouraged the Obama Administration to hold the line against broader exemptions.⁶³

Others resisted the idea of providing accommodations, saying that accommodations legitimise scientifically unfounded ideas – specifically, the notion that by giving access to EC, religious objectors are providing an ‘abortion on demand’.⁶⁴ For example, the *New York Times* lamented that ‘[t]here was no evidence to support’ the ‘belief that [Plan B or *ella*] might be an abortifacient’.⁶⁵ The American College of Obstetricians and Gynecologists (ACOG) flatly contended that neither Plan B nor *ella* can ‘prevent implantation of a fertilized egg’.⁶⁶

⁵⁹ Kathryn Jean Lopez, ‘Stand Up, Already, for Religious Freedom’, *National Review* (20 October 2012), www.nationalreview.com/corner/331051/stand-already-religious-freedom-kathryn-jean-lopez.

⁶⁰ Carol Keehan, ‘Something Has to be Fixed’, *Catholic Health World* (15 February 2012), www.chausa.org/publications/catholic-health-world/article/february-15-2012/something-has-to-be-fixed.

⁶¹ Planned Parenthood Federation, ‘Planned Parenthood Applauds HHS for Ensuring Access to Affordable Birth Control’ (20 January 2012), www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-applauds-hhs-ensuring-access-affordable-birth-control-38582.htm.

⁶² National Women’s Law Center, ‘HHS Decision on Contraceptive Coverage a Major Milestone’ (20 January 2012), www.nwlc.org/press-release/hhs-decision-contraceptive-coverage-important-milestone.

⁶³ J Lester Feder, ‘On Contraception, Obama May Please Nobody’, *Politico*, 8 December 2011.

⁶⁴ Complaint, *Sharpe Holding, Inc.*, ¶7, www.becketfund.org/wp-content/uploads/2013/04/Sharpe-Holdings-complaint.pdf; *CCU v Sebelius, Complaint*, ¶30, 6 August 2013, www.becketfund.org/wp-content/uploads/2013/08/CCU.pdf (contending that ECs that ‘prevent a human embryo ... from implanting in the wall of the uterus, thereby caus[e] the death of the embryo’).

⁶⁵ Editorial, ‘How Morning-After Pills Really Work’, *NY Times* (8 June 2012), www.nytimes.com/2012/06/09/opinion/how-morning-after-pills-really-work.html.

⁶⁶ The American College of Obstetricians and Gynecologists, Committee on Health Care for

The *Hobby Lobby* Court did not have to resolve this complicated factual contention because ‘HHS acknowledge[d]’ that objected-to drugs and devices ‘may result in the destruction of an embryo’.⁶⁷ HHS likely had little choice but to make this concession. The FDA-approved label for *ella* says it ‘mainly works by stopping the release of an egg from the ovary [but] it is possible that *ella* may also work by preventing attachment (implantation) to the uterus’.⁶⁸ Although the *New York Times* discounted as ‘speculative’, a similar disclosure on Plan B’s label, the FDA still explains the mechanism of action of Plan B and *ella* in just these terms on its website today, indicating that both ‘may prevent attachment (implantation)’.⁶⁹

Religious objectors took to the political process to address the collisions between faith and the law. Responding to growing rancour over the Mandate, President Obama in 2012 proffered an accommodation for religious employers. The President explained: ‘[I]f a woman’s employer is a charity or a hospital that has a religious objection to providing contraceptive services as part of their health plan, the insurance company – not the hospital, not the charity – will be required to reach out and offer the woman contraceptive care free of charge without co-pays, without hassle’.⁷⁰

The President’s proposal encountered stiff resistance. Five hundred scholars, university presidents, religious leaders, and others, led by the Archbishop of

Underserved Women, ‘Access to Emergency Contraception’, Committee Opinion 542 (November 2012), www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Access_to_Emergency_Contraception.

⁶⁷ 134 S Ct 2751, 2775.

⁶⁸ Watson Medical Communications, *ella* label, ‘Highlights of Prescribing Information’, www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s0001bl.pdf.

⁶⁹ ‘Birth Control: Medicines to Help You’ US Food and Drug Administration (August 2013), www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm.

Across 14 years of accumulated research, two conclusions emerge: (1) nearly every authority now believes that Plan B does not act after fertilisation, and so cannot work in a woman’s uterus. ‘Birth Control: Medicines to Help You’ US Food and Drug Administration (August 2013), www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm. But mounting evidence about *ella* suggests it is likely to work, sometimes for some women, after fertilisation to prevent or derail implantation. A 2013 review article by the Independent Family Health Center at the Cleveland Clinic, home of the third-ranked gynecology programme in the US, concluded that *ella* ‘may have an additional action of affecting the ability of the embryo to either attach to the endometrium or maintain its attachment, by a variety of mechanisms of action’. See P Batur, ‘Emergency Contraception: Separating Fact from Fiction’, *Cleveland Clinic Journal of Medicine* 79, no 11 (2012): 771–776, at 772, www.ccm.org/content/79/11/771.full.pdf+html. Other reviews have reached the same conclusion. See generally Cameron Flynn and Robin Fretwell Wilson, ‘Speaking Candidly About EC and Abortion: What Should Guide Disclosure’, 43.1 *Journal of Law, Medicine, & Ethics* 72 (Spring 2015).

⁷⁰ See Richard Wolf, ‘Obama Tweaks Birth Control Rule’, *USA Today* (10 February 2012), <http://content.usatoday.com/communities/theoval/post/2012/02/source-obama-to-change-birth-control-rule/1#.VZGie1VViko>.

New York Cardinal Timothy Dolan, labelled that accommodation ‘unacceptable’, accusing the White House of hiding a ‘grave violation’ of religious liberty behind a ‘cheap accounting trick’.⁷¹

Taking the criticism about narrowness on board, the Administration simplified the test for an exemption so that all nonprofit organisations recognised by the IRS as faith-based would qualify, just as churches do.⁷² Although the simplified criteria extended no help to for-profit employers, who before *Hobby Lobby* received no relief, the final regulations relaxed the exacting four-part test to obtain a religious exemption, requiring only that the organisation be a faith-based body.⁷³

Under the accommodation, employees of an objecting organisation would receive contraceptive coverage from an insurer through separate add-on contraceptive coverage – at no cost to the religious organisation and no cost to the employee.⁷⁴ The insurer that provides the add-on coverage either absorbs the cost entirely (for group insurance purchased in the marketplace) or pays itself back from monies it would otherwise owe the federal government for running a federally facilitated exchange (for self-insured plans).⁷⁵

To make this more concrete, consider the University of Notre Dame, which filed suit over the Mandate early on.⁷⁶ Notre Dame employed 17,037 people in 2010 according to the Form 990 that it files as a nonprofit. Over 5,200 of those employees were full-time in 2012 according to Notre Dame’s 2013 complaint. Before the concessions, if all 17,000+ employees were full-time, Notre Dame would have faced an annual penalty of nearly \$34m if it dropped its coverage rather than comply with the Mandate. If Notre Dame continued to provide employer-paid healthcare coverage to its 5,200 full-time employees, without the objectionable contraceptives, it would have been on the hook for \$189.8m annually (calculated as \$100 per day per full-time employee).

After the Administration’s concessions, Notre Dame no longer faces either penalty. Notre Dame simply does not have to provide the contested coverage. Instead, an insurer in the marketplace will provide the contested coverage – at no cost to Notre Dame’s employees and at no cost to Notre Dame.⁷⁷

⁷¹ ‘Unacceptable’, Statement of 11 April 2012, www.becketfund.org/wp-content/uploads/2012/04/Unacceptable-4-11.pdf; Wolf, ‘Obama Tweaks’ (see n 35); ‘Catholic Group Backs Obama Birth Control Policy’, *boston.com* (10 February 2012), www.boston.com/news/nation/washington/articles/2012/02/10/catholic_group_backs_obama_birth_control_policy.

⁷² ‘Coverage of Certain Preventive Services Under the Affordable Care Act’, 78 FR 8456-01, 8461, 8462, 8465 (6 February 2013).

⁷³ *Ibid.*

⁷⁴ ‘Coverage of Certain Preventive Services Under the Affordable Care Act’, 78 FR 8456-01, 8461, 8462, 8465 (6 February 2013).

⁷⁵ ‘Coverage of Certain Preventive Services Under the Affordable Care Act’, 78 FR 39869 (2013).

⁷⁶ *Univ of Notre Dame v Sebelius*, 2012 US Dist LEXIS 183267 (ND Ind Dec 31, 2012).

⁷⁷ Healthcare.gov, *What Marketplace health plans cover: Birth control benefits*, www.healthcare.gov/coverage/birth-control-benefits.

For exempted objectors that purchase group health plans in the market, which only the smallest employers would do, the insurer that sells the underlying policy will provide the contested coverage for ‘free’ to Notre Dame’s employees – and absorb that cost. The Administration contends that the insurer is made whole for providing the ‘free’ coverage by the savings it reaps from ‘lower costs ... and fewer unplanned pregnancies’ in the underlying pool.⁷⁸

For exempted objectors that self-insure for their employees’ healthcare costs, as Notre Dame does, the plan’s third-party administrator (TPA) will be required to locate an insurer running a federally facilitated exchange (FFE) which will then provide the contested coverage to Notre Dame employees without cost. The FFE insurer reimburses itself for the ‘free’ coverage from dollars it would otherwise owe the federal government for running the exchange. These concessions are real. In the end, the religious organisations squeezed out extremely generous concessions: the government dragoons a random insurer and makes it pay for what the religious objector will not pay for.

While this accommodation provides relief to religious nonprofits, there was no accommodation made for other types of organisations like Hobby Lobby. To evaluate Hobby Lobby’s entitlement to such concessions, it is important to briefly review the genesis of RFRA, the statute being construed in *Hobby Lobby*.

III RELIGIOUS FREEDOM BEFORE *HOBBY LOBBY* AND THE ROAD TO RFRA

The statute at the heart of *Hobby Lobby*, RFRA, emerged from a desire to provide more protection for religious belief and practice than the United States Supreme Court, in a deeply controversial decision, announced that the US Constitution itself does. This Part recounts the jurisprudence leading up to the Supreme Court’s pivotal decision in *Employment Div, Dept of Human Resources of Ore v Smith*,⁷⁹ and then charts RFRA’s development as a response to that decision.

The First Amendment to the US Constitution provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’.⁸⁰ For decades before the *Smith* decision, the Supreme Court used something akin to strict scrutiny to evaluate whether a state action impermissibly burdened free exercise. In that era, courts were charged with asking whether a challenged government action imposed a substantial burden

⁷⁸ 78 Fed Reg 39870, 39877 (2013).

⁷⁹ 494 US 872 (1990). *Smith* was left in place by the Supreme Court’s 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, which held that a ministerial exception, based on the First Amendment’s Religion Clauses, bars a suit brought under the Americans with Disabilities Act on behalf of a teacher-minister against a church. 132 S Ct 694, 706–07.

⁸⁰ US Const amend I.

on the practise of religion, and, if so, whether such burden served a compelling government interest.⁸¹ Cases before *Smith* applied this balancing test to hold, for example, that the state could not deny unemployment benefits to an employee fired for refusing to work on the Sabbath.⁸² Neither may the state force Amish children to stay in school until age 16 when religious beliefs require the Amish to focus on Amish beliefs and values during their adolescent years.⁸³

In *Smith*, however, the Supreme Court flatly rejected the older balancing test as unworkable when evaluating Free Exercise claims under the First Amendment. *Smith* dealt with two members of the Native American Church who were fired from their jobs after ingesting peyote for sacramental purposes.⁸⁴ The State of Oregon denied their unemployment claims because ingesting peyote was a crime in Oregon.⁸⁵

In upholding the denial, the *Smith* Court found that a ‘neutral, generally applicable law’⁸⁶ would not offend Free Exercise Clause guarantees even if that law tended to burden religion.⁸⁷ As the *Hobby Lobby* Court noted, *Smith* ‘largely repudiated the method of analyzing free-exercise claims that had been used in [earlier] cases’.⁸⁸

Justice Antonin Scalia, writing for the Court, justified the Court’s departure from the pre-*Smith* framework established in *Sherbert v Verner*.⁸⁹ Continuing to apply the *Sherbert* balancing test ‘would open the prospect of constitutionally required religious exemptions from civic obligations of almost every

⁸¹ *Burwell v Hobby Lobby Stores, Inc.*, 134 S Ct 2751, 2760 (2014). How rigorous the pre-*Smith* standard was is the subject of some debate. Compare *Hobby Lobby*, 134 S Ct at 2760 (describing the *Sherbert* test as ‘us[ing] a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest’), with Kent Greenawalt, *The Hobby Lobby Case: Controversial Interpretive Techniques and Standards of Application* (Columbia Public Law Research Paper No 14-421, *10 (2014)) (‘[S]ince RFRA explicitly adopted the approach taken prior to *Employment Division v Smith*, its use of the “compelling interest” standard should be understood to require what is really a kind of intermediate scrutiny, more rigorous than “rational basis” but less than the demanding test used to invalidate laws effecting racial discrimination or interfering with core forms of protected speech’).

