EDUCATION PROGRAMME MATERIALS PACK

IAFL Introduction to European Family Law Conference, Ibiza, Spain 13th and 14th October 2022

CONTENTS

IAFL INTRODUCTION TO EUROPEAN FAMILY LAW CONFERENCE
EDUCATION PROGRAMME
Ibiza, Spain
Thursday 13 October – Friday 14 October 2022
Palacio de Congresos de Ibiza

Education Programme Chairs
Frances Goldsmith, *France* and Jennifer Wilkie, *Scotland*

Thursday 13 October

1400-1410 **Welcome and introduction to the Education Programme**
Opening remarks: Rachael Kelsey, *Scotland*

1410-1455 **Resilience, avoiding burnout in family law practice and why feedback in the office and with clients is so important**
Chair: Frances Goldsmith
Speaker: Dr Ali O'Malley PhD, *USA*

1455-1555 **Session 1: Who knew? Useful things you didn't know about the law in another jurisdiction. Short presentations and contributions from the floor**
Chair: Jennifer Wilkie, *Scotland*
Speakers:

- Dr Jorida Xhafaj, *Kosovo*
- Dr Marta Zavadilová, *Czech Republic*
- Andrea Mariani, *Italy*
- Julie Losson, *Russian Federation (and France)*
- Dr Daniela Ježová, *Slovakia*
- Dr Brikena Kasmi, *Albania*

1555-1615 **Coffee Break and Networking**

1615-1715 **Session 2: Who knew? Useful things you didn't know about the law in another jurisdiction. Short presentations and contributions from the floor**
Chair: Frances Goldsmith, *France*
Speakers:

- Simona Ambroziūnaitė, *Lithuania*
- Eniko Fulop, *Romania*
- Tijana Saldic, *Serbia*
- Sandra Strahm, *Switzerland*
- Iryna Moroz, *Ukraine*
- Yordanka Bekirska, *Bulgaria*

1830-1930 **Welcome drinks reception** *Ginger Bar*, **Sol Beach House Hotel**
2000-2300 **Pre-paid dinner at the Chiringuito Blue, Ibiza**

Friday 14 October

0930-1115 **Be the change! Influencing and changing the law: strategic litigation and working for, in and against government**

Chair: Rachael Kelsey, *Scotland*

Speakers:

- Margaret Casey KC, Barrister, *New Zealand*
- Michal Kubalski, Head of Family Law Unit, Office of Human Rights Commissioner, *Poland*
- Mia Dambach, Executive Director, Child Identity Protection, *Switzerland*
- Prof. Jakub Urbanik, University of Warsaw, *Poland*
- Arpi Avetisyan, Head of Litigation, ILGA Europe, Armenia and Belgium

1115-1145 **Coffee Break and Networking**

1145-1245 **Privacy rules in your jurisdiction and the enforceability of non-disclosure agreements**

Chair: Jennifer Wilkie, *Scotland*

Speakers:

- Jamie Kennaugh, *England and Wales*
- Lukas Deppenkemper, *Germany*
- Frances Goldsmith, *France*
- Larry Ginsberg, *USA*

1245-1250 **Our Family Wizard Presentation**

1250-1300 **Presentation of IAFL European Chapter Young Lawyers' Award**

1300-1415 **Light Lunch,** *The Kitchen*, *Sol Beach House Hotel*

1415-1500 **Capacity (I) Starting the conversation about capacity in family law matters**

Chair: Rachael Kelsey, *Scotland*

Speakers:

- Dr Sian Tucker, *Scotland*
- Samantha Hillas KC, *England and Wales*
- Jenna Lucas, *England and Wales*

1500-1530 **Coffee Break and Networking**

1530-1615 **Capacity (II) Capacity in international family law matters- the International Protection of Adults Convention 2000 and its relationship with European Regulations and domestic law**

Chair: Jennifer Wilkie, *Scotland*

Speakers:

- Josef Alkatout, *Switzerland*
- Pierre-Guillaume Ducluzeau, *France*
- Magda Fernandes, *Portugal*

1615-1630 **Closing Remarks -** Alberto Perez-Cedillo, *England and Spain*

1830-1930 **Drinks reception,** *Ginger Bar*, **Sol Beach House Hotel**

2000-2130 **Pre-paid dinner at Hotel Aguas de Ibiza**

Resilience, avoiding burnout in family law practice and why feedback in the office and with clients is so important

ALI O'MALLEY PhD

Reflexion Group

Email: ali@reflexion-group.com
Tel: +13303221696
LinkedIn

Dr. O'Malley has nearly 20 years of experience coaching and consulting across industries. Ali specializes in the design and implementation of coaching interventions to help people build resilience, (re)define success, and achieve their full personal and professional potential. She is the founder and owner of Reflexion Group, a firm that specializes in virtual leadership coaching.

Ali began her career as a psychology professor where she founded a university research lab focused on feedback for peak performance. After earning tenure and promotion through her teaching and research, Ali pivoted to global corporate roles. Her scholarship has been cited hundreds of times and she has moderated over 100 invited keynotes, workshops, and conference sessions on leadership development and well-being.

Ali holds an MA and PhD in Industrial-Organizational Psychology from The University of Akron. She received her executive coaching certification through Georgetown University's Institute for Transformational Leadership and is certified as a leadership coach by the International Coaching Federation.

Ali lives in Indianapolis, Indiana, USA with her partner, her daughter, and pets. She loves baking, birding, admiring art and architecture, and reading fiction.

Attendees will leave Ali's session with:

- A refreshed perspective on feedback as a "power skill" that enhances performance and satisfaction
- Tools to build self-awareness and engage in the self-reflection practices that build resilience, which we
  define as the process of responding adaptively to challenges

Who knew? Session 1

Useful things you didn't know about the law in another jurisdiction

JENNIFER WILKIE

Family Partner
Burness Paull LLP
Scotland

Web: burnesspaull.com
IAFL Fellow Profile: view here

Jennifer Wilkie is a highly regarded Divorce and Family Partner at Burness Paull LLP, based in Scotland, United Kingdom.

As an accredited specialist in both Family Law and Family Law Mediation, Jennifer has a wealth of experience in cases with international elements where multiple jurisdictions are involved, both in respect of pre and post nuptial agreements, and in respect of divorce and separation. She also deals with cases involving children moving from one country to the other and care arrangements.

Jennifer has been instructed by a wide range of clients, yet continuously maintains her highly effective holistic approach to cases, working alongside and encouraging individuals to work alongside other professionals to reach the best possible outcome for all involved.

Jennifer is a Fellow of the International Academy of Family Lawyers. She is also a member of AIJA and Co-Chair of the American Bar Association – Section of International Family Law.

ANDREA MARIANI

Avvocato
Studio Legale Cesaro
Milan, Italy

Web: studio-cesaro.it

I was born on 28th June 1985.

In 2011 I graduated in Law, cum laude, from the Catholic University of the Sacred Heart in Milan, discussing a thesis in Civil Law titled: “The object of community property between the spouses: critical profiles”.

I’ve been a member of Studio Legale Cesaro (Cesaro Law Firm) in Milan since 2011.

I qualified as a lawyer (avvocato) in 2014 and I am a member of the Milan Bar Association.

My area of expertise covers family law, with particular regard to its patrimonial aspects, juvenile law and the protection and care of personal rights.
I also deal with international family law (cross-border cases involving separation, divorce and/or international child abduction cases).

I regularly speak at professional training courses and I’ve held university lectures in family law and juvenile law.

Most recently, in 2022, I’ve been a lecturer for the SSPL Pavia-Bocconi (Scuola Specializzazione Professioni Legali Pavia-Bocconi), at the Bocconi University of Milan.

I’ve been a member of “Camera Minorile di Milano”, an association reuniting lawyers specializing in juvenile law, since 2011.

Since 2022 I’ve been a member of the scientific committee of “Ius et Vis”, an association of lawyers with various professional backgrounds, and in my role I am responsible for the organization of meetings focused on family law and juvenile law.

Dr BRIKENA KASMI

AFortiori Legal Counselors
Tirana, Albania

Email: bkasmi@afortiori.al
Web: afortiori.al

Ms. Brikena Kasmi was born on 29.4.1979 and is resident in Tirana, Albania. Ms. Kasmi has been an attorney – at – law from 2002 and on and is specialized in media law and international private law. She is currently managing and founding partner of AFortiori-legal-counsels law studio.

Ms. Kasmi has 12 years of experience as a professor and lecturer in the university and is author of more than 34 articles on human rights in national and international journals. Ms.Kasmi holds PhD in media law and has doctorated under the thesis of "*commercial activity of media companies*" from 2016. She is the author of academic books "Media law – General part (i) and Particular part (ii).

She is co-author of mediation law *commentary*, co-author of the prevention of the conflict of interest law *manual* and *commentary* and has participated in the drafting of more than *98 legal acts* including (i) the law on registration of real estate with the focus of women property rights; (ii) the criminal and civil code with the focus of libel and defamation; (iii) the mediation and arbitration law with the focus of establishing procedures on lawyer appointment; (iv) the criminal procedures code with the focus of reform of preliminary procedures, etc.

Ms. Kasmi is a lecturer in the Albanian University in subjects of Administrative Law and International Private Law from 2013 and ongoing. Before then, she has been a lecturer in the School of Magistrate for 4 years and Tirana University for 3 years.

Ms. Kasmi has also been employed in the Albanian Ministry of Justice for 10 years in different positions 2003 – 2013 as in the Directory of Codification, and Deputy minister of Justice for 1 mandate.

Ms. Brikena Kasmi has held different positions and engagements in the civil society, distinguishing different nonprofit organizations as an expert in law, trainer, and project manager and director mainly in the field of human rights and media law. She is also an expert with the council of Europe in the justice field.

Her native language is Albanian. She speaks excellent Italian and English and medium level Spanish.

DANIELA JEŽOVÁ

Bratislava, Slovakia

Web: jezova.sk
IAFL Fellow Profile: view here

Daniela is a partner and is managing a law office which deals with International and European family law. Daniela lectured for almost 15 years at the Comenius University law faculty in Bratislava the International and European law, she published a lot of scientific articles in this area. She has also actively contributed to several conferences of family law such as international scientific conference Children in the Nett or the workshop about the Brusel IIbis Recast in the relation to International abduction cases. She provides lectures also for practicing lawyers in Slovakia in Family law (C.H.Becks). She was selected as an expert to cooperate with European Union Agency for Fundamental Rights (FRA) in regard to Update of the Handbook on European Law Relating to Rights of the Child.

Daniela is IAFL fellow for Slovakia.

Prof Assoc
Dr JORIDA XHAFAJ PhD

Kosovo

Jorida Xhafaj, Prof. Assoc. Ph.D. has completed with honours both her Bachelor and Master degrees (2007) in Law from the University of Ruse, Bulgaria. She has completed her doctoral studies from the same university in 2013 in Privacy and Data Protection.

She has a 14-year of experience as dean, head of the department, lecturer of Family Law and researcher at various universities in Bulgaria, Albania, and Kosovo. During her career, she has been a visiting professor of Law also in state universities, such as the University of Tirana and the University of Prizren.

Ms. Xhafaj is a senior expert in many projects relating to family legislation, property rights protection, drafting the Law on Higher Education and Research of the Republic of Albania, and, recently, the EU-funded Project "Support to the Civil Code" - Phases 1 and 2. She is also an accreditation expert for the Albanian Accreditation Agency and author of many conference and journal papers.

JULIE LOSSON

Attorney
Villard Cornec & Partners
Russian Federation & France

Email: losson@villard-avocats.com
Web: villard-avocats.com
IAFL Fellow Profile: view here

Qualified Attorney - Paris Bar
Partner and co-founder of the French law firm “VILLARD CORNEC & PARTNERS”
Registered on the list of foreign lawyers of the Ministry of Justice of the Russian Federation
Legal Advisor for the French Consulate in Moscow

Medal of Merit from the Russian Federal Chamber of Lawyers for the protection of rights and freedoms of citizens (2015 - 1st level)
Fellow of the International Academy of Family Lawyers
Member of the International Association of Lawyers
Member of the Cercle Kondratieff

Master in Private International Law and European Law (Université Paris I Sorbonne)
Master of Law (Russian Law) (Université Paris X Nanterre)
Master of Arts (Russian language) (Université Marc Bloch - Strasbourg)

Practice areas: international family law (private clients), matrimonial and estate Law, expatriation and impatriation, international adoption.

Member of the Paris Bar for almost ten years, Julie LOSSON co-founded the French law firm “Villard Cornec & Partners” and since 2012 manages its Moscow office under the “OOO Interjurist”. She is experienced in general international family law, especially with Russian citizens. She defends cases involving financial disputes pertaining to divorce settlements and inheritance issues (prenuptial agreements, removal and jurisdiction disputes, child and spousal support, child abduction, registration and enforcement of foreign court decisions…).

Publications:
“10 advises to a French citizen before entering into marriage with a Russian citizen”, Moscow, 2021
Author of the Russian Chapter in the 2020 International Comparative Legal Guide
Writer for the "International Children Law Information Portal" of Jordan Publishing
"French Supreme Court Restates Rules on Jurisdiction, Recognition and Enforcement of Foreign Decisions in Matrimonial Matters: A New Chance for Old Cases" Family Law Quarterly, 2010 Vol. 44, No. 1 (Spring 2010) p. 83–94. ABA

Languages: French, Russian, English

JUDr MARTA ZAVADILOVÁ PhD

Atorney
Bříza & Trubač
Prague, Czech Republic

Web: brizatrubac.cz

Specializations
EU and international law, Disputes, Family and inheritance law, Labour and Immigration Law

Education
- Charles University Faculty of Law (Master in 2003, JUDr. 2007, Ph.D. in 2007)
- Universität Passau, Germany (2000-2001), program Erasmus/Socrates

Main fields of expertise
International private law, dispute resolution with cross-border element, family law, succession law, law of obligations.

Language of provided services
- Czech
- English
- German

Membership in arbitral, vocational, professional and advisory institutions and boards
- Czech Bar Association
- Internal Judicial Network in civil and commercial matters

Past working experience
Ministry of Justice of the Czech Republic (2003 - 2018)

Marta is an attorney working in the Bříza & Trubač law firm. Before joining Bříza & Trubač, she worked in the International Section of the Ministry of Justice for more than 15 years, including as Director of the International Civil Division, Head of the International Civil Law Department and Head of the European Civil Law Department. Since 2007 she has been externally cooperating with the Faculty of Law of Charles University, since October 2018 she has been working as an assistant professor for private international law at the Department of Commercial Law.

In the area of private international law, she focuses primarily on disputes with a cross-border element and family law.

Who knew? Useful things you didn't know about the law in another jurisdiction – Italy

by Andrea Mariani, lawyer, Milan Bar Association

- - - oOo - - -

Italian family law has been profoundly affected by a recent and important legislative reform. In particular, in accordance with specific requests coming from the European Union, the Italian judicial system dealing with family law cases has been the subject of an overhaul, in order to improve its effectiveness and to assure a better protection of the fundamental rights of the people involved.

*

Therefore, on 26th November 2021, with law no. 206, the following -extremely relevant- changes to the system were introduced.

In particular, I'll focus on the following aspects:

a) The strengthening of the role of the guardian ad litem for the minors

b) The introduction of a new "unified procedure" for all the proceedings dealing with family, persons and minors

c) The broadening of the scope of the "assisted negotiation" in family law matters

d) The introduction of the new "unified Court" for families, persons and minors

*

A) A new, enhanced role for the guardian ad litem

Law no. 206/2021 has deeply innovated the legislative provisions, contained within the Code of Civil Procedure, which deal with the guardian ad litem for minors.

These innovations are now in force since 22nd June 2022, i.e., applicable to all proceedings brought before a Court starting from that date.

Before the reform, article 78 of the Code of Civil Procedure did not contain any specific provision explicitly dedicated to the guardian ad litem for minors, as it broadly stated -according to a very general and rather vague wording- that a guardian ad litem (for a minor) was to be appointed when the child could not be represented in Court by either parent,

because they were absent or because (and this was, and still is, statistically, the most relevant case) the child and the parents had conflicting interests.

Case-law, in application of the principles contained within the international instruments of protection for children (i.e., 1989 New York Convention, 1996 Strasbourg Convention), subsequently expanded and defined the circumstances when the appointment of a *curatore speciale* (guardian ad litem) for the minor was necessary.

Indeed, we may say that the current reform, as outlined by new law no. 206/2021, is a codification of the results and of the objectives defined by a consolidated tradition of case law.

According to the new wording of article 78 of the Code of Civil Procedure, a guardian ad litem for the minor shall now be appointed

*) As it used to be even before, when there is a conflict of interests between the child and the parents or legal guardian

*) In addition: a) if the Prosecutor is asking the Court to remove both parents from the exercise of parental responsibility or if such a request is made by a parent against the other / b) when the proceedings to remove the child from the family are activated / c) if, during the course of the proceedings, the Judge acquires elements that suggest the existence of prejudice for the child and the parents cannot adequately represent the minor / d) if the children themselves, provided they are 14 or older, ask for a guardian to be appointed. In all the aforementioned cases, if the guardian is not appointed, the proceedings are invalid and null.

*) The guardian ad litem can also be appointed -but this is discretionary i.e., if not appointed the proceedings are nonetheless valid- by the Judge, if the parents appear, for serious reasons, temporarily unable to represent the child's interests.

*

If these are the "procedural innovations" pertaining to the role of the guardian ad litem for minors, the "substantive innovations" appear of equal importance.

In particular, pursuant to the "new" article 80 of the Code of Civil Procedure, as amended by law no. 206/2021, in force since 22nd June 2022, the guardian ad litem can also be tasked with specific substantive powers (i.e., representation and/or decisions for the child even outside the framework of judicial proceedings) by the Court.