⁸² *Sherbert v Verner*, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963).

⁸³ *Wisconsin v Yoder*, 406 US 205, 92 S Ct 1526, 32 L Ed 2d 15 (1972).

⁸⁴ 494 US at 883, 110 S Ct 1595.

⁸⁵ *Ibid.*

⁸⁶ *Smith*, 494 US at 872 (‘The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections’).

⁸⁷ See *ibid.* In *City of Boerne v Flores*, 521 US 507, 514 (1997), the Court held that ‘neutral, generally applicable laws may be applied to religious practices [under the First Amendment], even when not supported by a compelling governmental interest’.

⁸⁸ *Hobby Lobby Stores*, 134 S Ct at 2760.

⁸⁹ 374 US 398, 409-10 (1963) (barring the government from refusing to pay unemployment benefits to an employee fired for refusing to work on her Sabbath).

conceivable kind'.⁹⁰ Thus, continued use of the *Sherbert* approach 'would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself'.⁹¹

Even as the *Smith* Court significantly cut back on the scope of protection under the Free Exercise Clause, it invited religious believers to pursue greater protection in the legislative and political process:⁹²

'Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.'

With that door open,⁹³ Congress enacted RFRA in 1993 to rectify the *Smith* ruling and provide protections that go beyond the Supreme Court's interpretation of the First Amendment. RFRA 'facially require[s] strict scrutiny of all substantial burdens on religious practices' by the federal government (and initially the states).⁹⁴ Congress imposed restraints on its own legislative actions, as well as those of regulatory bodies implementing federal law.⁹⁵

The statute is short and to the point, laying out a two-pronged test for evaluating laws that substantially burden religion:⁹⁶

'Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.'

Furthermore, as later amended, RFRA covers 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief'.⁹⁷

⁹⁰ *Smith*, 494 US at 888.

⁹¹ *Ibid* at 879.

⁹² *Ibid* at 890.

⁹³ Given the background and the flavour of the *Smith* opinion, it seems likely that Justice Scalia contemplated measured exemptions from particular statutory schemes, such as draft exemptions, rather than a RFRA-like generalised protection. Since the *Smith* court's intent as to RFRA is not crucial to my thesis here, I do not deal with it further.

⁹⁴ Eugene Volokh, 'Intermediate Questions of Religious Exemptions – A Research Agenda with Test Suites', 21 *Cardozo L Rev* 595, 598 (1999).

⁹⁵ See *ibid* §2000bb–2 (2012) (defining 'government' to include any 'department' or 'agency' of the United States); *ibid* § 2000bb–3(a) (2012) (encompassing 'all Federal law, and the implementation of that law').

⁹⁶ 42 USC § 2000bb–1(b) (2012).

⁹⁷ Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 USC §§ 2000cc–5(7)(A) (2012).

Although invalidated as applied to the states,⁹⁸ 21 states have enacted similar restrictions on state burdens of religion.⁹⁹ But the respect for religious belief runs even deeper in the American legal fabric: in 11 states, courts interpret the state's constitution to protect against neutral and generally applicable laws that have the effect of burdening religion.¹⁰⁰ Together with state RFRAs, then, 32 states in the United States subject laws and rules that burden religion to a more exacting review than *Smith* says is constitutionally required. This includes nearly all of the most populated states in the United States (Illinois, Pennsylvania, Texas, Florida, Michigan, Ohio, and New York), except California.¹⁰¹ Thus, while *Smith* still governs Free Exercise claims under the First Amendment, religious belief and practice receive considerable protections today across the country.

Hobby Lobby, RFRAs, and state constitutional protections for religious belief more generally highlight a 'larger struggle'¹⁰² to 'define the meaning of America

⁹⁸ See *City of Boerne v Flores*, 521 US 507, 532-36 (1997) (finding that RFRA was unconstitutional as applied to the states).

⁹⁹ Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia have enacted state RFRAs. See Ala Const amend 622; Ariz Rev Stat Ann §§41-1493-41-1493.04 (2011); Religious Freedom Restoration Act, No 975, 2015 Ark Acts — (to be codified at Ark Code Ann §§ 16-123-401 to 407); Conn Gen Stat §52-571b (2013); Fla Stat §§ 761.01-761.05 (2012); Idaho Code Ann §§ 73.401-73.404 (2013); 775 Ill Comp Stat 35/1-99 (2012); Religious Freedom Restoration Act, PL 3-2015, 2015 Ind Acts — (to be codified at Ind Code §§ 34-13-9-1 to 11), as amended by PL 4-2015, 2015 Ind Acts — (to be codified at Ind Code §§ 34-13-9-0.7 and 34-13-9-7.5); Ind 2015 SB 101, enacted 26 March 2015; 2015 SB 50, enacted 2 April 2015; Kan Stat Ann §§ 60-5301-60-5305 (West 2013); Ky Rev Stat Ann §446.350 (West 2013); La Rev Stat Ann §§ 13:5231-13:5242 (2012); 2014 Miss Laws WL No 196; Mo Rev Stat §§1.302-1.307 (West 2013); NM Stat Ann §§ 28-22-1-28-22-5 (West 2013); Okla Stat tit 51, §§251-258 (2013); 71 Pa Stat Ann §§ 2401-2407 (West 2013); RI Gen Laws §§42-80.1-1-42.80.1-4 (2006); SC Code Ann §§ 1-32-10-1-32-60 (2013); Tenn Code Ann § 4-1-407 (West 2013); Tex Civ Prac & Rem Code Ann §§ 110.001-110.012 (West 2013); Va Code Ann §57-2.02 (West 2013). See generally Douglas Laycock, 'Religious Liberty and the Culture Wars', 2014 U Ill L Rev 839, 845 (hereinafter 'Religious Liberty and the Culture Wars'); Religious Freedom Restoration Act – State Listing, <https://inadvancesheet.files.wordpress.com/2015/03/rfra-state-by-state-listing.pdf>.

¹⁰⁰ These states include Alaska, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin: see *Swanner v Anchorage Equal Rights Comm'n*, 868 P 2d 274 (Alaska 1994); *Dedman v Board*, 740 P 2d 28 (Haw. 1987); *Rupert v Portland*, 605 A 2d 63 (Me 1992); *Attorney General v Desilets*, 636 NE 2d 233 (Mass 1994); *Porth v Roman Catholic Diocese*, 532 NW 2d 195 (Mich Ct App 1995); *Hill-Murray Federation of Teachers v Hill-Murray High School*, 487 NW 2d 857 (Minn 1992); *Davis v The Church of Jesus Christ of Latter Day Saints*, 852 P 2d 640 (Mont 1993); *Matter of Browning*, 476 SE 2d 465 (NC App 1996); *Humphrey v Lane*, 728 NE 2d 1039 (OH 2000); *Munns v Martin*, 930 P 2d 318 (Wash 1997); *State v Miller*, 549 NW 2d 235 (Wis 1996). Some states apply only intermediate scrutiny, as New York does. See *Williams v Bright*, 632 NYS 2d 760 (NY Sup Ct 1995).

¹⁰¹ United States Census Bureau, Florida Passes New York to Become the Nation's Third Most Populous State (1 July 2014), www.census.gov/newsroom/press-releases/2014/cb14-232.html.

¹⁰² Steven D Smith, *Die and Let Live? The Asymmetry of Accommodation 1* (Univ of San Diego Sch of Law, Legal Studies Research Paper Series, Research Paper No 14-162, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484801.

– of how and on what terms Americans will live together, of what comprises a good society'.¹⁰³ At the core of this struggle over the American social contract is whether the government should impose burdens on religion without exceedingly good reasons and, if burdens are warranted, when those burdens can be avoided.

Such generalised protections allow religious adherents to challenge the application of any law to their religious practice,¹⁰⁴ raising anew *Smith's* spectre that some will be set above the law.

Critics say RFRA operates as a kind of free pass or 'get-out-of-jail-free card', entitling the protected party to 'discriminate'.¹⁰⁵ True, RFRA relieves successful litigants from otherwise applicable duties under the challenged statute, and it does not do so on the face of the challenged statute itself.¹⁰⁶ But Congress instituted the restraints on federal action contained in RFRA by *enacting* federal legislation – making the result lawful, not lawless. Moreover, Congress can always choose not to make new laws subject to RFRA – which it did not do in the ACA. Indeed, efforts after *Hobby Lobby's* release to amend the ACA to require compliance with the Mandate nonetheless failed to garner enough support to force a House vote.¹⁰⁷

IV *HOBBY LOBBY'S* LEGAL CLAIMS AND THE RULING

With this background, this Part now turns to the legal arguments made by the three plaintiffs in the case, Hobby Lobby Stores Inc, Conestoga Wood Specialties Corp, and Mardel Inc,¹⁰⁸ and the Court's analysis of those claims.

¹⁰³ James Davison Hunter *Culture Wars: The Struggle to Define America* (HarperCollins New York, 1991) at 51.

¹⁰⁴ *Hobby Lobby*, 134 S Ct at 2780.

¹⁰⁵ Thompson Wall, 'Businesses Take a Stand Against Indiana's Religious Freedom Restoration Act Inc' (30 March 2015), www.inc.com/thompson-wall/indianas-new-religious-freedom-act-detering-big-business.html.

¹⁰⁶ It is this *ex post* application of RFRA that most lends itself to the claim that by exempting religious believers, society sets them 'above the law.' See Robin Fretwell Wilson, 'When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions', 48 UC Davis L Rev 703 (2014). Yet the blowback over *Hobby Lobby* has not been confined to generalised accommodations for religious practice like those made in RFRA, but has spilled over to specific exemptions to particular statutes, like those in the ACA allowing no coverage of abortion. Specific exemptions operate differently. Specific exemptions clarify the government's intent not to impose a legal duty on everyone by describing specific acts that fall outside the law's intended scope, *ex ante*. As such, specific exemptions do not relieve the exempted parties from duties under a challenged statute. When a legislature chooses to exempt a religious belief or practice from the scope of a new law, it is no more placing religious believers 'above the law' than when the legislature chooses to exempt a small employer, or any other party. *Ibid* at 713.

¹⁰⁷ *Ibid* at 711.

¹⁰⁸ Conestoga Wood Specialties Corp and Mardel Inc are the second and third (less well known) named petitioners in the *Hobby Lobby* case.

(a) The legal claims

The *Hobby Lobby* plaintiffs advanced two main arguments for why they should not be forced to violate their sincerely held religious beliefs that life begins at conception, which they believe they would violate by being required to facilitate access to drugs that operate after conception. First, they argued that the Mandate infringed on the Free Exercise guarantee that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’.¹⁰⁹ Second, they argued that the Mandate violated RFRA because the government did not need to burden their religious beliefs to accomplish its goals. Because the Court resolved the challenge to the Mandate on the second grounds, it did not need to reach the Free Exercise claim.¹¹⁰

(b) Applying RFRA’s test to the Mandate

As noted earlier, for the government to defeat a RFRA challenge, it must prove that (1) a person’s exercise of religion is not ‘substantially burdened’ by a government action or (2a) if burdened, the government’s imposition of that burden furthers a ‘compelling governmental interest’, and (2b) is the ‘least restrictive means’ of achieving that interest.

(i) Is a person’s exercise of religion being burdened?

The threshold question of who qualifies as a person under RFRA and whether a corporation can hold or exercise religious beliefs arguably garnered more media attention than any other question. This sub-part recaps how the Court dispatched such thorny questions.

Who is a person?

HHS argued that neither a for-profit closely held corporation, nor its owners, could assert a RFRA claim – the Mandate would only apply to the companies, not to the owners as individuals and companies do not, qualify for RFRA protection, HHS asserted.¹¹¹ The Supreme Court, however, concluded that Congress intended to include closely held corporations within RFRA’s protections.

Nothing in RFRA suggested an intent by Congress to depart from the Dictionary Act definition of ‘person’, which ‘include[s] corporations ... as well as individuals’.¹¹² When an act of Congress does not specifically define a certain term it uses, the Dictionary Act definition governs.¹¹³ Because RFRA does not deviate from the traditional meaning of ‘person’, the Court had no

¹⁰⁹ US Const amend I.

¹¹⁰ *Hobby Lobby*, 134 S Ct at 2785.

¹¹¹ *Ibid* at 2764.

¹¹² 1 USC § 1.