Another important innovation contained within the amended article 80, is the possibility for the minor to ask for the guardian to be removed, once again, if the child is 14 or older. The same power is conferred to the parents of the child, to the legal guardian and to the

Prosecutor. The request to remove the guardian ad litem should be addressed to the Court, which will evaluate its merits.

*

In late September 2022, the Council of Ministers of Italy approved the legislative decrees for the implementation of the principles of the new law, especially for the parts regarding the unified procedure for family and juvenile law matters.

It is expected that these innovations will enter into force starting from 2023. The current provisions of articles 78 and 80 of the Code of Civil Procedure will, therefore, be transferred to the new articles that are set to be inserted within the Code of Civil Procedure and will become a new article 473-bis.8, whose content, however, will be the same of articles 78 and 80 combined.

***

B) The unified procedure for family proceedings

It can be rightly assumed that the true core of the reform as envisaged by law no. 206/2021 lies in its far-reaching procedural innovations, due to enter into force during the course of the year 2023, following the approval of the legislative decrees by the Council of Ministers in late September 2022.

The legislative reform is the answer to the structural problem that has always affected the Italian system when it came to dealing with family law matters, i.e., the existence of multiple procedural rules that overlapped every time a Court had to deal with families, personal rights and/or children.

Indeed, under the current state of the Italian legal system, we still have to deal with different procedural rules for separations, for divorces, for the modifications of separation and/or divorce judgments; again, still, very different procedural rules apply to children, depending on their parents' marital status. Different rules, once again, dictate how motherhood or fatherhood should be ascertained or established in Court.

The great objective pursued by the amendments to the Italian legal procedural system, once these modifications will become effective (2023), is to provide a unified set of procedural rules for all matters pertaining to family and/or juvenile law, with no distinctions as now they are made on the basis of the substantive right/situation that is brought before the Court.

Hopefully, this would bring a long-awaited simplification, rationalisation and effectiveness to the judicial protection offered in family law matters.

The legislative decree adopted under the guidelines contained in the law no. 206/2021 has introduced a new Title in the framework of the Code of Civil Procedure (Title IV-bis), officially designated as "rules for the proceedings in the matters of persons, minors and families", where, by the way, the expression "families", in the plural form of the noun, is a very apt recognition of today's reality, where a plurality of diverse family models are present, and all are entitled to receive the same amount of legal consideration and protection.

The principles that inspire, as general rules, the amendment made to the Code of Civil Procedure (effective since mid-2023) are: simplification, expeditiousness, rationalisation, fair trial.

The only matters that, albeit falling within the area of family law, are expressly excluded from the application of the new procedural rules, are the ones linked to the adoption of minors and to the matters of immigration law.

For the first time, an explicit definition of "habitual residence" of the child is enshrined in the codification, where the residence is not considered as habitual if the child has left the place for more than one year (art. 473-bis.11).

Again, in order to achieve the stated aim of more effectiveness in the judicial proceedings, the Courts are now given the power to demand the parties to show, at the start of the proceedings, a full disclosure of their incomes, assets and financial statuses.

As a general rule, now, all the written defensive arguments, as well as the introduction of documents or the requests for evidence, shall be complete when the introductory legal briefs are submitted to the Court; further requests or additional evidence may be introduced/requested, but this now becomes an exception rather than a rule. The strict preclusion is somewhat tempered, however, if children are involved, by the Court's power to proceed ex officio, and to order the parties the production of additional evidence, and at the same time the Court can also grant the parties' requests to hear new claims, if connected with the main request, if this is deemed to be in the child's best interest.

The proceedings are now the same, whether they deal with the separation of the spouses, their divorce, their personal or financial claims for themselves of the children; and, also, the same exact rules apply to all other family law matters. The proceedings are started with the submission of a petition, followed by a Court order scheduling the date of the hearing; before the hearing, the respondent will have enough time to submit their counterclaims.

A short exchange of written defensive arguments shall follow, until the parties meet at the hearing in front of the Court. All the legal briefs, it is recommended, shall be written with clarity (see articles 473-bis.12 to 472-bis.21).

PIAZZA GRANDI, 3 - 20129 MILANO - TEL. 02 49680901 - 02 55196056 - FAX 02 7496775

SEGRETERIA@STUDIO-CESARO.IT - WWW.STUDIO-CESARO.IT

The appeal proceedings are now similarly regulated, and follow the same principles seen for the first-instance proceedings.

***

C) Assisted negotiation in family matters

The institution of "assisted negotiation" (i.e., an agreement to be reached, following talks between the parties each one assisted by their lawyer) is not new, as it has made its appearance in Italian family law in 2014.

Basically, this is an out-of-court, alternative dispute resolution, for family law matters: separations and divorces can be reached with the procedure of "assisted negotiation", which has many advantages. It is more expeditious, it respects the parties' personal privacy, it can lead to an agreement which can really be tailored to the parties' needs and desires.

At the end of the negotiation, the agreement is validated and formalised by the Prosecutor, which verifies that all the formal requirements have been met, and then it is registered in both the Court's registrars and the civil records of the "*comune*" (township).

Through the assisted negotiation, the parties could reach agreements even dealing with financial obligations towards minors, therefore the negotiations could really be a substitute for the judicial proceedings.

However, at least three major fallacies were to be found in the outline of the "assisted negotiation", as defined under the 2014 law.

1. It could not be used when dealing with children born out-of-marriage.

2. It could not be used when, in the event of divorce, a lump sum was to be transferred by one of the spouses for the benefit of the other, as an alternative to the usual rule of monthly/periodical payments

3. It could not be used to transfer real estate between the spouses

With the amendments introduced by the law no. 206/2021 – effective since 22nd June 2022, with no need to be implemented by other decrees- all of the shortcomings seen above have been addressed and now: it is possible to resort to the assisted negotiation to regulate personal and financial matters regarding children born outside of marriage; it is possible to transfer lump sums within the context of a divorce reached through assisted negotiation; it is possible to transfer real estate property between the parties, although only as an obligation to be subsequently realized at a later stage and not with an immediate transfer of ownership.

PIAZZA GRANDI, 3 - 20129 MILANO - TEL. 02 49680901 - 02 55196056 - FAX 02 7496775

SEGRETERIA@STUDIO-CESARO.IT - WWW.STUDIO-CESARO.IT

Also, in the event of the transfer of lump sums between the parties, it is now a responsibility of the parties' lawyer to ensure that the amount of said sum is adequate, therefore -basically- assuming a role that has always been traditionally reserved to the Courts.

The strengthening of the ADR method of assisted negotiations can be seen as falling fully within the scope of the reform, as it is conceived as a way favouring out-of-court settlements, freeing the Judges from at least a part of the burden of their still heavy caseload, and on the other hand empowering the parties in order for them to "create" the rules best-suited at regulating their post-marriage life.

***

D) The new unified Court for persons, families and minors

Along with the amendments made to the Code of Civil Procedure, and pertaining to the rules of procedure, the innovations of the law no. 206/2021 will affect -presumably starting from years 2024 and 2025- the "judicial geography" of Italy, when it comes to defining the Judges with competence for family and juvenile law matters.

We've seen that on one hand the reform has unified the proceedings. It is therefore logical that, on the other hand, the same objective of rationalisation and unification is reached when defining "who" should decide over family law and juvenile law proceedings.

In fact, as of today, a plurality of Courts and Judges are identified as "judges of the family": the Ordinary Court, the Juvenile Court and the Judge of Guardianships.

Their competences, as well as the borders between their various roles, are anything but rational or functional, with the effect that, often, different Judges are called to decide on the same family, sometimes with conflicting judgments.

In the future, that is when the decrees for the implementation of the reform will be completed, a new, unified Court will be created, superseding the current fragmentation.

A new Court, for persons, families and minors, will be created, and it will be articulated between a "sezione circondariale" (one Judge dealing with most family matters), and a "sezione distrettuale" (a panel of three Judges dealing with appeals against the decision of the sezione circondariale, or, acting as a first-instance Court, dealing with the most complex cases, such as juvenile criminal cases or adoption proceedings).

The implementation of these new measures will be better defined when the legislative decrees are approved. We expect the reform to be fully operational by 2024-2025, but we can already reflect upon the effects of this true "overhaul" of the system. If we can positively welcome the answer to the needs of rationalisation and efficiency of the judicial activity, with the creation of a new, unified and specialised Court, the lack of "lay" Judges

(people with a specialisation different from a legal one, i.e., psychologists, psychiatrists, sociologists, etc.) in the panels that are tasked with the power to issue judgments on matters where a plurality of specialisations and experiences should be regarded as an added value, may risk the consequence of creating a Court that is only nominally effective, but, in reality, deprived of the knowledge and capacity to understand the complexity of the situations it is called to ascertain in order to make fair and sensible decisions.

As the reform of the Courts is still underway, the hope is for the Legislator to introduce corrections in the proposed schemes of legislative decrees, that may take into account the aforementioned remarks, while at the same time still working on the simplification and rationalisation of the Courts, in order to assess the needs of the families and the people involved in the proceedings.

PIAZZA GRANDI, 3 - 20129 MILANO - TEL. 02 49680901 - 02 55196056 - FAX 02 7496775

SEGRETERIA@STUDIO-CESARO.IT - WWW.STUDIO-CESARO.IT

EDUCATION PROGRAMME PAPER

Topic:

KOSOVO FAMILY LAW AND DEVELOPMENTS

Prepared by

Prof. ass. Jorida Xhafaj

Pristina, 2022

I. FAMILY LAW IN KOSOVO

Kosovo has a civil law system, also known as Continental European law. Kosovo's legal system has evolved over time, and it now includes prominent bodies and branches that assist Kosovo in enacting adequate laws and carrying out proper legal procedures.
Until now, Kosovo has not had a Civil Code, but rather special laws in the civil field such as the Law on Obligations, Law on Property and Other Real Rights, Law on Family and the Law on Inheritance. As a result, has been introduced the idea of the codification of Kosovo civil law, whose overall effects were concentrated by the fact that the entire civil law legislation was fragmented by the significant number of laws in the field of civil law and by the discrepancy between these regulations.
As a result, Kosovo launched the civil law codification process in 2014, with assistance from the European Commission and the Kosovo Ministry of Justice. The second phase of CC began in 2017, with project support from the European Commission. It largely unifies civil law and contains innovations reflecting new modern institutions. After several years, the Government approves the consolidated draft of the KDCC, which was not approved by the Assembly in April 2022 due to heated debates in Kosovo about the permissibility of civil partnerships and the rejection of institutions as a bridge to same-sex marriage.
The draft Civil Code is the largest single legal act up to date in Kosovo both in terms of the volume as well as in the terms of the scope of its regulation. It is divided into 5 separate books, coherently and logically connected with each other. The order of the books is as following: Book 1 (General Part); Book 2 (Obligational Relations), Book 3 (Property Rights and other Real Rights), Book 4 (Family) and Book 5 (Inheritance);

The Kosovo Family Law "regulates engagement, marriage, relations between parents and children, adoption, custody, protection of children without parental care, family property relations and special court procedures for disputes of family relations.
The regulation of family relations is based on the principles of:

- monogamy and the secularity of marriage;
- equality between husband and wife and also, mutual assistance between them and family members;
- protection of children's rights and the responsibility of both parents for the growth and education of their children;
- the obligation of parents and children to provide each other assistance and consideration for the entire span of their lives.
- children of unmarried parents enjoy the same rights and have the same obligations as children born from parents who were married at the time of their birth.

According to the report of monitoring non-governmental organizations and the Ombudsman, the most solid comprehension issues are as follows:

- lengthy delays in the resolution of cases;
- shortcomings with respect to the hearing of witnesses and the adduction of evidence,
- deficiencies in managing the mandated role of Centres for Social Work[1] (CSWs) and Custody organ[2] in these cases; and /or
- insufficiently reasoned judgements or lack of harmonization of court decision realted tot he same provisions.

A. Legal Grounds

- International human rights standards, particularly Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Articles 3, 9, and 12 of the Convention on the Rights of the Child, are applicable in Kosovo.
- Other norms taken into account in the analysis of the legislation of Kosovo include the two Protocols to the CRC, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, and 18 other UN instruments.
- European norms taken into account include the European Social Charter, European Convention on Nationality, the Lanzarote Convention on the Protection of Children Against Sexual Exploitation and Abuse, the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, and the European Guidelines on Child Friendly Justice…

B. Domestic framework

- Constitution of Kosovo No. K-09042008 published in Official Gazette No. 09. 04. 2008 and which is in force since 15 June 2008.
- Law No. 2004/32 on Family published in Official Gazette No. 4 of 1 September 2006 and Law No. 06/L-077 on Amending and Supplementing the Law on Family published in Official Gazette No. 3 of 17 January 2019.
- Law No. 2005/02-L17 on Social and Family Services, as promulgated by UNMIK Regulation 2005/46, 14 October 2005.

[1] The Centers for Social Work (CSWs) are government bodies operating in each municipality in Kosovo under the auspices of the Department of Labour and Social Welfare. Their role is set out at Article 7 of the Law on Social and Family Services.

[2] Law No. 2005/02-L17 on Social and Family Services, defines in article 1 the custodian body as "the function within the Centre for Social Work that is responsible for protection of children." The Albanian language text refers to the custodian body is a phrase which is translated into "guardianship authority" and "custodian body" seemingly interchangeably in the Kosovo legal framework. Referring to article 6, of Family Law „*The Custodian Body is an administrative municipal body competent for social issues. It shall be comprised of a group of experts with professional work experience in the specific field of duty……The Custodian Body, participating in the family relations procedures, is authorized to present motions for the protection of children's rights and interests, to present facts that parties have left out, to suggest administration of necessary evidence, to exercise legal remedies, and undertake other contentious actions*

- Law No. 2004/26 on Inheritance published in Official Gazette No. 2005/7.
- Law No. 03/L-006 on Contested Procedure, 20 September 2008
- Law on Out Contentious Procedure, No. 03/L-007, 13 December 2008, which courts in Kosovo began applying on 28 January 2009
- Law No. 05/L-021 on the Protection From Discrimination

II. Marriage

Marriage is defined as "a legally registered community of persons of different sexes, through which they freely decide to live together with the goal of creating a family". Spouses are equal "in all personal and property relations" that characterise the marriage. Marriage is regulated by special provisions in Articles 14 till 98 of the law, implying that it is a central institution in the Kosovo Family law. Several characteristics can be gleaned from this regulation, including the following:

a. the existence of two persons of different sexes;
b. their free will and desire to live tin a family;
c. the absence of marriage prohibitions and bans.

The majority of marriages are obtained at the ages of 18 and 16 years, respectively, and with the court's permission to conclude the marriage.

Finally, it should be noted that the draft Civil Code of Kosovo has taken the initiative to prohibit child marriage, and this issue is associated with a lot of debates, related to traditional norms and the uncertainty of whether the best interests of the minor will be ensured.

Likewise, there are no corresponding provisions in any legal system known that enable the registering official to inform the fiancées that they should inform themselves about the state of health of the other spouse. Such a provision is already found in the existing family law.

The same applies to the duty of the registering official to inform the spouses about the legal matrimonial property regime and its effects. Even though marriage contracts (premarital, during the marriage, and during a divorce) are no longer provided for in the draft law before us, this provision makes sense in order to make both spouses aware of the very property law effects associated with divorce.

To summarize, the draft Civil Code (in accordance with the LOF) regulates only the classic or traditional form of marriage between a man and does not recognize marriage between persons of the same sex, but it has opened the door for a special law that would regulate cohabitation or civil union of persons of the same sex. This solution is consistent with the evolution of the most advanced European legal systems.

COHABITATION

Entering into a non-marital partnership is regulated under German, Austrian or Swiss law according to the principles of contract law, i.e. the non-marital partnership is a contract that can also be structured and dissolved like any other contract, whereby the provisions of the law of obligations must be observed. So far, the Hague Conference on Private International Law (HCCH)

has been dealing with these international law issues relating to cohabitation outside marriage since the late 1990s (including registered partnerships)
The current family law and the draft CC provisions codify this institution as a source of family relations. Cohabitation is presupposed as a source of creating a "family relationship between an unmarried adult man and an adult woman who openly live as a couple, characterized by a joint life and work that represents a character of stability and continuation." This is because, according to current family law articles 39 and 40, as well as the draft Civil Code (article 1164), marital obstacles must not exist at the time the marriage is formed.
The need to protect the weaker partner (mostly women) and children strongly suggests that, as in Kosovo, family law regulation of non-marital, even non-formalized partnerships is a modern and forward-thinking approach.
The property rights of the property acquired during the factual relationship (out-of-marriage relationship) will be discussed in the following session, as will the distribution or division of joint property.

THE IMPACT OF MARRIAGE ON SPOUSES' PROPERTY RIGHTS

The property law of Kosovo is not a community of accrued gains and it is based on the preliminary work of the CEFL (Commission of European Family Law), taking into account the fact that the European countries, except Germany, have predominantly a matrimonial property regime of community of acquisitions, has provided preliminary work to combine the advantages of both matrimonial property regimes.
The starting point of the property law is - as in the case of community of acquisitions - two types of property: Separate and Joint Property.
According to the revised Kosovo Family Law, joint property of spouses includes property acquired through joint or separate work and contribution during the marriage, as well as income derived from the joint property in any other way. Work and contributions are regarded as equal.
The starting point of matrimonial property law is also that if the matrimonial community is dissolved, the joint property is divided by two, with each spouse receiving half. And this regardless of how he contributed to the Joint Property (through housework, family work, or paid employment; E*.g. the male spouse works in a supermarket and he saves in his bank account during the marriage from his incomes 10.000 EUR, whereas the female spouse does not earn any money but since she is at home caring for the common child, the 10.000 EUR savings in the bank account is a joint property of both spouses).*

This principle applies irrespectively of any other provisions that refer to "contribution to the joint property" and, in the wrong judicial interpretation, could give the court more leeway.
It is the responsibility of judicial practice to follow the principle that, regardless of any possible leeway, this half-share principle of joint property is respected. And this regardless of how and under what circumstances the spouses' joint property acquired during the marriage. This is especially important in order to ensure that housework and paid work are equivalent.