¹¹³ *Hobby Lobby*, 134 S Ct at 2769.

reason to assume a new definition. Furthermore, HHS conceded that a nonprofit corporation could be a ‘person’ under RFRA.¹¹⁴ For the majority:¹¹⁵

‘This concession effectively dispatches any argument that the term “person” as used in RFRA does not reach the closely held corporations involved in these cases ... [N]o conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.’

Moreover, not reading in closely held corporations would mean that owners would face the difficult choice of either giving up the right to seek judicial protection of their religious liberties or forgo the advantages of operating as a corporation.¹¹⁶

Who exercises religious belief?

HHS and the dissent focused significant time and energy on a second thorny question: whether a corporation could exercise religion. The government did not proffer an explanation satisfactory to the majority showing why a corporation could not exercise religion.¹¹⁷ The posited limitation could not be due to the corporate form, the Court observed, because the government conceded that a nonprofit corporation could exercise religion.¹¹⁸ Neither can the posited limitation be due to the profit-making objective of a corporation because the Court had previously decided RFRA cases brought by individual merchants who sought to make a profit.¹¹⁹ Moreover, the Court notes, Congress explicitly excluded for-profit corporations when enacting other laws, but did not do so in RFRA.¹²⁰

Also receiving a lot of media attention was how to even discern what belief a corporation holds.¹²¹ The HHS brief discussed the problem as it relates to large public companies – a spectre quickly dismissed by Justice Alito, who noted that no publicly traded company has filed suit to avoid the Mandate. More importantly, corporate law contains ample precedent for deciding what a corporation’s intent is.¹²² In the end, the Court held that a closely held corporation, owned by members of a single family with sincere religious beliefs, may invoke RFRA’s protection.¹²³

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid at 2768.

¹¹⁷ Ibid at 2773.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid at 2774.

¹²² Ibid at 2775.

¹²³ Ibid.

(ii) Does the Mandate substantially burden religious belief or practice?

The majority had little trouble finding a substantial burden as a result of the Mandate. Corporations that do not comply face draconian penalties. By the Court's calculation, if Hobby Lobby refused to provide mandated coverage, it would be taxed \$100 per day per individual, amounting to \$1.3m a day or \$475m per year.¹²⁴ If Hobby Lobby instead elected to drop the insurance benefit for its employees altogether, it would still face a smaller, yet substantial penalty of \$26m a year.¹²⁵

Some 'friends of the court', known as *amici*, argued late in the process that the second penalty is less than the cost of providing health insurance, so it could not burden the objector.¹²⁶ HHS did not raise this issue, allowing the Court to bracket the question. Nonetheless, the Court found it unpersuasive: providing health coverage is a religious obligation for many employers. Moreover, some employers would come out ahead financially, especially those with just over the threshold for compliance with the ACA, of 50 employees.¹²⁷ Of course, putting objectors to the choice of complying with the Mandate or complying with their faith may actually act as an inducement to drop coverage, amounting to bad public policy.¹²⁸

HHS also argued that the Mandate does not impose a substantial burden because the connection between the Mandate and the destruction of an embryo is too attenuated, a framing that resonated with the dissent.¹²⁹ HHS argued that the destruction of an embryo would only occur if an employee actually used the ECs in question.¹³⁰

The majority opinion saw the question quite differently, as resting on the religious objector's perceptions. The Court reaches back to its 1981 case, *Thomas v Review Bd of Indiana Employment Security Div*,¹³¹ in which a Jehovah's Witness objected to making weapons for war based on religious grounds. There, the Court rejected Indiana's claim that Thomas was not entitled to unemployment compensation benefits because other Jehovah Witnesses at the foundry did not share his objection.¹³² Drawing on *Thomas*, the *Hobby Lobby* Court concluded that it is not for the courts to determine whether the line a religious objector draws is unreasonable:¹³³ 'Instead, our

¹²⁴ Ibid at 2776.

¹²⁵ Ibid.

¹²⁶ Ibid at 2798 n 20.

¹²⁷ *Hobby Lobby*, 134 S Ct at 2776.

¹²⁸ See Robin Fretwell Wilson, 'The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State', 53 BC L Rev 1417, 1466 (2012).

¹²⁹ Ibid at 2777; ibid at 2798 (Ginsburg J dissenting).

¹³⁰ Ibid.

¹³¹ 450 US 707, 101 S Ct 1425, 67 L Ed 2d 624 (1981).

¹³² 450 US 707, 715 (1981).

¹³³ 134 S Ct 2751, 2778 (2014).

“narrow function ... in this context is to determine” whether the line drawn reflects “an honest conviction,” and there is no dispute that it does [for Hobby Lobby].¹³⁴

In her dissent, Justice Ginsburg takes issue with such deference. She contends that corporations like Hobby Lobby make payments into ‘undifferentiated funds’, so that whatever happens to the money is too far removed from the source of the payment for the religious objector to be accountable.¹³⁵ Alito and the majority get the better of this argument, pointing directly to HHS regulations which require money for contraceptive services to be segregated separately from insurance premiums.¹³⁶ More importantly, no one could purchase the ACA’s total benefit package, less only the objectionable coverage. Even though a woman makes her own choice whether to use birth control, employers know that across a large group, some woman somewhere will use what they have paid for and find objectionable, which is exactly Hobby Lobby’s point.

(iii) Does the burden further a compelling governmental interest?

HHS argued the Mandate served a variety of governmental interests, but couched them in broad goals like ensuring ‘public health’ and ‘gender equality’.¹³⁷ However, under RFRA, courts must analyse the government’s interest in imposing a burden on the specific objectors¹³⁸ – here, of being made to ‘fund’ drugs and devices the plaintiffs consider tantamount to abortion.¹³⁹ The Court does not decide whether the broad goals identified may count as compelling interests; the Court simply assumes, *arguendo*, that access to the contraceptives is a compelling governmental interest. The Court expressed concern, however, that the extensive exemptions and grandfathering discussed above may undercut any compelling interest in enforcing the Mandate.¹⁴⁰

(iv) Is the burden the least restrictive means of achieving that interest?

Having satisfied the first two questions above, Hobby Lobby now had to show that the government had other less restrictive means of achieving the government’s compelling interest. The religious liberty ‘fix’ that the Obama Administration extended to religious nonprofit corporations proved to be fatal

¹³⁴ Ibid at 2779.

¹³⁵ Ibid at 2799 (Ginsburg J dissenting).

¹³⁶ 45 CFR § 147.131(c)(2)(ii). The accommodation established by HHS requires issuers to have a mechanism by which to ‘segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services’.

¹³⁷ *Hobby Lobby*, 134 S Ct at 2779.

¹³⁸ Ibid at 2780 (reading RFRA to require the government to show ‘it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by *the objecting parties*’ (emphasis added)).

¹³⁹ See *ibid* at 2779.

¹⁴⁰ Ibid.

to the government's argument. As noted above, this 'fix' respected religious objections while ensuring that their employees would have access to the mandated contraceptives at no cost to the employees.¹⁴¹ Worse, HHS acknowledged that this 'fix' had no net economic burden on the insurance companies providing the coverage.¹⁴²

As a consequence, the Court could identify 'no reason why' HHS could not extend its non-profit accommodations to for-profit corporations.¹⁴³ Of course, this option represented only one potential alternative way of achieving the HHS's desired goal of cost-free access. In fact, the number of employees employed by nonprofit corporations dwarfed the number of for-profit employees who would have been affected by widened exemptions.¹⁴⁴ Yet, the government only wanted to force payment by for-profit employers, a distinction the Court found unacceptable.

In rejecting the conclusion that less restrictive alternatives exist, Justice Alito rejected HHS's contention that no accommodation under RFRA may impose costs on a third party – in a sharp departure with Justice Ginsburg in dissent.¹⁴⁵ Justice Ginsburg charged that it would be deeply unfair to fail to enforce the Mandate as to closely held corporations.¹⁴⁶ The inability to apply the ACA's 'statutory scheme of employer-based comprehensive health coverage' to the plaintiffs would 'operat[e] to impose the employer's religious faith on the employees'.¹⁴⁷ Importantly, Justice Ginsburg fails to appreciate how the government's proffered accommodations for religious nonprofits actually work

¹⁴¹ Ibid at 2760.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ While the Mandate precipitated lawsuits from 49 for-profit companies that collectively employ at least 19,500 full-time employees (as determined by the number of employees included in complaints compiled at HHS Mandate Information Central, a website maintained by the Becket Fund, lead counsel for a number of litigants as of June 2014), HHS's concessions would insulate the 56 religiously affiliated nonprofits that filed suit, like University of Notre Dame, from having to directly pay for the objected-to drugs. See Robin Fretwell Wilson, 'The Political Process Offers Important Protections for Religious Freedom, Berkley Ctr. for Religion, Peace & World Affairs' (2 June 2014), <http://berkeleycenter.georgetown.edu/cornerstone/shifting-applicability-a-history-of-judicial-approaches-to-free-exercise/responses/the-political-process-offers-important-protections-for-religious-freedom> (hereinafter 'The Political Process'). And the nonprofit litigants collectively employ far more people – at least 58,000 full-time employees, according to their complaints.

¹⁴⁵ *Hobby Lobby*, 134 S Ct at 2799 (2014) (Ginsburg J dissenting).

¹⁴⁶ See *ibid* at 2790–91 (discussing the millions of Americans left out of the ACA's employer-provided health insurance and insurance reforms as a result of scope limitations).

¹⁴⁷ See *ibid* at 2804 (quoting *United States v Lee*, 455 US 252, 261 (1982), in which the Court sustained the application of the Social Security tax against a Free Exercise challenge by an Amish employer that employed only Amish workers).

One can see any third-party burden as economic, not religious – meaning that the employer could not have imposed its faith, although it may have imposed a cost. It is unlikely that the burdened party will parse the difference this closely.

– it dragoons an insurer to provide the contested coverage and makes the insurer bear the cost, if any, or reimburse itself from fees it would owe the government.¹⁴⁸

Nonetheless, for Justice Ginsburg, the possibility of imposition is sufficient reason for saddling the plaintiffs with the Mandate: ‘Working for Hobby Lobby or Conestoga ... should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.’¹⁴⁹ Fearing that the ‘Court has ventured into a minefield’ in ‘approving some religious claims while deeming others unworthy of accommodation’, Justice Ginsburg sees the Mandate as ‘surely binding’ on the plaintiffs.¹⁵⁰

Tackling Justice Ginsburg’s contention head-on, Justice Alito rejected the notion that ‘recognizing a religious accommodation under RFRA ... threaten[s] the viability of ACA’s comprehensive scheme’.¹⁵¹ The government need only extend the concessions made for religious nonprofits. More fundamentally for Justice Alito, the Court’s task is not to second-guess the ‘wisdom of Congress’s judgment’ that RFRA’s ‘compelling interest test ... is a workable test’ for balancing religious liberty with other governmental interests; instead, the Court’s ‘responsibility is to enforce RFRA as written’.¹⁵²

Because the Obama Administration essentially handed the Court an alternative, less restrictive option to complying with the Mandate,¹⁵³ it should come as no surprise that the government could not satisfy this prong of the RFRA test.

¹⁴⁸ See Part II(b) above.

¹⁴⁹ *Hobby Lobby*, 134 S Ct at 2804.

¹⁵⁰ *Ibid* (arguing that the ACA’s ‘statutory scheme ... is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga’, as was the Social Security taxation system in *United States v Lee*, 455 US 252 (1982), where the Court turned aside a Free Exercise claim for exemption on religious grounds).

¹⁵¹ *Ibid* at 2784 (distinguishing *United States v Lee*, 455 US 252 (1982)).

¹⁵² *Ibid* at 2785 (quoting 42 USC § 2000bb(a)(5) (2012)).

¹⁵³ The Obama Administration could have ensured near-universal access by significantly expanding government programmes such as Title X that now provide contraceptives to lower-income women. This solution to what is a very real access issue facing many financially strapped women would have been more consistent with the goal of ACA. The ACA sought to expand the access of all lower income Americans to all health care services, not just contraceptive coverage, by requiring states to extend Medicaid eligibility to ‘adults with incomes at or below 138% of the federal poverty level’. The Kaiser Commission on Medicaid and the Uninsured, ‘Issue Brief: Analyzing the Impact of State Medicaid Expansion Decisions’ (July 2013): 1, <http://kaiserfamilyfoundation.files.wordpress.com/2013/07/8458-analyzing-the-impact-of-state-medicaid-expansion-decisions2.pdf>. The US Supreme Court ultimately struck down the ACA’s Medicaid expansion scheme in June 2012 as exceeding Congress’s authority under the Spending Clause. *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2608 (2012).