Besides the special property or separate property that belongs only to one of the spouses that he/she may administer it independently form other spouses, under the Civil Code, it is provided the regulation for the joint property, too.
In addition, joint property may also include property rights and obligations rights (claims). *(e.g. the male married spouse buys a flat during marriage because he earns more incomes than his female spouse. He has a job, whereas the female spouse is at home with the kids. The flat becomes a joint property or if the male spouse provides a loan of 10.000 EUR. The loaner owes him 10.000 EUR. The claim against him is joint property, too).*
The property acquired through gambling games, from joint gifts, intellectual property and other similar forms, during the duration of marriage is considered as joint property, too.
Before 2020, matrimonial and pre-matrimonial agreements (contracts) were introduced into the Civil Code and rejected in its final version. Even though the previous legislation was not discriminatory on the basis of gender, women paid the consequences due to traditional old customs in Kosovo society, being denied unjustly inheritance rights and during divorce proceedings. For this reason, safeguards have been introduced as an absolute protection in the context of the traditions' impact and social developements, foreseeing that property rights will be automatically 50/50 between spouses, with the exception of special property (e.g. inheritance and gifts).
Provisions of this law relating to apportioning of joint property of spouses of a legally registered marriage apply analogically for property relations of persons in a factual relationship (non-marital cohabitation. So, according article 58 of Kosovo Family law property of a husband and wife gained through corporate work and during the existence of cohabitation is considered their joint property. From a wording interpretation of the provisin joint property may exist:

- from cohabitation
- from partnership without cohabitation

The registration is the creiteria that can make the difference of these two relationships. In fact in Kosovo the lack of the registration requirement lead to idea that it referes mainly to

Apportioning of joint property of spouses and evaluation of shares
Joint property of spouses may be apportioned during marriage and upon its termination (KFL Article 56, par. 1 and Article 89). Persons eligible to demand apportioning are:

- Spouses
- Successors of a dead spouse or of a spouses announced to be dead
- Creditors, if the request of the creditor cannot be realized from the separate property

Joint property is apportioned after marriage ends in divorce (KFL Article 89), but also after analogous annulment of the marriage as in the case of divorce

- In principle, the joint property may be apportioned in the same decision that dissolves the marriage, if spouses agree and there are no contentious circumstances;
- In practice, joint property is apportioned with another contentious procedure after the dissolution of marriage;
- Apportioning of objects for exercising the craft, vocation and personal objects;

- Article 90 of KFL determines the rule that when dividing property, the debt are divided as well. Debts are divided by apportioning in proportion with the share of property divided to each spouse;
  In case of apportioning, the objects belonging to one of the spouses as part of craft or vocation (working machines, medical clinics, etc.) should belong to the spouse, i.e. transferred to the spouse exercising the craft or vocation. If the value of these objects is proportionally higher than the value of joint property, the other spouse shall be entitled to the equal value.
- The spouse to whom the joint children have been entrusted to for protection and education, besides his/her share, is provided with objects serving the child or those for fulfilling the child needs (KFL Article 93);
- If the value of these objects is bigger compared to the joint property, the other spouse shall be entitled to equal value;
- When the spouse's property is apportioned, the other spouse has the right to pre-emption in that share (KFL Article 94);
- Shares of property jointly used at home and right to housing are evaluated separately (KFL, Article 95).

Remark:

All participants are welcome to ask questions about the regulation of family relations such as child custody or adoption, which are frequently encountered in our practice, particularly in cases with an international element.

Main principles of Czech family law

- The principle of equality between women and men in marriage
- Definition of marriage:

  Marriage is the permanent union of **man** and **woman**. The main purpose of marriage is the establishment of a family, the proper upbringing of a children and mutual support and assistance (§ 655 Act No 89/2012 Sb. - **'Civil Code'**)
- **Registered partnership** - for same-sex couples only
    - Act No 115/2006 (26.1.2006)
    - Adoption of children by both partners is not (yet) possible
- The principle of **equality of parental rights**

  Parents have equal right to the child, **regardless their marital status** and children have the same rights, regardless the marital status of their parents (§ 865 Civil Code)
- Matrimonial property regime
    - **Community property** as statutory (general) regime (§709 Civil Code)
    - includes what has been acquired by one of the spouses or jointly by both spouses during the marriage
    - deviations from the statutory regime – allowed on contractual basis or, in exceptional cases, by court decision
- Children´s rights

  Convention on the Rights of the Child

  § 100(3) Code of Civil Procedure – obligation for courts to hear children above **12**, practice: even younger children are heard in proceedings involving them
- Charter of Fundamental Right and Freedoms
    - Articles 10(2) and 32
    - The right to family life
    - Raising children is the right of parents

Who knew? Session 2

Useful things you didn't know about the law in another jurisdiction

FRANCES AUCHINCLOSS GOLDSMITH

Libra Avocats
Paris, France

Web: libra-avocats.com
IAFL Fellow Profile: view here

Frances Auchincloss Goldsmith - Admitted to the Paris bar and Franco-American, Frances litigates in Paris and throughout France in divorce proceedings, complex financial claims involving Trusts and various business structures, child related proceedings, orders for financial provisions, as well as litigating estate disputes. She regularly advises on pre and post-nuptial agreements and has been personally appointed an expert before foreign courts on matters relating to matrimonial property regimes and division of property. Frances has also lectured at the University Paris II – Assas on estate and succession law. She is a frequent lecturer at conferences on international and domestic family law topics.

ENIKO FULOP

Managing Partner
Fulop Lawyers
Bucharest, Romania

Email: contact@fuloplawyers.com
Web: fuloplawyers.com

I came from a multinational background and 5 years ago after a child abduction case won with 3 countries involved I found out how fulfilling is emotionally when you leave a family in another place than found, and practically changes my life. After it now I have more than 30 international cases and really engages me. I also do other private international legislation commercial area, fiscal, labor, but family law is closest to my heart.

Current responsibilities include:-

- International representations before European Consumer Center, European Court of Justice and Entreprise Europe Network
- International family law consultancy and trials; National Family law consultancy and trials
- Board member in UK organization Global Arrk
- International private law contracts, consultancy, representation before authorities (European Consumer Centre Belgium)
- Collaboration with authorities, embassies (Pretoria Embassy (South Africa), Albanian, Ministries (Ministry of Internal Affairs, Ministry of Foreign Affairs), Adoption Authority, Immigration Office)
- Exequatur trials (US, Greece, Germany, Italy)
- Presidential orders for obtaining immediate measures at the Court (replacing the parents' wills in different situations - to start school, for essential voyage, immediate surgery)
- Collaboration with commercial companies Dras medical, Daf consulting, Business Apps,
- Yours, Just Travel, NTT Data, etc.
- Commercial trials
- Real estate consultation, due diligence
- Banking law trials
- GDPR expertise
- Commercial contracts
- Legal consultancy and Nis legislation consultancy
- Administrative law- public pension system, concession contracts
- IT legislation
- Corporate consultancy and representation

Education, Skills and Qualifications:-

- Master degree in European Law and Regulations Babes-Bolyai University, Law Faculty, 2006-2007
- Bachelor's Degree in law Babes-Bolyai University, Law Faculty, 2001-2005
- Member of the Bucharest Bar, since March 2009, entered as definitive lawyer
- Languages: English (Fluent), Spanish (Intermediate with definitive certificate obtained at Instituo Cervantes), Romanian & Hungarian (Native) , Italian (Intermediate), French (Beginner)

IRYNA MOROZ

Attorney-at-law
Partner at AGA Partners
Kyiv, Ukraine

Web: agalawyers.org
IAFL Fellow Profile: view here

Iryna possesses wide experience of advising clients on the issues of international family law, marriage registration, division of property, child support, maintenance, temporary or permanent relocation, abduction, adoption, inheritance, ART treatment, surrogacy, etc. She is a Member of a Board of the Committee on Civil and Family Law of the Ukrainian Bar Association (UBA) and constantly organizes conferences and events to discuss burning problems of Ukrainian family law with leading practitioners. She is also a Member of the Committee on Family Law of the Association of Corporate Security Professionals.Iryna Moroz regularly participates as a speaker at international conferences organized by the International Academy of Family Lawyers (IAFL), the International Bar Association (IBA), the International Association of Young Lawyers (AIJA). Mrs. Moroz frequently participates in pro-bono projects related to the protection of children and family rights, regularly speaks on Ukrainian television as an expert in the field of family law. Moreover, Iryna is one of the few practitioners in the Ukrainian legal market who have deep knowledge and experience in ART and surrogacy treatment for foreigners in Ukraine.