Significantly, expanded subsidies would have addressed the access concerns animating the Mandate. Birth control pills cost from \$160 to \$600 a year. ‘How Much Does Birth Control Cost?’ Alpha Consumer, US News & World Report, 27 August 2010, <http://money.usnews.com/money/blogs/alpha-consumer/2010/08/27/how-much-does-birth-control-cost>. Taxpayers already subsidise contraceptives for many lower income women. In fact, of the 36 million

To be sure, the Obama Administration is to be credited for finding a way to respect religious beliefs without sacrificing a woman's access to needed medical services. This is the nirvana point in efforts to balance religious liberties with access to healthcare. As Justice Kennedy said in his concurrence, 'the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means'.¹⁵⁴

After the decision's release, the Administration published a Notice of Proposed Rulemaking about how best to extend its accommodation for religious nonprofits to closely held corporations that object on religious grounds to the Mandate.¹⁵⁵ In that Notice, the Administration proposed two approaches to

women in 'need' of publicly funded contraceptive services and supplies – defined by the Guttmacher Institute as any woman whose income is less than 250 per cent of the federal poverty level or who is under 20 years of age – taxpayers provided that coverage for 9 million such women, at a cost of \$1.85 billion in 2006: '70.6% [of the funds came] from Medicaid, 13.1% from state appropriations, 11.7% from Title X, 2.1% from Maternal and Child Health block grants, [and] 2.6% from TANF/Social Services block grants'. Guttmacher Institute, 'Facts Sheet: Publicly Funded Contraceptive Services in the United States', March 2014, www.guttmacher.org/pubs/fb_contraceptive_serv.pdf.

If taxpayers paid for 'free' contraceptives for all women in need (36 million), 27 million more would need to be covered, about three times the current number. Of course, aggregate costs for that coverage would almost certainly drop because the government would get a good deal based on volume. But even assuming the same cost per unit, coverage of all women of childbearing age would require an expenditure of \$5.55 billion – far less than what the US spent in 2010 for one month of war in Afghanistan. As a comparison, in 2013, the authorised monthly expenditure on the war in Afghanistan was \$7.2 billion. See 'Cost of the Afghanistan War: By the Numbers', Friends Committee on National Legislation, 6 June 2013, http://fcn.org/issues/afghanistan/Cost_of_the_Afghanistan_War_By_the_Numbers_13_FEB13.pdf. Moreover, any expenditures would be offset by savings in government-supported health care plans like Medicaid, as well as in savings for Temporary Assistance for Needy Families (TANF) and other payments to needy families, since families would grow at a smaller rate. 78 FR 39869 (2013).

To avoid subsidising wealthier women who do not need a subsidy, the Obama Administration could have also taken a more focused tack, massively expanding Title X, which provides family planning services to lower income women. The Administration could have, for example, expanded this important safety net to reach women with significantly higher income thresholds – say, for example, 400 per cent of poverty, where the ACA's subsidies for premium tax credits and cost-sharing subsidies cut off. See CSR Report No R42663, Health Insurance Exchanges Under the Patient Protection and Affordable Care Act (ACA), 31 January 2013, 34, www.fas.org/sgp/crs/misc/R42663.pdf. Because those most in need represent a fraction of all women of childbearing age, the cost to the public of providing 'free' contraceptive coverage would be considerably less.

Whether free coverage for all or free coverage for the neediest, a government subsidy would have given lower income women access without forcing objecting employers to choose between 'violating the law [and] violating their consciences'. It may have been more constructive to have sought a creative solution from the beginning that would balance needed access to contraceptives with respect for religious liberty. As the Obama Administration's concessions to nonprofits demonstrate, creative solutions can protect access without surrendering religious liberty.

¹⁵⁴ *Hobby Lobby*, 134 S Ct at 2787.

¹⁵⁵ Lyle Denniston, 'Rules for birth-control mandate after Hobby Lobby', *ScotusBlog*, 22 August 2014, www.scotusblog.com/2014/08/rules-for-birth-control-mandate-after-hobby-lobby.

defining what corporations would count as a closely held corporation. Under either definition, a corporation would not be eligible for an exemption if it had publicly traded stock.¹⁵⁶ The two options differ in the size restrictions to be used. The first option would define a closely held corporation as having a ‘relatively small number of owners’, which for some purposes ‘in the past [has] been limited to corporations with 10 or fewer shareholders’.¹⁵⁷ The second option would specify a ‘fraction of the ownership interest [that may be] concentrated in a limited and specified number of owners’, which might be, for example, no ‘more than 50 percent owned by or for not more than five individuals’.¹⁵⁸ The government did not proffer actual numbers for either option, asking instead for the public’s input.¹⁵⁹ Open for comments until 22 October 2014, HHS is currently considering the public’s suggestions.¹⁶⁰

V RFRA AND THE FUTURE OF SOCIAL WELFARE LEGISLATION

In the ‘furious reaction’ to *Hobby Lobby*,¹⁶¹ the parade of horrors took on any number of forms: ‘Some companies will claim a religious right to discriminate against gay job applicants. Others will insist a woman’s place is in the home, and claim a religious exemption to Title VII’s obligation that women be paid the same as men. And are we sure there are no companies that will assert a religious right to pollute?’¹⁶² This Part reviews articulated concerns about the breadth of the *Hobby Lobby* holding. It argues that it is premature to credit such ‘dire consequences’ as a result of *Hobby Lobby*.¹⁶³ This Part then describes the litigation by nonprofit religious institutions over the proffered

¹⁵⁶ Coverage of Certain Preventive Services; Eligible Organizations, Office of Information and Regulatory Affairs, www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=0938-AS50.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Long, above n 22.

¹⁶² See Kent Greenfield, ‘Unfair Advantage Would Spur Abuse of Exempt Status’, *Boston Globe* (2 March 2014), www.bostonglobe.com/opinion/2014/03/02/unfairadvantage-would-spur-abuse-exempt-status/jKhgXAMJyxaiC3vjb7qGxH/story.html (‘The response to a Hobby Lobby victory will be quick. Companies will experience a Road to Damascus conversion like the Apostle Paul, discovering religious beliefs where they had none before. Companies will assert religious convictions inconsistent with whatever regulation they find obnoxious, and not just Obamacare’s contraceptive requirement’). Some possibilities are clearly more ‘far-fetched’ than others. Eugene Volokh, ‘Prof Michael McConnell (Stanford) on the Hobby Lobby Arguments’, *Washington Post* (27 March 2014), www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments (hereinafter ‘Hobby Lobby Arguments’). Moreover, as Professor McConnell notes, RFRA’s compelling interest prong is likely to police claimed exemptions to antidiscrimination laws. *Ibid.* (‘Courts typically regard antidiscrimination laws, especially with respect to race, as one of the most compelling of governmental interests, superseding free exercise rights’ (citation omitted)).

¹⁶³ Long, above n 22; see also Volokh, ‘Hobby Lobby Arguments’ (quoting Professor McConnell, who predicts that many purported religious objections would fail on the merits under RFRA).

accommodation that is presently working its way through the lower courts, and describes the thorny questions raised by it.

(a) A parade of horrors?

Some contend that after *Hobby Lobby*, at stake is no less than the social progress made on ‘contraception and abortion, sexual freedom and choice, women’s rights, gay rights, [and] racial discrimination’.¹⁶⁴ The Supreme Court attempted to proactively address the parades of horrors in the majority decision. The majority noted that the decision only addressed the Mandate and did not insulate religious claims as to other covered services under the ACA, like vaccinations or blood transfusions.¹⁶⁵ Neither does the decision shield employers who were to claim unlawful discrimination as a religious belief.¹⁶⁶

With an imminent decision by the Supreme Court on whether the federal Constitution guarantees access to marriage by same-sex couples,¹⁶⁷ no one should doubt that a central concern about RFRA going forward is whether it will be used to subvert general anti-discrimination laws.¹⁶⁸ Even if religious believers assert a RFRA defence to anti-discrimination laws, they would almost certainly lose. Nondiscrimination laws serve the compelling interest of ensuring that individuals are not fired for irrelevant characteristics.¹⁶⁹ They serve the compelling interest of permitting lesbians and gays to be served in restaurants and to rent apartments like everyone else.¹⁷⁰ As Professor Michael McConnell notes, RFRA’s compelling interest prong is likely to bar claimed exemptions to antidiscrimination laws: Courts typically regard antidiscrimination laws, especially with respect to race, as one of the most compelling of governmental interests, superseding free exercise rights’.¹⁷¹

True, in order for the government to sustain a regulation or policy, it must satisfy each of RFRA’s strict scrutiny-like prongs, aptly described as ‘strict in theory, fatal in fact’.¹⁷² Yet some scholars, as noted above, dispute whether the RFRA test is ‘really a kind of intermediate scrutiny, more rigorous than

¹⁶⁴ Long, above n 22.

¹⁶⁵ *Hobby Lobby*, 134 S Ct at 2758.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Obergefell v Hodges*, 135 S Ct 1039 (2015). Also consolidated into this case are *DeBoer v Snyder*, 135 S Ct 1040 (2015), *Tanco v Haslam*, 135 S Ct 1040 (2015), and *Bourke v Beshear*, 135 S Ct 1041 (2015).

¹⁶⁸ See Part I above.

¹⁶⁹ Some, like Professor McConnell, believe that claims to be exempt from immunisation mandates, if brought, ‘will be rejected under the compelling interest test’. Volokh, ‘Hobby Lobby Arguments’ (citation omitted).

¹⁷⁰ Trevin Wax, ‘How to treat gays with dignity while respecting religious freedom’, Religion News Service, 31 March 2015, www.religionnews.com/2015/03/31/treat-gays-dignity-respecting-religious-freedom-commentary.

¹⁷¹ Volokh, ‘Hobby Lobby Arguments’ (citation omitted).

¹⁷² *Regents of the Univ of Cal v Bakke*, 438 US 265, 362 (1978) (Brennan J concurring in part and dissenting in part).

“rational basis” but less than the demanding test used to invalidate laws effecting racial discrimination or interfering with core forms of protected speech’.¹⁷³

(b) Claims to be exempt from facilitating the Administration’s proffered accommodation

A harder question after *Hobby Lobby* involves the fate of the litigation brought by the beneficiaries of the Administration’s accommodation – religious nonprofits colleges and organisations, like Wheaton College, a private Christian school in Illinois; the University of Notre Dame; and the Little Sisters of the Poor. These organisations continue to pursue lawsuits precipitated by the Mandate even after the proffered accommodation, taking the contraceptive objection one step further – from a claim to be exempt from paying for objected-to drugs and devices to one of an entitlement not to facilitate the provision by others of such drugs and devices.¹⁷⁴

For example, prior to the Obama Administration’s accommodations, Notre Dame argued that compliance would cause them to ‘*subsidize, facilitate, and/or sponsor* coverage for abortifacients, sterilization services, contraceptives and related counseling services, which are inconsistent with the teaching of the Catholic Church’.¹⁷⁵ After the concessions, the ground for religious objection shifted. Notre Dame now contends that ‘[n]otwithstanding the so-called ‘accommodation’, Notre Dame is still financially penalised or required to pay for, facilitate access to, and/or *become entangled in* the provisions of the objectionable products and services in violation of it sincerely held religious beliefs’.¹⁷⁶ Specifically, Notre Dame maintains that its religious beliefs are burdened by requiring it to contract with a third party to provide contraceptives banned by Catholic doctrine.¹⁷⁷ Other objectors argue that merely accepting the accommodation violates RFRA because it forces them to ‘facilitate’ or ‘trigger’ the provision of insurance coverage for contraceptive services, which they oppose on religious grounds.¹⁷⁸

The Little Sisters of the Poor makes a similar argument, maintaining that to take advantage of the accommodation, it must complete the self-certification form, known as the EBSA Form 700. That Form informs the entity that

¹⁷³ Kent Greenawalt, *The Hobby Lobby Case: Controversial Interpretive Techniques and Standards of Application* (Columbia Public Law Research Paper No 14-421, *10 (2014)).

¹⁷⁴ The gravamen of the *Hobby Lobby* decision seems to rest on the harm to objectors in being forced to pay for objectionable drugs and devices. The decision refers to ‘fund’ or ‘funding’ 12 times and ‘money’ 11 times.

¹⁷⁵ *Univ of Notre Dame v Sebelius, Complaint*, Case No 3:12-cv-00253 (ND Ind, May 21, 2012), www.becketfund.org/wp-content/uploads/2013/11/show_temp-2.pdf (emphasis added).

¹⁷⁶ *Univ of Notre Dame v Sebelius, Complaint*, Case No 3:13-cv-01276 (ND Ind, Dec 3, 2013), www.becketfund.org/wp-content/uploads/2013/12/ND-complaint.pdf (emphasis added).