Iryna Moroz is a co-author of the Ukrainian section of the following books and editions:

- Family Law. Jurisdictional comparisons - 2019, 2017, 2015, 2013 and 2011 editions, supported by Thomson Reuters;
- IBA Family Law newsletter, 2018, supported by the International Bar Association
- International relocation of children. Global guide. 2016 edition, supported by Thomson Reuters;
- IBA Surrogacy newsletter, 2016, supported by the International Bar Association
- Private Client. 2014-2016 editions, supported by Getting the Deal Through.

Education and bar admission

- Master of Law, 2007. Ivan Franko National University of Lviv
- Admitted to the Bar since 2013
- Chartered Institute of Arbitrators: Practice and Procedure of International Arbitration Assessment (Kyiv, May-July 2019)

Membership at Professional associations

- Member of the Board of the Committee on Civil, Family and Inheritance Law of Ukrainian Bar Association
- Member of the International Bar Association. She was an Officer of the IBA Family Law Committee
- Member of International Academy of Family Lawyers (IAFL)
- Member of the Kiev City Bar Association
- Member of the Ukrainian National Bar Association

Awards and Recognition

- Leading Individual in Ukraine for Private client (2018-2022) - The Legal500
- Leading lawyer in Ukraine for Private client practice - Ukrainian Law Firms 2021, Yuridicheskaya Praktika
- Leading lawyer in Ukraine for Family law - Client's choice. Top 100 best lawyers of Ukraine (2019-2021), Yurydychna Gazeta
- One of the most successful female lawyers in Ukraine - Ukrainian Women in Law 2019-2021, Yurydychna Gazeta.

Foreign Languages

In addition to her native Ukrainian, Mrs. Moroz is fluent in English and Russian.

SANDRA STRAHM

Attorney at Law
Schwärzler Attorneys at Law
Zurich, Switzerland

Web: s-law.com

Sandra Strahm completed her studies in Lucerne. After working for the courts, lawyers' offices and public authorities, she was admitted to the bar of the Canton of St. Gallen. Since then she has been working as an attorney and advises and litigate mainly in the areas of family and inheritance law, but also in contract and criminal law. In addition to divorce, her areas of practice also include family law disputes concerning children of unmarried couples. She is also involved in international settlements concerning visitation and maintenance law.

Simona Ambroziūnaitė

ILAW LEXTAL
Vilnius, Lithuania

Email: simona.ambroziunaite@ilaw.legal
Web: en.ilaw.legal

Simona Ambroziūnaitė, a lawyer, an advocate, graduated from the Law Faculty of the Vilnius University in 2014. Since 2014 Mrs. Ambroziūnaitė is a member of Lithuanian Bar.

Simona Ambroziūnaitė, admitted to the Lithuanian Bar, has almost ten years of legal experience and litigation before the Lithuanian courts in private client matters and civil litigation.

Simona Ambroziūnaitė is a committed and creative lawyer with specialty in family law and inheritance law. Highly skilled in oral argumentationb and legal research, leading to successful litigation of various cases.

She has a significant case load involving international or intra-Lithuania jurisdictional issues too. Deals with both divorce and child cases with experience in Hague and non-Hague abduction/wrongful retention cases.

Currently, Mrs. Ambroziūnaitė works at the international law company ILAW LEXTAL held in Vilnius, Lithuania, where she is in charge of proceedings involving international family cases (child abduction, child custody, communication rules, maintenance, etc.).

TIJANA ŠALDIĆ

Lawyer
Novi Sad, Serbia

Email: adv.tsaldic@gmail.com

Tijana graduated with honors from the Law school of the University of Novi Sad, Serbia and received a Masters of Law in 2016, receiving scholarships from the Rotary Club and European movement in Serbia for exceptional results during her studies. She became a member of the Vojvodina Bar Association, Serbia in 2018. She practices civil law and family law and is Secretary of Academic activities in "Glasnik of the Bar Association of Vojvodina" - Journal of legal theory and practice. She is a registered Mediator with the Ministry of Justice of Serbia and holds a certificate for special knowledge in the field of children's law and juvenile delinquency with permission to deal with juvenile offenders in all types of proceedings.

YORDANKA BEKIRSKA

Human Rights Lawyer
Sofia, Bulgaria

Yordanka Bekirska is a human rights lawyer, member of Sofia Bar Association. Her everyday work is to enhance the human rights international standards in Bulgaria. She held her first Master degree in Law from Plovdiv University in 2004 and LL.M in the International Institute for the Sociology of Law, Spain, 2007. Yordanka graduated in Womens' Human Rights Training Institute in USA and did her third master degree in Private International law in 2016. Yordanka is specialized in strategic human rights litigation and conducts cases before national and international tribunals.

Since 2009 Yordanka develops her legal practice on the right to respect for private and family life. As a managing partner at SPECIALIZED LAW OFFICE IN INTERNATIONAL AND FAMILY LAW "BEKIRSKA § PARTNERS" she deals mainly with national and cross-border family cases and has comprehensive knowledge on implementation of the 1980 Hague Convention in Bulgaria.

Mrs. Bekirska educates legal practitioners since 2012 on the International Family Law at the Center for Legal Education in Bulgaria part of the Supreme Bar Council.

Since May, 2018 Mrs. Bekirska is a permanent member of the Human Rights Commission of The European Bars Federation/Fédération des Barreaux d'Europe (FBE), and member of the international team of Advo Alliance Group (www.advoalliancegroup.com).

Mrs. Bekirska established the first Cross-Border Family Mediation Center in Bulgaria and deals with family mediation since 2009.

For her active and devoted work, she was awarded as the best lawyer on International Law at the 2018 Judicial Awards and nominated for the most challenging law suit for 2021 among 5 listed.
On a daily basis she monitors and analyzes the situation of human rights in Bulgaria, conducts advocacy campaigns and lobbies for legislative changes and takes part at many working groups for amendment of the legislation.

Romanian family law

particularities & problems

1

Particularities

- 1. Joint custody above everything
- 2. Presidential ordinance also called as injunction order as special emergency procedure
- 3. Minor's aversion may lead to non-application of the legislative provision
- 4. Public legal aid for family law cases
- 5. Damages and spousal maintenance only in exceptional cases

2

Problems

- • Children left behind while their parents migrated for work abroad
- • Refusal of Power of attorneys
- • Child maintenance payment

3

Joint custody above everything

- Romanian legislation enshrines the principle of co-parenting supporting the harmonious development of the child, which in this way can benefit from the education and guidance of both parents.
- The Law no. 272 on the Protection and Promotion of the Rights of the Child guarantees the right of the child to the family life, having the right to grow up with his parents as well as the fact that he can not be separated from his parents or one of them, against their will, except the cases is required by the best interests of the child.
- These principles are so firmly established that it is a fierce battle in court to obtain sole custody rights even if the other parent is completely disinterested in the child after divorce or separation.
- Also, even if we have specific legislation, the termination of parental rights is almost impossible even in a situation where it is proven that the other parent consumes alcohol or even drugs.

4

Presidential ordinance as special emergency procedure

- Presidential ordinance or injunction order procedure can be taken in all cases where interim measures have to be pronounced in order to protect the child's immediate interest.
- In family law is a procedure often used to replace the consent of the defendant who refuses to give in case the other parent refuses to give his consent for emergency surgeries, enrolling the child in school, granting the passport or other identity documents, for temporary custody until the end of civil or even criminal law cases.
- These interim measures must be provisional and cannot deal with the substantive merits of the case.

Fuloplawyers human rights in business

5

Minor's aversion may lead to non-application of the legislative provision

- Article 912 of the Code of Civil Procedure regulates the Minor`s refusal in cased of foreclosure proceedings
- If the bailiff during foreclosure, and applying the non-residential parents right for visiting rights, or child abduction procedure finds that the minor himself refuses to leave the debtor or manifests aversion to the creditor, will draw up a record of its findings and will communicate it to parties and to the representative of the General Directorate for Social Assistance and Child Protection.
- The Social Assistance and Child Protection will ask the competent court to dispose a psychological counseling program, for a period not exceeding 3 months.

Fuloplawyers human rights in business

6

Minor's aversion may lead to non-application of the legislative provision

- Request is urgently solved in the council chamber, and legal provisions on hearing the child remain applicable.
- At the end of the counseling program, the psychologist appointed by the court will draw up a report that will be communicated to the court, to the bailiff, and to the General Directorate for Social Assistance and Child Protection. After receiving the report from psychologist, the bailiff will resume the forced execution procedure, and the creditor may refer to the competent court for the purpose of applying a penalty.
- This procedure grants the child's best interests, but at the same time non- residential parents can see their visiting rights, or their right of child return as impossible to implement even if they have a definitive court decision on their side.