¹⁷⁷ *Ibid.*

¹⁷⁸ *Geneva Coll v Sec’y US Dep’t of Health & Human Servs*, 778 F 3d 422, 427 (3d Cir 2015) (Feb 11, 2015).

administers Little Sisters' employer-provided healthcare plan, known as a third party administrator (TPA), that Little Sisters has a religious objection; the Form then directs the TPA to make changes to Little Sisters' ERISA plan document. For Little Sisters of the Poor, executing and delivering Form 700 to the TPA would cause them to 'deputize a third party to sin on their behalf'.¹⁷⁹

Wheaton arguably has articulated the clearest explanation of why complicity with wrongdoing if one avails oneself of the accommodation as structured. By 'designating another plan administrator is necessary to "ensure[]" that someone has "legal authority" to make payments to beneficiaries for contraceptive services', Wheaton is involving itself in this process, making it complicit.¹⁸⁰ The government, Wheaton contends, has acknowledged that 'no one would have authority to use its plans with this purpose' without Wheaton's assistance.¹⁸¹ By contrast, if the add-on contraceptive coverage were provided automatically as a result of federal law, then the government would not need Wheaton's involvement in the first place.¹⁸² In short, the law, Wheaton alleges, requires Wheaton's help in order to provide a plan for the government to use in ways that violates Wheaton's religion.¹⁸³

For Wheaton, this is no different than forcing 'a religious hospital ... by law to allow external doctors to perform abortions on the premises' of an objecting institution.¹⁸⁴

'It would not matter if the hospital's own doctors were exempted; such a rule involves the hospital *itself* in actions that violate its religious beliefs. Wheaton is likewise involved because it is Wheaton's plan that the government seeks to use. The government nowhere disputes the accuracy of this analogy.'

This difficult question of complicity came to a head mere hours after *Hobby Lobby* was handed down. The US Court of Appeals for the Eleventh Circuit granted a temporary injunction against Eternal Word Television Network (EWTN) having to file Form 700. Writing a separate opinion, Judge William Pryor charged that the Administration 'turns a blind eye to the undisputed evidence that delivering Form 700 would violate EWTN's religious beliefs'.¹⁸⁵ Although the court expressed no opinion about the merits of the case, Justice Pryor noted in a concurring opinion that EWTN likely would succeed on the merits.¹⁸⁶

¹⁷⁹ *Eternal Word Television Network v Burwell*, 756 F 3d 1339 (11th Cir 2014).

¹⁸⁰ Reply Brief of Plaintiff-Appellant at 6-7, *Wheaton College v Burwell*, No 14-2396 (7th Cir May 29, 2015), www.becketfund.org/wp-content/uploads/2015/06/2015-05-29-Wheaton-7th-Cir-Reply-FILED.pdf (quoting 78 Fed Reg at 39880).

¹⁸¹ *Ibid* at 7.

¹⁸² *Ibid* at 6.

¹⁸³ *Ibid* at 5.

¹⁸⁴ *Ibid* at 31.

¹⁸⁵ *Ibid* at 1340 (Pryor J concurring).

¹⁸⁶ *Ibid*.

Then, just 3 days after handing down *Hobby Lobby*, the Supreme Court granted Wheaton a temporary injunction exempting it from compliance with the Mandate's workaround.¹⁸⁷ In a scathing dissent, Justice Sonia Sotomayor, joined by Justices Ruth Bader Ginsburg and Elena Kagan, criticised the Court for going beyond *Hobby Lobby* – and questioned the validity of Wheaton's claim.¹⁸⁸ 'Let me be absolutely clear: I do not doubt that Wheaton genuinely believes that signing the self-certification form is contrary to its religious beliefs', she wrote. 'But thinking one's religious beliefs are substantially burdened ... does not make it so'.¹⁸⁹

Additionally, in the year since *Hobby Lobby*, decisions in the Sixth¹⁹⁰ and Seventh Circuits¹⁹¹ both denied preliminary injunctions like that granted to Wheaton for religious organisations and the University of Notre Dame, respectively; the injunction would have temporarily exempted them from the Mandate while their lawsuits work their way through the court system. The Supreme Court remanded both cases to the circuits for reconsideration in light of *Hobby Lobby*.¹⁹² Similarly, in April the Court issued a stay prohibiting the Third Circuit's upholding of a new opt-out process from taking effect until further briefings.¹⁹³

Nonetheless, lower courts remain hesitant to extend *Hobby Lobby* to the complicity claim, at least for purposes of injunctive relief. On remand from the Supreme Court, the Seventh Circuit, in a 2–1 ruling, again denied the University of Notre Dame's request for an injunction that would have temporarily exempted the university from offering contraceptive coverage.¹⁹⁴ The panel noted that an injunction would operate to deny thousands of women access to contraceptive coverage.¹⁹⁵ The panel's decision did not reach the merits of Notre Dame's suit over the Mandate.¹⁹⁶

Despite the scepticism of the Courts of Appeals, the Supreme Court's continual remanding of cases post-*Hobby Lobby* may indicate that the Court is more open to the complicity argument.

¹⁸⁷ *Wheaton College v Burwell*, 134 S Ct 2806 (2014).

¹⁸⁸ *Ibid* at 2808 (Sotomayor J dissenting).

¹⁸⁹ *Ibid* at 2812 (Sotomayor J dissenting).

¹⁹⁰ *Michigan Catholic Conference v Burwell*, No 14-701, 2015 WL 1879768 (US Apr 27, 2015).

¹⁹¹ *Univ of Notre Dame v Burwell*, 135 S Ct 1528 (2015).

¹⁹² Tom Coyne, 'Court Won't Exempt Notre Dame from Birth Control Provision', Associated Press, 21 May 2015, www.washingtontimes.com/news/2015/may/20/appeals-court-denies-notre-dame-preliminary-injunc/; Jeff Overley, 'High Court Blocks 3rd Circ. OK Of ACA Birth Control Waiver', Law 360, 16 April 2015, www.law360.com/articles/644169/high-court-blocks-3rd-circ-ok-of-aca-birth-control-waiver.

¹⁹³ *Zubik v Burwell*, 135 S Ct 1544 (2015).

¹⁹⁴ Tom Coyne, 'Court Won't Exempt Notre Dame from Birth Control Provision', Associated Press, 21 May 2015, www.washingtontimes.com/news/2015/may/20/appeals-court-denies-notre-dame-preliminary-injunc/.

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid*.

VI CONCLUSION

While controversy continues to envelope the US Supreme Court's decision in *Burwell v Hobby Lobby Stores*, the result itself should not have come as a surprise. The Obama Administration's generous accommodations for religious nonprofit organisations opposed to the Mandate served as proof-in-principle that a less restrictive means – making an insurer pay, not an objecting organisation – would allow the government to achieve the important goal of providing needed contraceptives to women, free of charge. Ultimately, closely held corporations opposed to paying for drugs and devices they see as ending life received protection for those religious beliefs under the federal RFRA. This occurred because religious nonprofits succeeded through a political process spanning several years to avoid the most direct involvement with the Mandate, actual payment for the mandated coverage. In this sense, political dialogue and political compromise drove the result in *Hobby Lobby*, demonstrating that religious freedom need not come at the expense of important social welfare needs.

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ZANZIBAR

THE CHILDREN'S ACT OF ZANZIBAR (2011): PROCESS, PROGRESS AND POTENTIAL

*Julia Sloth-Nielsen**

Résumé

Ce texte traite de l'adoption et de la portée du Children's Act de Zanzibar, sanctionné et entré en vigueur en 2011. Il s'intéresse sommairement au processus de participation, notamment celle des enfants, ayant conduit à son adoption finale. Nous nous arrêterons plus particulièrement aux articles consacrés au domaine de la justice pour enfants (c'est-à-dire la protection de l'enfance, la délinquance juvénile et le témoignage des enfants). Le texte souligne l'interface entre la loi et l'Islam, qui est la religion dominante à Zanzibar. Il jauge l'impact que pourrait avoir cette nouvelle loi dans la construction d'un Zanzibar plus sensible à la situation des enfants.

I THE ZANZIBARI CONTEXT

Zanzibar comprises two islands (Unguja and Pemba) situated off the coast of mainland Tanzania. It has a brutal history as a central site from which slave traders plied their business. It had a long history under British colonial rule, which ended in 1963. A bloody revolution which led to the overthrow of the Sultan of Zanzibar and his Arab Government took place shortly thereafter in 1964, ending 200 years of Arab rule of Zanzibar as an overseas territory of Oman. The new President negotiated a merger of the archipelago merged with mainland Tanganyika to form the United Republic of Tanzania. However, Zanzibar maintains a separate legislative and parliamentary functional competence over areas which are not constitutionally a central function (these are areas such as police, defence and foreign affairs). Thus, the Revolutionary Government of Zanzibar has the authority to legislate for family law, child protection, and procedural law (amongst others). It also maintains a separate civil and criminal court system from that of mainland Tanzania.

* University of the Western Cape and Leiden University. The chapter is substantially based on a chapter which appeared in Chris Maina Peter (ed) *The Zanzibar Yearbook of Law* vol 3 (Zanzibar Legal Services Centre, Zanzibar, 2013). It is reworked for publication here with the permission of the editor and publishers.

Zanzibar, better known for its idyllic beaches and spectacular tropical waters teeming with beautiful fish, has a population of around one million inhabitants; of these, around half live in the quaint and picturesque capital Stonetown (once home to David Livingstone). It is relatively poorer than mainland Tanzania, and within Zanzibar, Pemba island is relatively poorer than the larger Unguja island. Tourism is the main source of income, along with the export of exotic spices, for which the islands are also renowned.

A crucial historical determinant is the Muslim character of Zanzibar. Even whilst under British colonial rule, the functioning of the Khadi's courts to adjudicate personal law disputes was maintained by the colonisers,¹ and adherence to Islam is strictly observed by 95 per cent or more of the population.

After a long period of incubation, Tanzania mainland adopted the Law of the Child in 2009, to give expression to the norms and principles of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. With this, political support for drafting a Children's Act for Zanzibar also took root.

This chapter reviews the adoption and scope of the Children's Act of Zanzibar which was assented to and came into operation in 2011. It will dwell briefly on the participation processes, including participation by children, in the lead-up to the finalisation of the Act. The substantive provisions that relate (especially) to Justice for Children (ie child protection, children in conflict with the law and child witnesses) will be featured.² The strive towards institutionalising the groundwork for a 'child friendly' Zanzibar will be gauged.

II PROCESS OF DEVELOPING THE ACT

The Children's Act was developed over the period 2009 to 2011 in a consultative process led by the Ministry of Labour, Youth, Women and Children. Working with a 'zero draft' based on examples drawn from legislation in other countries in the region, including mainland Tanzania, South Africa, Malawi and Botswana, a series of workshops was held with government departments, civil society organisations, professional organisations (eg the Zanzibar Women Lawyers Association), national bodies (eg concerned with disability and with HIV), members of the judiciary of the High Court, and

¹ Abdulkader Hassim Abdulkader 'Reforming and retreating: British policies on transforming the administration of Islamic Law and its institutions in the Busa'idi Sultanate 1890–1963' Unpublished LLD thesis, University of the Western Cape, 2008.

² This chapter therefore does not deal with foster care, approved schools, residential establishments and day care centres, special measures of protection (mainly concerning child labour), consent to medical intervention, and kafalah and adoption. *Kafalah* is the Islamic institution for transferring the care of a child to an adult guardian, although legally the tie with birth parents is not severed, nor does the child adopt the name of the guardian. See Art 20 UNCRC and M Assim and J Sloth-Nielsen 'Kafalah as an alternative form of care' (2014) 2 African Human Rights Law Journal 322.

representatives of the Khadi's courts, which adjudicate Muslim personal law disputes. A key event to lay the ground work for eventual support of a child rights-based law was a dedicated one-day workshop which was convened with Muslim religious leaders in order to probe the intersections between Islam and children's rights. Drawing on texts from the Koran, a study on the topic undertaken by Al-Azhar University in Egypt for UNICEF, and other published work by Islamic scholars concerned with children's rights, the workshop led to the understanding that children's rights feature prominently in Islam, and that coherence between international treaty precepts and the Koran can be identified. This workshop was probably crucial to paving the way for the passing of the Act by the Revolutionary Government of Zanzibar.

A unique feature of the process was the far-reaching and dedicated child consultation process that took place, led by Save the Children Sweden on behalf of the Ministry responsible for spearheading the drafting of the law. This was to be the first time that children in Zanzibar had participated in law or policy processes.

A team from Save the Children worked on developing a common set of questions and on training facilitators to the requisite standards and in the necessary techniques of focus group work with children. Facilitators drawn from local non-governmental organisations and communities were carefully selected and trained. The collaborative Zanzibari strategy for engaging children in the reform process commenced with utilising existing child participation structures, namely the Children's Advisory Boards (CABs), although these were rather new, having been established only slightly earlier in 2009. An ambitious plan was envisaged: that a group of children would be consulted in each and every shehia (the lowest administrative unit at village level) on the islands of both Unguja and Pemba – in other words, reaching to children in their own communities and on such a scale that a truly national picture could emerge. It was subsequently suggested that the consultation with children should be led by children. Consequently, the CABs trained children from the Children's Council to lead the consultations with the support of adults.

In total, 514 children drawn from the 100 shehias over 10 districts on the two islands of Unguja and Pemba took part in the consultations. The children were stratified in gender, age and vulnerable groups, though some were young adults of between 18 and 21 years. The children were consulted through either focus groups, featuring peer-to-peer awareness-raising and information-sharing activities, or through targeted individual interviews, capturing the testimony of 60 vulnerable and most-at-risk children in 13 groups. Three overarching themes guided the consultations, namely child protection, discrimination and participation.³

³ Save the Children et al *Capturing children's views on the Children's Bill 2010: National Child Consultation programme in Zanzibar* (Save the Children, Zanzibar, 2010) pp 12–13 (available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/3700.pdf>, accessed 29 May 2015).

Some of the key conclusions reached at the end of the consultations with children, which informed the draft Bill were as follows:

- on child protection, 85 per cent of the children consulted were of the view that a law protecting their rights and interests was vital, while 92 per cent felt that the state had a responsibility to protect vulnerable children and children in need of care and protection;
- on corporal punishment, 77 per cent of the children described it as harmful, arbitrary and meaningless, while over 80 per cent recommended that it should be banned in schools and alternative forms of discipline promoted; and
- on the best interest of the child principle, most (90 per cent) of the children held the belief that every child in Zanzibar had a right to live free from discrimination. They also acknowledged that in addition to enjoying their rights, children had duties towards their families and communities; 82 per cent of the children were of the view that children had a right to participate in decisions affecting their lives.

The relatively small and geographically accessible population clustered on Pemba and Unguja islands undoubtedly contributed to the success of the strategy adopted in consulting children about the law, and the extensive consultation process in Zanzibar has been hailed in the region as a good practice example. Zanzibari children's voices were exposed to their own community for the first time, and the initiative gave a huge boost to the nascent CABs.

III SCOPE OF THE ACT AND FOUNDING PRINCIPLES

The Act comprises 139 substantive sections, some divided into many subsections, and these sections appear in eight parts. The first part, Part I, contains the short title and the interpretations section.

Substantively, the Act commences with the domestication of the most important children's rights derived from the international Convention on the Rights of the Child and the regional treaty, the African Children's Charter, in Part II, which is titled best interests and rights of a child.⁴ These comprise 12 discrete rights, including the best interests of the child principle, the principle of non-discrimination, child participation and the right to be provided with certain conditions of living. The formulated rights are not on all fours, or copied directly, from traditional formulations, but are tailored to the needs and requirements of the Zanzibari community.⁵ So in relation to the right to registration of birth (s 8(1)), s 8(2) continues to require health authorities and any other relevant person or agency to cooperate in measures to secure the

⁴ Both treaties have been ratified by the United Republic of Tanzania.

⁵ However, s 4 which provides criteria for the determination of the best interests of the child appears to draw largely for the formulation in the South African Children's Act 38 of 2005.

registration of all births. This provision holds the potential to advance the rate of birth registration in so far as it lays the basis for health authorities to play an explicit role in advancing notification of births. Section 9 provides for the child's entitlement to live with parents, guardians and families, and for the right to grow up in a caring and peaceful environment; a child separated from a parent shall have the right to maintain personal relations and direct contact with both parents on a regular basis, except where this is not in the best interests of the child.⁶

The provisions of section 10 establish children's right to (inter alia) nutrition, education (including religious education), shelter, appropriate clothing, appropriate care and protection, and sport, all of which are the duty of parents to secure within their available resources. However, in line with the provision of Art 20 of the African Charter on the Rights and Welfare of the Child (1990), s 10(3) provides that government may, in accordance with its national means, if needs be together with partners, provide assistance to parents in cases of need by providing material assistance and support. The last subsection in this part provides that a child of 16 years or older has the right to relevant information concerning health care and healthy development, including appropriate information related to HIV.⁷ This age threshold for a right of access to health care information seems unusually high, and can be regarded as contrary to the advice of the Committee on the Rights of the Child in General Comment no 4 (Adolescent Sexual Health and the Rights and the Child, 2004) as well as General Comment no 3 (HIV Aids and the Rights of the Child, 2003). Subsection (6) of the same section provides (uncommonly) for the right of the child who has been sexually abused to be medically examined immediately after reporting the alleged commission of an offence to the police. Casting this as a right of the child is rarely encountered, though undoubtedly a wise and positive move.

Child abuse by any person having care of custody of a child is criminalised in s 15(a), with sexual abuse by any person also made an offence in s 15(b). Female circumcision is included expressly as a form of abuse. It is unclear the extent to which this overlaps with, or differs from, general sexual offences laws

⁶ Section 9(4).

⁷ See also further Part X of the Act, titled 'Consent to medical intervention and HIV-Testing'. This part affirms the age of 16 as the age at which a child can consent to medical intervention upon him or herself, also for consent to surgical procedures (s 111(1)(a) and (b)) provided that in the latter case the child must be duly assisted by his parent or guardian. Section 111(2) permits a child who is 16 years or older to furnish consent for an HIV test upon himself or herself, or if the child is under the age of 16 years, he or she may consent provided that the child is of sufficient maturity to understand the benefits, risks and effects of such a test (s 111(2)(a)(i) and (iii)). Both for generalised consent to medical treatment and for consent to HIV testing, the age threshold of 16 is high in the modern era, where increasing recognition has been given to children's evolving capacity and ability to make reasoned decisions at a much younger age. It is, however, reflective of the conservative nature of the community of Zanzibar.

that apply in Zanzibar,⁸ but as the provision is drafted, the offence created in the Children's Act is not limited to sexual offences committed by parents or care-givers, but by anyone.

Some of the other principles in this part are also accompanied by a penalty provision, which provides for a criminal sanction for the contravention of certain of its provisions, namely ss 6,⁹ 11,¹⁰ 13,¹¹ and 14(1).¹²

As is required by the African Children's Charter in its Art 31, the final principle concerns the general duties of the child. These are couched in words that are more or less identical to those found in the treaty, with one addition, namely the duty to respect and abide by the laws of the land. The Charter limitation in the preamble to Art 31 is included in a proviso to s 17: namely that a child's responsibilities are dependent on the age, maturity, stage of development and ability of the child, and that they are moreover subject to the limitations contained in the Act itself (eg for instance the part concerning child labour).

IV ESTABLISHMENT AND JURISDICTION OF THE CHILDREN'S COURT

Part III of the Act provides the legal framework for the establishment of a specialised justice for children system founded on a dedicated children's court for each region. A children's court has in fact been set up in Stonetown, with

⁸ For instance in the Penal Code or in a dedicated Sexual Offences Act.

⁹ Section 6(1) provides for the child's right to live a life free of discrimination, and s 6(2) provides a series of listed grounds upon which discrimination is outlawed (gender, race, colour, disability, health status (including HIV status), rural or urban background, birth etc). This may be the first time that discrimination on the basis of HIV status as been expressly included in a non-discrimination clause.

¹⁰ Section 11(1) provides that no person, institution, authority or other body shall treat a child with a disability in a degrading manner. Section 11(2) provides for the right of the child with disabilities to special care and protection and to have effective access to and receive inclusive and non-discriminatory education, health services etc. The elaborate formulation of s 11(2)'s provisions concerning children with disabilities appears to be unparalleled in children's legislation in the subregion, including by comparison to the South African Children's Act 38 of 2005, which has been hailed as unusually disability-friendly.

¹¹ Section 13 provides that (subject to s 18(2)), upon the death of a child's parent, a child shall not be deprived from the inheritance of his deceased parents.

¹² Section 14(1) contains the well-known prohibition on torture, cruel and inhuman or degrading treatment or punishment. Added to the standard phrasing is the addition of a prohibition of violence (*eo nomine*), which accords well with the current thrust on ending all forms of violence against children (<https://srsg.violenceagainstchildren.org>). The wording also includes a prohibition on any cultural or traditional practice which dehumanises or is injurious to the child's physical and mental well-being. Section 14(2) however provides that the prohibition on all forms of violence against children does not encompass parental discipline, as the provision permits parents to discipline their children which 'shall not amount to injury to the child's physical or mental well being'. Equally, it is clear that corporal punishment in all other settings – alternative care facilities, education facilities – is now outlawed on pain of criminal sanction. Children's views on the effects of corporal punishment articulated during the child consultation process were clearly swept aside in the formulation of this provision.

effect from July 2013, and a regional magistrate designated by the Chief Justice to serve as presiding officer. Separate and child friendly facilities have been put in place: the court is separated from the usual courts in the building, with child friendly waiting areas and aids for giving testimony have been installed. There is a second children's court on Pemba island now.

The Act provides that the court shall have jurisdiction to make care and protection orders, maintenance orders, custody, guardianship and access orders, orders of parentage,¹³ and additionally the court has jurisdiction to hear criminal charges allegedly committed by young persons under the age of 18, save for the offences of murder, manslaughter, treason or rape.¹⁴

An important exclusion from the jurisdiction of the children's court is contained in s 18(2), which preserves the jurisdiction of the Khadi's courts as set out in s 6 of the Khadi's Courts Act, no 3 of 1985; more specifically, this entails that Khadi's courts' determination of personal status, marriage, divorce and maintenance, and inheritance proceedings concerning children born of Muslim parents shall be unaffected by the equivalent provisions of the Children's Act. This does not exclude the jurisdiction of the children's court in all non-criminal matters, as is evident from the section which follows, s 18(2)(b). This subsection provides that where a non-criminal matter (ie the orders specified in s 18(1)(a), for instance a care and protection order) involves parents subscribing to the Islamic religion, the children's court must be assisted by a suitably qualified person of that religion to ensure that orders made are consistent with the Muslim faith.

However, since divorce and its aftermath for Muslim parents is to be determined by religious courts, equally guardianship, custody, access and maintenance will for the greater part not be dealt with in the children's court, given that the overwhelming majority of the population of Zanzibar is Muslim. However, the jurisdiction to deal with child protection matters involving Muslim children is evidently retained by the children's court, even if it involves the court making orders that affect care, custody and access to children. Parentage determination might also be the exclusive preserve of the children's court since this does not appear to be a function of the Khadi's courts, unless it is understood to be part of the determination of personal status.¹⁵

Section 18(3) lays the basis for the development of child friendly procedures and a specialised children's court, in so far as it enables the Chief Justice to promulgate regulations to designate premises used as a primary court to function as a children's court, and to designate district court magistrates to entertain cases involving children. Regulations are contemplated concerning the

¹³ Part VI of the Act deals with parentage, custody, guardianship, access and maintenance. For reasons of space the details will not be discussed in this chapter. It must be borne in mind that the provisions will apply by and large only to persons not of the Muslim faith.

¹⁴ Section 18(1)(a) and (b). These offences must be tried in the High Court.

¹⁵ However, s 18(2)(c) clarifies that proceedings may be instituted in one court only where there is a choice of forum.

layout of the children's court or a court functioning as such, the informality of proceedings, the attire of court officials and any other measure aimed at contributing to putting children at ease. These regulations were developed in a consultative process in 2013, and have been submitted to the Chief Justice for consideration and gazetting.¹⁶

Section 18(4) provides that every children's court shall, in addition to the presiding magistrate, sit with at least two other persons (appointed by the Chief Justice) who have special knowledge in child welfare or child psychology, or who have been actively involved in health, education or welfare activities pertaining to children. In practice, officials from the Department of Social Welfare serve this role, and sit en banc with the regional magistrate in the children's court in Stonetown in both civil and criminal cases. The extended bench is, however, subject to section 18(5): according to this subsection the regional magistrate is empowered to sit alone when minor criminal charges concerning children are at stake. Children court proceedings are to be held in camera,¹⁷ must take the best interests of the child as their primary concern, and are authorised to make a range of necessary orders and to vary or amend these or make auxiliary orders.¹⁸ Appeals, which must be made within 30 days, lie to the High Court.¹⁹

V CARE AND PROTECTION OF CHILDREN

Part IV of the Act provides the first foundation for a child care and protection system, outlining in s 19(1) when a child could be regarded as being in need of care and protection. Examples include where a child is orphaned or abandoned or has insufficient care or support; or lives or works on the streets or begs for a living; is in a state of physical or mental neglect; is an unaccompanied migrant or refugee; is chronically or terminally ill including a child affected by or infected with HIV/Aids; who lacks a suitable care-giver and who is being or is likely to be maltreated, neglected or abused. A total of 11 situations are included. Section 19(2) provides for a list of circumstances in which a child may (after investigation) be found to be in need of care and protection (such as children living in child-headed households, child victims of child labour, and children living in a violent family environment, including a child named in a protection order issued by a court). The finding in these instances is, however, discretionary and dependent on the individual circumstances, as a care and protection order may not ultimately be warranted.