7

Public legal aid for family law cases

- Legal aid may be sought under Emergency Order No 51/2008 and may be granted separately or cumulatively in the form of assistance by a lawyer, payment for an expert, translator or interpreter; the payment for the bailiff's fee; for the exemptions, reductions, rescheduling or delays in payment of the Court fees.
- Legal aid regarding the assistance from a lawyer, can be granted in all criminal cases. In civil law cases only in specific cases where the defendant cannot be identified by domicile, cannot be summoned or for defending the interests of people with disabilities or limited capacity of exercise.
- Legal aid is not granted for custody problems, for divorce, for low income parents who would need assistance in their dispute resolution.
- Exception would be certain child abduction cases when the foreigner notifies the Ministery Of Justice, and the authority requests Bucharest Bar to grant an ex officio lawyer.

8

Damages And Spousal Maintenance

- The general provisions of the Romanian civil code do not foresee maintenance obligation of the spouses after the marriage ends.
- According to the Civil Code of Romania, the former spouse is entitled to maintenance if he or she is in financial need, due to incapacity to work arising before or during the marriage, or to incapacity arising within a year of the divorce provided this incapacity is due to events relating to the divorce.
- The former spouse loses the right to maintenance from the other spouse if he or she remarries.
- If the divorce judgment has found only one of the spouses to be at fault, this spouse is entitled to maintenance from the other spouse for only one year after the divorce, whereas the other spouse is entitled to maintenance for an indefinite period.

Fuloplawyers
human rights in business

9

Children left behind while their parents migrated for work abroad

- The increase of labor force's movement within European borders brought Romania in front of a massive migration, Romanians trying to find job opportunities in countries with a more developed economy. This phenomenon is more characteristic for poor areas of the country, where large communities migrated abroad, leaving behind a high number of children, in the care of grandparents, other relatives or even in no one's care.
- Beyond social problems that these children may develop behavioral problems like school dropout and absenteeism, juvenile criminality or even suicide, there are many legal problems as parental consent for important aspects, child custody issues, and in many of these cases grandparents or the sole parent does not have the financial background to hire lawyer for resolving family disputes, child maintenance or habitual residence aspects.
- A recent study indicated more than 200.000 children are in this situation.

10

Refusal of Power of attorneys

- In Romania in case of joint custody all important decisions, emergency surgeries, enrolling the child in school, issuing the passport or other identity documents, permission to leave the country for have to be granted by written consent of both parents.
- In many cases the non – residential parent is not invested in the child's wellbeing and ignores the power of attorney, refuses or uses this opportunity to blackmail the other parent.
- In emergency procedures this can be resolved with the presidential ordinance, mentioned above but in daily legal practice this is granted in exceptional, emrgent acses like surgery, school application, but not granted when parents want to leave abroad for a better life, sport competitions, family visits, etc.

Fuloplawyers
human rights in business

11

Child maintenance payment

- According to the Romanian Family Code (art. 42), the parent who does not have the custody of the minor child has the legal obligation to support the minor child after divorce, by paying a periodic amount, representing his contribution to the child's maintenance, education, sustenance to assure the child's professional training etc.
- The maintenance support can be effectively performed in kind or by financial support. The court will decide upon the way of execution, considering the particular circumstances. The amount of the financial maintenance support shall be set to maximum a quarter of the salary of the non-custodial parent – for one child, a third for two children, and one half for three or more than three children. In most of the cases, the court decides the non-custodial parent to pay the maintenance support as a monthly amount.

Fuloplawyers
human rights in business

12

Child maintenance payment

- According to the Romanian Criminal Code (article 305 regarding the family abandonment), in case the non-custodial parent fails to execute his obligation of payment the maintenance support, as set by the court, he shall be subject to imprisonment from 1 to 3 years or to fine.
- In practice many non-custodial or even nonresidential parents do everything they can in order to not pay the maintenance obligation, they are changing the jobs in order to put the garnishment on the salaries, going abroad and working without proper legal documents or even refuse the payment as they have no regular income, and is almost impossible for bailiffs to proceed in foreclosure proceedings. Not even the criminal charges scary the parent as the criminal investigations have no deadlines.

Fuloplawyers
human rights in business

13

Thank you for your attention

- Eniko Fulop
- International lawyer
- Managing partner „Fuloplawyers"
- www.fuloplawyers.com

14

Interesting Insights on Ukrainian Family Law

1. To get divorce in a few months

It is possible to get fast divorce in Ukraine irrespective of the financial and children settlement.

Ukrainian court considers divorce claim as completely independent from maintenance, property division and/or child support issues. You don't need to determine financial and/or children claims at the time of divorce.

Divorce through court proceedings can be obtained by filling a court claim for divorce. In a case where one of the spouses does not give his or her consent to the dissolution of the marriage, the court grants a reconciliation period. After this period has elapsed, the court grants a divorce if it is found that the further joint life of the spouses and continuance of their marriage is contradictory to the interests of either party and the interests of their children.

Cases regarding the dissolution of a marriage are considered by the courts in simplified claim proceedings. The timeline is defined by the Civil Procedural Code.

Simplified claim proceedings must be considered on the merits within a reasonable period, however, not later than 60 days from the day on which the proceedings began.

In practice, the abovementioned timelines might be prolonged to three- seven months.

The divorce for spouses who has no children is available through the public civil acts' registration authority within one month:

- The couple must submit a joint application for divorce to be filed with the authority in the presence of both applicants.
- On the preliminary arranged date, no less than one month from the date of the application filing, both spouses again must visit public civil acts' registration authority to officially confirm the divorce and obtain divorce certificates. It is also possible to grant a power of attorney by one of the spouses in the name of the other, to confirm the divorce and obtain a copy of the divorce certificate.
- The marriage can also be dissolved under the application of one of the spouses, in case the other is recognised officially as missing or without legal capacity.

2. Spousal maintenance is limited after the divorce

Under the general provisions of Family Code of Ukraine (FCU), the other spouse has no right to maintenance after the breakdown of marriage irrespective of the spouse's income.

A former spouse is obliged to support the other in only in exceptional circumstances described in Article 75 of the Family Code of Ukraine 2002 if that spouse:

- Became disabled during the marriage or within a year from the date of the marriage breakdown.
- Is pregnant.
- Is raising a child util the age of three or caring for a disabled child.
- Is set to reach pension age within five years.
- if due to raising a child, housekeeping, care for family members, illness or other circumstances that are essential, one spouse had no opportunity to receive education, to work, to take a certain position, he/she is entitled to the maintenance after the divorce,

provided that he/she needs financial support, and that ex-husband/ex-wife can provide financial support.

Spousal maintenance is rarely claimed and awarded. The amount of awarded spousal maintenance is linked to the level of living wage in Ukraine and is extremely low compering to the other countries.

3. Notion of “single custody” is unknown

Ukrainian law does not have the notion of “single custody”.

After dissolution of marriage, the Ukrainian courts can make the following orders regarding the children custody (among others):

- Order for participation in the child's upbringing (visitation or access order).
- Order for the establishment of the place of residence of the child (residence order).

In the event of divorce, the court does not automatically make any of the above orders. The parent seeking visitation or residence order should apply to the court with respective application. While determining the above claims the court will follow the general rule that both parents have equal rights and responsibilities towards the child.

FCU operates with the concept of termination of parental rights (full single custody) in exceptional circumstances if the other parent fails to perform parental responsibility or abuses with it (puts the child under the risk of physical harm or criminal offense, abuses alcohol or drugs etc).

4. No need to get leave to remove a child out of the jurisdiction

The children nationals of Ukraine can freely travel abroad after outbreak of russian-Ukrainian war (from 24 February 2022) without written consent of the other spouse.

Children of Ukrainian parent/parents have right to acquire Ukrainian citizenship by birth irrespective of the country of their birth.

Ukrainian parent has right to formalize acquisition of Ukrainian citizenship and subsequently apply to get Ukrainian passport for traveling abroad without the consent/permission of the other parent.

Majority of foreign jurisdictions allow the child to leave the country based on Ukrainian travel documents without the consent of another parent.

These situations often give rise to the disputes on international child abduction.

Iryna Moroz, partner, attorney-at -law

AGA Partners

Useful things you might not know about the (family) law in Switzerland

I. Child maintenance

In Switzerland, until 2017, children of married couples were given preference over children of unmarried couples with regard to child maintenance. In 2017, a revision of the law was introduced to eliminate this inequality. Since then, children are treated equally in terms of maintenance, regardless of whether the parents are married or not.

For child maintenance in Switzerland, a distinction is made between **cash maintenance** and **care maintenance**. The cash maintenance is calculated according to the actual costs of what the child needs financially (e.g. health insurance, housing costs, etc.). Hence Switzerland does not know a cash maintenance according to a percentage of the income of one, who has to pay alimonies. Now, care maintenance must also be calculated.

In Switzerland, a classic role model was lived for a long time, according to which one parent looked after the children at home (mostly the woman) while the other parent worked. Third-party care outside the family was not possible for a long time due to the lack of sufficient day structures (e.g. crèche places). Today, if the parents agree that the child will be cared for by one parent at home and therefore the caring parent cannot work full time to cover his or her own living costs, the other parent must cover the shortfall between income and living costs. This is called care maintenance (= living expenses minus income from employment). Hence, for all family members a calculation is made regarding the living costs. What all is considered for the calculation depends on the family income.