Section 20 sets up a system of mandatory reporting²⁰ of child abuse and neglect; this duty is imposed upon a list of obligated reporters who, in the

¹⁶ The author was the consultant who oversaw the process of development of these regulations.

¹⁷ Section 18(8), with exceptions for parents or guardians and officials whose presence is necessary for the case.

¹⁸ See s 18(9) for a broad list of functions and powers.

¹⁹ Section 18(10), (11), and (12).

²⁰ For a broad overview of the history of mandatory and community reporting systems, see J

course of the exercise of their duties, may encounter evidence of child abuse and neglect.²¹ The statutory standard is a 'reasonable belief that a child's rights are being significantly infringed including abuse of a child or because a child's parent or guardian is able, but refuses or neglects, to provide the child with the conditions of living set out in section 10 of the Act'. The obligated reporters are then compelled to report this to the Director of Social Welfare, a welfare officer, a police station or the sheha.²² This entrenches a response potentially at local level, as the sheha is the lowest level of district administration. Provision is made for an allegation of abuse or neglect made to a police station or a sheha to be reported in the prescribed manner forthwith (but not later than within 24 hours) to the relevant welfare officer.²³ This is to trigger a social welfare response to the report received.

In s 20(3), additional to mandatory reporting by professionals, provision is made for so-called community reporting, ie any member of the community (including a child) who reasonably believes that a child is or may be in need of care and protection may report this to a person mentioned above. No sanction for non-reporting is (obviously) provided.

Nor, for that matter, is a criminal sanction provided for professionals who fail to report under s 20(1), which may be unusual, as the threat of penal sanctions is the traditional way in which mandatory reporting laws have been given teeth (at least in theory).²⁴ Instead, s 20(5) provides that contraventions may render a professional subject to the disciplinary provisions of their respective professional codes of conduct.

Section 21 of the Act further entrenches the nascent child protection system, by providing that the welfare officer must, within 14 days of the receipt of the report made under s 20, conduct a risk assessment in relation to the child. Risk assessment is a process of investigation which is intended to determine principally whether the child is in need of immediate protective services requiring an application to the children's court.²⁵ If a court application is not required, other measures such as requiring the parents or guardians to comply with certain measures can be discussed.²⁶ The specific actions of the welfare officer acting with the consent of the parents or guardians include advice and

Sloth-Nielsen 'Chapter 7: Child Protection' in A Skelton and CJ Davel, *Commentary on the Children's Act 38 of 2005* (Juta and Co, Cape Town, 2007 with looseleaf updates).

²¹ Mentioned are a school or madrasa teacher, doctor or medical officer, occupational therapist, staff at a pre-school or place of safety, legal practitioner and so forth.

²² Reports made in good faith are exempt from civil liability in case of mistake, and the identity of the reporter is confidential: s 20(4).

²³ Section 20(2).

²⁴ B Mathews 'Exploring the contested role of mandatory reporting laws in the identification of severe child abuse and neglect' in M Freeman (ed), *Current Legal Issues Volume 14: Law and Childhood Studies* (Oxford, Oxford University Press, 2012) pp 302–338.

²⁵ Section 21(2)(a). If the commission of an offence is suspected, this must be reported to the police: s 21(4).

²⁶ The Regulations on Child Protection, developed in 2012, provide for the convening of a case conference with relevant stakeholders by the welfare officer in order to develop a plan to advance the protection of the child.

counselling, placement in foster care or in an institution, organising medical care (including mental health care), organising disability aids, and the provision of education or training for the child.

The children's court, when seized of the matter, is empowered to make a variety of orders, including requiring parents or guardians to give an undertaking to exercise proper care and guardianship.²⁷ An emergency protection order issued in terms of s 22 can be utilised to authorise a welfare officer (if needs be accompanied by a member of the police) to enter premises to search for and remove a child who is in need of immediate emergency protection or is exposed to a 'substantial risk of imminent harm'.²⁸ In such instances, the child must appear before a children's court as soon as possible,²⁹ but not later than within 7 days of the emergency removal.³⁰ A child's parent or guardian is to be informed as soon as possible about the removal of the child, and the child shall be permitted to have contact with them unless that is not in the best interests of the child.³¹ Emergency protection orders may be renewed for 7 days at a time, but the finite period for such extension is 30 days.³²

A third order that the children's court can make is a supervision order, which does not interfere with the legal rights of parents, but which aims to prevent harm to the child and to take reasonable steps to promote the best interests of the child whilst enabling the child to remain in the family home and community.³³ Such supervision order can only be made after consideration of a social welfare report as provided for in s 27 of the Act. The order can place the child under the supervision of a welfare officer or any fit and proper person in the community,³⁴ where the placement is with a member of the community, the welfare officer must satisfy himself or herself on a regular basis that the supervision is in the best interests of the child, and must take responsibility for all reports, applications and reviews that are required.³⁵ The normal period of a supervision order is envisaged to be one year, although extensions are possible on receipt of a written social worker's report to the effect that the child continues to be at risk and that further extension of the order is in the child's best interests.³⁶

²⁷ Section 21(2)(b)(ii).

²⁸ Section 22(1).

²⁹ Section 22(4).

³⁰ This is in line with Art 25 of the UN Convention on the Rights of the Child, which provides for periodic review of placement of children who have been removed by the competent authority.

³¹ Section 22(5).

³² Section 22(6). The child's parent or guardian is entitled to be heard during any application for renewal of an emergency protection order: s 22(7).

³³ In line with the UN Guidelines on Children in Alternative Care (2009), which emphasise prevention of children entering alternative care in the first place.

³⁴ Section 23(7).

³⁵ Section 23(6).

³⁶ Sections 23(7) and (8).

A fourth possibility is a care order in circumstances where a supervision order would not be sufficient to secure the care and protection of that child.³⁷ Such an order removes the child from any situation where the child is suffering (or is likely to suffer) harm; such an order then also transfers the parental rights to the welfare officer or to such other person determined by the court. In line with the suitability principle of the UN Guidelines on Alternative Care (2009), provision is made for placement with another parent, guardian or relative; an approved foster parent; a prospective adoptive parent; a fit and proper person; and finally an approved residential establishment.³⁸ However, the criteria for issuing a care order are strict: s 24(4) confirms that all possible and practicable methods of protecting the child must have been tried without success, that the child is suffering from or is likely to suffer from harm, and transferring parental rights is necessary to protect the child (the 'necessity principle' of the UN Guidelines on Alternative Care).³⁹

Care orders have an inbuilt limitation, in so far as the initial order may not be imposed for a period of more than 3 years, to allow for the possibility of reunification of the child with his or her family, or for permanent placement.

Prohibition orders are provided for next, in s 25. These can be part of proceedings for a supervision or care order, and prohibit a named person (including potentially a care-giver) from having contact with a child. Such order must be necessary for the protection of the child and to safeguard the child's best interests and its duration should be specified. Contravention of the terms of a prohibition order is a criminal offence.

Section 26 provides for a wide variety of additional orders that a children's court is empowered to make, such as an order instructing a parent or guardian to undergo professional counselling or participate in mediation or another appropriate problem-solving forum; instructing the child to participate in a professional assessment; and instructing a person to undergo a specified skills development, education, training, treatment or health rehabilitation programme, to cite a selection of the variety provided for.

Social welfare reports are mandatory before a children's court can make a care order, a supervision order or a prohibition order. They must be undertaken after home visits and interviews with the appropriate persons (parents' guardians or relatives), and the views of the child capable of forming a view must be ascertained and reflected in the report, whether the welfare officer agrees with the views of the child or not. Motivated solutions to the action recommended to be adopted by the court must be included in the report, and

³⁷ Section 24.

³⁸ Section 24(3). There are dedicated Parts of the Act which regulate residential establishments and foster care; Part XII and Part VII respectively. They are not discussed in detail in the body of this work.

³⁹ Section 24(5). A number of further guiding principles are provided, such as the desirability of keeping siblings together, the desirability of continuity in a child's upbringing, and importantly, the views of the child: s 24(6).

the court is obliged to take into account the information contained in the report. If the court is not satisfied with the recommendation of the welfare officer, it must record reasons for deviating from these recommendations.

Where a child is as a last resort separated from his or her parents, guardians or care-givers, the parental responsibility for that child is transferred to the person in charge of the approved residential establishment or foster parent with whom the child is placed. This does not mean that parental rights have been transferred, however (s 32(2)). It means that the child's well-being and development must be promoted by the duty bearer, including planning for reunification where this is consistent with the child's best interests, encouraging the child to have contact with parents, relatives and friends, and encouraging independence and self-reliance where the child is unable to return to his parents. Removing a child without reasonable cause from a location where a child has been placed by order of court constitutes a criminal offence.

VI CHILDREN IN CONFLICT WITH THE LAW

As is the case with a number of recent African children's statutes (Malawi, Lesotho, Sierra Leone), the Zanzibar Children's Act combines the protection of children from abuse and neglect with detailed provisions concerning children in conflict with the law. Setting a minimum age of criminal responsibility at 12 years,⁴⁰ but retaining a rebuttable presumption for children aged between 12 and 14 years,⁴¹ the Act provides for the possibility of an evaluation of the criminal capacity of the child by a suitably qualified expert at the behest of the Director of Public Prosecutions or the child's legal representative.⁴² Section 36 of the Act provides for the determination of age where it appears to a court that the person appearing before the court is a child. Documentary evidence may be called for, and medical examinations ordered for this purpose.

The Act contains limits on the use of deprivation of liberty (arrest) – unless there are compelling reasons justifying an arrest or the offence is in the process of being committed, arrest may not be used where the offence in question is one contemplated in Sch 1.⁴³ Furthermore, the conduct of police officials effecting the arrest of the child must include informing the child of his or her rights, including the right to obtain legal assistance, explaining the procedures to be followed in terms of this Act, informing the child of the right to parental assistance and notifying the child's parent or an appropriate adult of the arrest,

⁴⁰ This is consistent with the age proposed in CRC Committee General Comment no 10 (Child Rights in Juvenile Justice) (2007).

⁴¹ To rebut the presumption it must be proved that at the time of the act or omission, the child had the capacity to know that he or she ought not to have acted thus or made the omission.

⁴² Section 35(3).

⁴³ Schedule 1 offences include theft, fraud, robbery where not aggravating circumstances exist, malicious injury to property, common assault, blasphemy, crimen iniuria and defamation, trespass, and any statutory offence where the maximum penalty determined by statute does not exceed one year of imprisonment.

where circumstances permit and they can be located.⁴⁴ This must happen as soon as practicable after arrest, but parents and a probation officer must be notified no later than 24 hours after such arrest.

Where an offence listed in Sch 1 is at stake, the police are empowered, instead of initiating a prosecution against a child, to issue a caution to the child not to re-offend. Such a diversionary caution may be used as evidence against a child should the child later re-offend.

Section 39(2) contains provisions providing for the release of a child who has been apprehended into the care of parents, guardians or family members, with or without sureties. This again promotes the principle of restriction of liberty as a last resort and for the shortest period of time, as provided for in Art 37(b) of the United Nations Convention on the Rights of the Child. If not released, the child may be detained in a children's remand home or place of safety (but not in a police station), unless the police official certifies that it is impracticable or that it would place the child at risk to be so detained in that alternative setting.⁴⁵ A certificate that it was necessary to detain the child in police custody must be produced to the children's court, following the example of South Africa's Child Justice Act no 75 of 2008 which provides similarly. The rights of children who are detained in police custody to be kept separately from adults, and to have access to adequate food, water, bedding and medical care are enshrined in s 40(2).

It is also mandated that the child be released into the care of a parent, guardian or other responsible person (with or without sureties) after the child appears in court.⁴⁶ A child may also be remanded to await the finalisation of charges in a children's remand home or a place of safety, and, only if a child is 16 years or older and poses a threat to any person, can the child be remanded to an Offender Re-education Centre to await completion of the criminal matter.

It must be pointed out that, as matters stand at present, there are no (formal) alternatives to detention of children in police custody or in the local Offender Re-education Centre, which is actually the local (adult) prison. An assessment of the child justice system in Zanzibar conducted in December 2013⁴⁷ notes that in practice custodial measures (both pre-trial and post-conviction) are utilised for children, frequently because of their family background or lack of a fixed address, rather than due to the seriousness of the offence.⁴⁸ In 2011, 15 children were sentenced to detention upon conviction, whilst nearly five times that number were detained on remand. For 2012, the equivalent figures were 11 sentenced, and 61 detained in the pre-trial phase. However, it was also recorded in early 2014 that, since the establishment of the children's court in

⁴⁴ Section 37(3) and s 38(a).

⁴⁵ Section 40(1)(a)-(c).

⁴⁶ Section 45.

⁴⁷ Ministry of Empowerment, Social Welfare, Youth, Women, and Children, UNICEF and Save the Children (draft of December 2013 on file with the author).

⁴⁸ Draft Report (note 47 above), p 69.

Unguga, no child had been sentenced to imprisonment: the court has utilised alternatives through referrals to social welfare services. At the same time, whilst welcoming the introduction of a more child friendly justice system, it is true that:⁴⁹

‘significant attention needs to be focussed on providing support to the Department of Social Welfare in building the financial technical and human resources required to provide appropriate alternatives to detention for children in trouble with the law if this is to be sustained.’

This will entail the development of diversion options, as well as the sourcing of placement options for children in conflict with the law who do not have families to whom they can be released. That these should be foster placements or small cottage type facilities with minimal deprivation of liberty seems obvious, given the relatively low numbers of children in conflict with the law in Zanzibar likely to need such accommodation. The lack of current facilities should not be seen as an invitation to build expensive prison-like facilities.⁵⁰

As is the case in comparable new children’s laws in the region,⁵¹ pre-trial assessment by a probation officer or a social welfare officer is mandatory (see s 41). The objectives of the assessment are fully detailed, such as establishing whether the child in conflict with the law is potentially a child in need of care and protection, gathering background information on the child, his or her family and on other material circumstances likely to be of relevance to the court, and formulating recommendations on release, detention or placement and on diversion. At workshops held in Zanzibar in November and December 2013, it was established that such pre-trial assessments are not yet taking place, although background information about the child’s circumstances and the circumstances pertaining to the commission of the offence are collated and presented as pre-sentence reports to the presiding officer. Failure to implement pre-trial assessment will inevitably limit access to diversion and the avoidance of formal criminal proceedings, which has now become firmly entrenched as a norm of international law.⁵²

Diversion is indeed comprehensively provided for in the new legislation, and a long list of possible diversion options, modelled on the South African legislation, are provided for. These include an apology, a caution, restitution, community service, referral to a family group conference or for victim offender

⁴⁹ Draft Report (note 47 above), p 70.

⁵⁰ See for an overview of some current debates around alternatives for youth incarceration J Sloth-Nielsen ‘Deprivation of Liberty as a “Last resort” and for the “shortest appropriate period of time”: How far have we come? And can we do better?’ 2013 (3) South African Journal on Criminal Justice 316–336.

⁵¹ Notably the South African Child Justice Act 75 of 2008.

⁵² See Art 40(3) of the Convention on the Rights of the Child, and General Comment no 7 (Child Rights in Juvenile Justice) of the Committee on the Rights of the Child (2010).

mediation and referral for a counselling or therapy.⁵³ The child and, if available, his or her parent or guardian must consent in writing to the diversion option to be imposed.⁵⁴

Several sections detail at length the due process or fair trial rights applicable in children's court proceedings, as well as the manner in which information must be furnished to the child in order to ensure his or her participation in the proceedings.⁵⁵

Finally, s 47 spells out the sentencing regime available to judicial officers where a matter involving a child has not been diverted. An impressive array of options is provided: these include dismissing the charges after advice or admonition to the child;⁵⁶ dismissing the charge and directing the child to participate in group counselling or similar activities (such as life skills programmes); discharging the child and releasing him or her into the care of parents, guardians, a responsible person or charitable institution able to take care of the child; supervision or probation (which is also accompanied by a discharge) for a period not exceeding 3 years;⁵⁷ employing any diversion options previously listed; ordering the payment of a fine, damages, or compensation if the child is in a position to do so;⁵⁸ ordering the child to perform community service; ordering the parent or guardian to give an undertaking that will secure the child's good behaviour; and ordering the child to be placed in an educational institution or on a vocational training programme.

More restrictive than the above orders – which seek to minimise deprivation of liberty which result in the child being discharged, thereby ensuring that the child will not have a permanent criminal record against him or her⁵⁹ – are the

⁵³ Section 42(2).

⁵⁴ This is to ensure that the right to plead not guilty and have the criminal matter proved by the state is respected.

⁵⁵ See the important role accorded the provision of information in the Council of Europe Guidelines on Child Friendly Justice (2010), echoed in the Guidelines for Action on Children in Justice Systems in Africa (2011) (available at <https://sgsrviolence.org>), which were endorsed by the African Committee of Experts on the Rights and Welfare of the Child in 2012.

⁵⁶ It is clear that this option must be accompanied by an assessment or pre-sentence report; counsel may also be provided to the parent of the child.

⁵⁷ In practice probation seems to be an option that the children's court prefers, as its first three sentences involved periods of probation (2 years and 1 year respectively). The Draft Assessment Report (note 47 above at p 68) points out that the exact role of the probation officer in monitoring good conduct is not yet clear. How many visits must take place, what the role of the probation officer is in working towards rehabilitation and providing support services, and so forth must still be fleshed out.

⁵⁸ It is worthy of note that a significant proportion of the non-economic offences coming to the attention of the children's court seem to involve consensual sexual activity between young people, which is charged as the offence of abduction. These offences (which in the view of the author could be tantamount to status offences, in so far as they criminalise acts which are not criminal if committed by persons over 18 years) could ideally be resolved through one of these alternatives already referred to. For a recent South African decision in point, see the Constitutional Court decision in *Teddy Bear Clinic and others v Minister for Justice and Constitutional Development* 2013 ZACC 35.

⁵⁹ See s 47(3): 'an order contemplated in subsection 1 of this section amounts to the diversion of

orders which follow. These include placement in an Approved School, if such a school is established in terms of Part XI of the Act,⁶⁰ and as a last resort, a sentence of imprisonment in an Offender Re-education Centre, provided that the child has attained the age of 16 years and has been convicted of the commission of an offence listed in the second schedule to the Act, or is a repeat offender in respect of a Sch 1 offence.⁶¹ Referral to an Approved School, where a child is above 16 years of age, is for a period not exceeding 2 years, whilst in the case of any other child, the order ceases when the child ceases to be a child, ie at 18 years.⁶² The order may not be made unless there is a vacancy, and the committal must be reviewed by the Court annually to determine whether detention continues to remain necessary and in the child's best interests.⁶³ This annual review must include reports from the Responsible Officer of the Approved School and from the social welfare officer.⁶⁴

In full compliance with international law, both corporal punishment as a judicial sanction and the death penalty are outlawed.

It is clear that the legislation sets a solid framework for the development of a child justice system for children in conflict with the law that is appropriate to the economic and prevailing socio-political conditions in Zanzibar. What now needs to happen is a concerted effort to upskill all stakeholders, commencing with the police who are the point of first contact with the criminal justice system, and who can play a valuable role in developing front line diversion. Training for probation officers is also warranted. An appropriate case

the child away from the criminal justice system, except for an order that involves the payment of a fine or the orders contemplated in subsections (g) [community service], (j) [placement in an Approved School] and (k) [sentencing to imprisonment]'. See further s 52(1) which provides that no child shall incur a criminal record for a diversion or a conviction and sentence imposed in terms of this Part other than for a conviction and sentence imposed in respect of an offence listed in the second schedule of the Act. This in practice moves Zanzibar quite close to the current call to separate the concept of responsibility from the concept of criminalisation (see www.crin.org/docs/Stop_Making_Children_Criminals.pdf) in so far as only a highly limited number of children in the system will get a criminal record.

⁶⁰ There is not one at the moment. See J Sloth Nielsen et al 'Surveying the research landscape for child law reform in Africa', African Child Policy Forum, 2007 for a plea that trenchant discussion about the need for, purposes and objects of such alternative institutions need to take place prior to their establishment. Their relevance in the African context seems dubious, and the skills they impart are often reminiscent of colonial times and unsuited to the modern era. Furthermore, their potential to becoming sites of violence and abuse is legendary, and often, governments lack the fiscal means to maintain them and cover running costs on an ongoing basis.

⁶¹ Schedule 2 offences include serious offences such as murder, manslaughter, abduction, kidnapping, robbery with aggravating circumstance or a firearm, rape and the commission of any unlawful sexual offence, trafficking of persons, offences relating to arms, ammunition, firearms and explosives, and statutory offences with a maximum penalty in excess of one-year imprisonment as provided by that statute.

⁶² The Court is empowered to impose a shorter period if it deems it expedient to do so: s 47(7).

⁶³ This is a particularly welcome provision, as it allows a court to maintain an ongoing oversight role in the well-being of the child, and which fulfils Art 25 of the UN Convention on the Rights of the Child which requires periodic monitoring of orders placing a child in alternative care.

⁶⁴ It would be ideal if it was specified, too, that the Court must hear the voice of the child in conducting any such annual review of placement.

management system must be instituted in the children's court to expedite the finalisation of cases which cannot be diverted. Basic diversion options – at minimum a life skills programme and community service – would be useful in dealing with cases in Stonetown where sufficient numbers of children pass through the system to warrant the investment. Judicial officers in other regions, having been sensitised to the details of the Act's provisions, can be encouraged to develop local diversion options building on the variety permitted in the Act. Finally, a coordinating committee (comprising all stakeholders including staff at the Offender Re-education Centre) should meet at least quarterly, and have at their disposal up-to-date data indicating progress towards implementation.⁶⁵

VII CHILD WITNESSES

In line with international best practice,⁶⁶ the Act contains some crucial new provisions aimed at reducing the hostile environment of the court for child witnesses. These provisions must be seen in conjunction with the Zanzibar Evidence Act, which at the time of writing this chapter was under review. The provisions are not contained in a separate part, but appear in s 49 at the end of Part V on children in conflict with the law.

No minimum age is set for children to provide testimony: a child may testify provided such a child is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible. In lieu of taking an oath, a child may be admonished to speak the truth.⁶⁷ Every child is presumed competent to testify and may not be a priori excluded from providing evidence unless he or she is found at any stage of the proceedings not to have the ability or mental capacity to respond to questions in an understandable way.⁶⁸ In criminal proceedings, the court must attach such weight to the child's evidence as it deems fit,⁶⁹ and may convict upon that evidence without corroboration if fully satisfied that the child is telling the truth.⁷⁰ The Act confirms that this is also the case for child witnesses in prosecutions for sexual offences.⁷¹

Although the above provisions may be considered fairly limited in elaborating a 'child friendly justice' regime for child witnesses, they do represent an important starting point to develop further (practical) modes of assistance, such as aides to giving evidence, one way mirrors, and child-adapted places from which children can testify.

⁶⁵ Some of these are indeed part of the Children's Court Rules developed under the Act.

⁶⁶ See the Council of Europe Guidelines and Guidelines on Action for Children in Justice Systems in Africa (note 55 above) and the UNODC Model Law on Child Victims and Witnesses (2010).

⁶⁷ Section 49(1).

⁶⁸ Section 49(2).

⁶⁹ Section 49(3).

⁷⁰ This provision thus abrogates the evidentiary cautionary rule that applied to the evidence of child witnesses.

⁷¹ Meaning those created by the Penal Act No 6 of 2004. See s 49(6).

VIII CONCLUSIONS

Zanzibar's Children's Act was developed in a fully consultational ambience, with obvious support from many stakeholders, including the organised legal profession and officials of the Revolutionary Government of Zanzibar. It contains provisions that have clearly been shaped by law reform in nearby countries in Southern and Eastern Africa, but with some home-grown adaptations and novelties (including the clear recognition of the Islamic faith to which most citizens adhere, and a detailed section aimed at the protection of children in respect of whom an application for kafalah is made).⁷²

The most important aspects of the Act (arguably) concern child protection and children in conflict with the law. There has been a demonstrated need to improve responses to children experiencing violence in Zanzibar,⁷³ and the nascent child protection system and specialised services that the Act establishes provides the bedrock from which major improvements can be made. Similarly, although the number of children in contact with the law annually is relatively small, the present detention scheme, lack of diversion opportunities and lack of specialised, speedy and rights oriented justice services all violate international law. However, equally, the fact that the numbers of children are not overwhelming signals that system reform can be achieved with fairly moderate resources. Again, the Children's Act provides the necessary legal framework within which this can occur.

⁷² These applications must be made to the Khadi's court and not the children's court: s 75(1). See further n 1 above.

⁷³ The Draft Assessment Report (note 47 above) records that 480 cases of rape against children were reported at the One Stop Centre at Mnazi Moja hospital in July 2012–June 2013, as well as 273 molestation, 53 sodomy cases, and 22 cases of abduction. These figures obviously only reflect sexual matters, and to these must therefore be added instances of physical and other abuse of children.

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Published on behalf of the International
Society of Family Law

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