II. Spousal maintenance

Spousal maintenance in Switzerland is limited. According to the most recent case law of the Federal Supreme Court, spouses can reasonably be expected to return to work even after divorce. This applies even if the spouse has not worked for several years. However, the individual case is always considered. In the worst case, a hypothetical income is imputed to the spouse entitled to maintenance after a transitional period.

The requirements, if a contribution is to be made and, if so, in what amount and for how long, the following factors in particular must be considered (Article 125 Swiss Civil Code):

1. the division of duties during the marriage;
2. the duration of the marriage;
3. the standard of living during the marriage;
4. the age and health of the spouses;
5. the income and assets of the spouses;
6. the extent and duration of child care still required of the spouses;
7. the vocational training and career prospects of the spouses and the likely cost of reintegration into working life;
8. expectancy of federal old age and survivor's insurance benefits and of occupational or other private or state pensions, including the expected proceeds of any division of withdrawal benefits.

III. Reproductive medicine and Registration of the parents

Reproductive medicine in the sense of sperm donation and surrogacy was not possible in Switzerland for a long time. Sperm donation was in principle only possible for married heterosexual couples in Switzerland. Since 2001 the anonymous sperm donation is not possible anymore in Switzerland. This means that since 2001 the donor's personal details, health status at the time of donation and physical appearance are recorded. In the event of the birth of a child, this information is reported to the Federal Office of Civil Status (https://www.bag.admin.ch/bag/en/home/zahlen-und-statistiken/zahlen-fakten-zu-fortpflanzungsmedizin/kinder-aus-samenspende.html). Therefore, every child has the right to know who the biological father is.

Sperm donation for unmarried couples is still not possible today. Sperm donation has only been permitted for same-sex married couples since 01.07.2022.

Surrogacy is not permitted in Switzerland at all. Even though surrogacy is not permitted in Switzerland, there are couples who look for a surrogate mother abroad. The question is still, if it is possible that the wishing parents are entered in the birth register of the child as parents. Lately, there has been a remarkable decision of the highest court in Switzerland. The ruling concerned a couple who had a child carried by surrogate motherhood in Georgia. The egg donation was fertilised with the sperm of the intended father. The intended father must apply for registration as father in the child's birth register in Switzerland by means of a child recognition procedure. Due to the direct biological descent, recognition is not a problem. As soon as the intended father is entered as father in the child's birth register, the wife can adopt the child. In such cases, the adoption authority is obliged to prioritise and decide quickly. Before the adoption, the surrogate mother is entered in the birth register as the mother, since in Switzerland the principle applies: the woman giving birth is considered the legal mother (lat.: mater semper certa est). This applies regardless of the law of the country in which the surrogate mother carries and gives birth to the child.

If a child is born within a same-sex married couple from one of the spouse, both spouses are immediately registered as parents (and not the sperm donor).

IV. Place of residence of the child

If parents exercise joint parental responsibility and if one parent wishes to change the child's place of residence, this requires the consent of the other parent or if the parent does not agree a decision of the court or the child protection authority if (Article 301a Swiss Civil Code):

1. the new place of residence is outside Switzerland; or
2. the change of place of residence has serious consequences for the ability of the other parent to exercise parental responsibility and have contact. It is decided individually by the court and can already apply, e.g. if the driving distance is 30 minutes by car.

Sandra Strahm, Attorney at Law

Schwärzler Attorneys at Law

26.09.2022

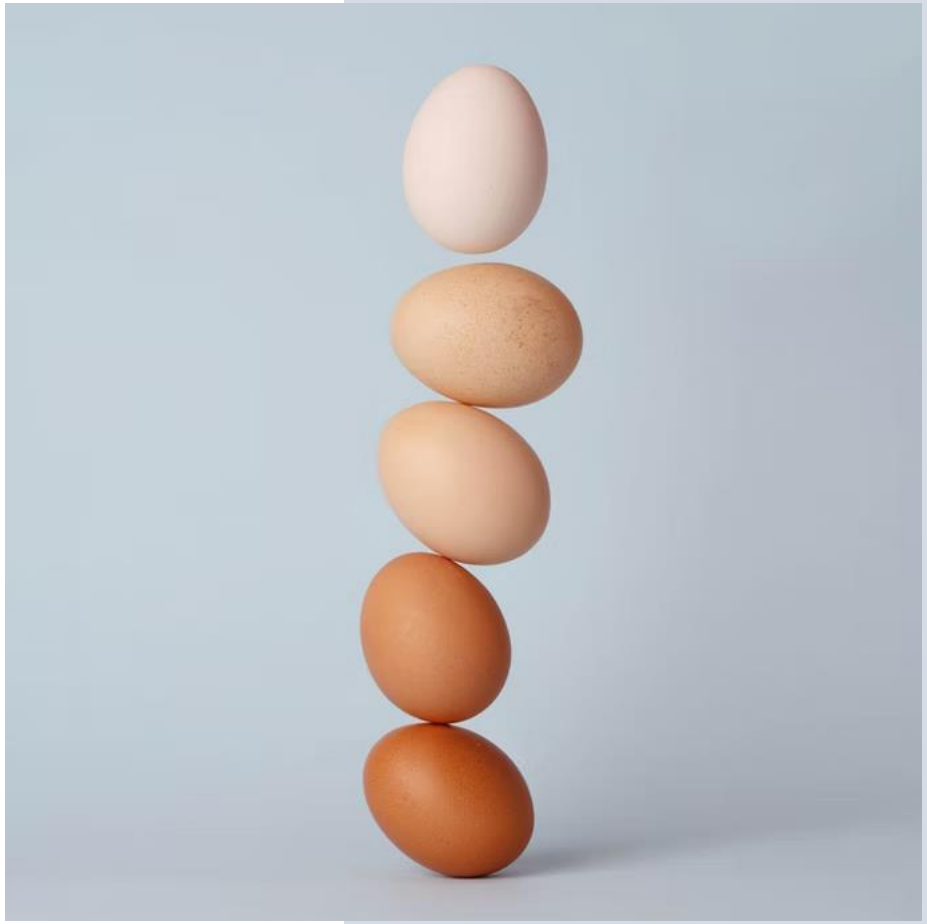
FUN FACTS ABOUT REGULATION OF LITHUANIAN FAMILY LAW

SIMONA AMBROZIŪNAITĖ
ILAW LEXTAL / Senior Lawyer / Attorney at Law

1. Mandatory mediation from 1st of January 2020;

2. Out-of-court divorce procedure from 1st of January 2023;

3. The shared custody or 50:50 model sharing of the child is limited in Lithuania.



1. The mediation process in Lithuania is mandatory from 1st of January 2020;

2. According to the 20 article of Mediation law mandatory mediation applies to family disputes with the exception of cases where a person has experienced domestic violence.

3. The main rule is that if it is possible to reach a peaceful agreement in the family dispute the parties first should try the mediation process. It is impossible to start the court case without the confirmation that the mandatory mediation were used first;

4. The same rule with the mandatory mediation applies in an international family disputes too;

5. Parallel proceedings. Lis pendens. According to the case-law of the Court of Justice, in the case of lis pendens, the date on which a mandatory conciliation procedure was lodged before a national conciliation authority should be considered as the date on which a 'court' is deemed to be seized.

1. New regulation. Out-of-court divorce procedure will be possible from 1st of January 2023. The divorce by notarial procedure.

2. The below mentioned criteria should be satisfied:
   (1) divorce by common agreement of both spouses. Agreement on the consequences of divorce was signed;
   (2) more than one year has passed since the marriage;
   (3) the spouses do not live a married life for more than one year and do not have joint minor children;

3. The agreement on the consequences of divorce enters into force on the next working day after the date of its notarization;

4. International jurisdiction? Applicable law?? Recognition???

1. The shared custody or 50:50 model sharing of the child is limited in Lithuania;

2. It is possible to share the custody of the child by both parents or to use 50:50 model sharing of the child only if the common agreement of both parents were reached;

3. The court can only establish such a procedure for the parent (mother) living separately with the child ("50:50 percent of the time") only after finding that it is in the best interests of the child. The aspect under consideration in legally significant circumstances is, among other things, the place of residence of each of the child's parents (distance between them and the possibilities of communication), the location of the child's educational institutions (distance between them and the place of residence of each parent), the employment of each parent, their ability to deliver the child to and from educational institutions, etc.;

4. If the shared custody or 50:50 model sharing of the child is agreed by parents, still the permanent residence of the child should be set with one parent;

5. How the child support should be paid? Is it possible to agree not to pay the child support?

FUN FACTS ABOUT REGULATION OF LITHUANIAN FAMILY LAW

SIMONA AMBROZIŪNAITĖ
ILAW LEXTAL / Senior Lawyer / Attorney at Law

+370 636 48170
simona.ambroziunaite@ilaw.legal
www.ilaw.legal

Serbia is a country located in the center of the Balkans, at the crossroads of Central and Southeastern Europe. It essentially represents a country in transition. Serbia is not a member of the EU, but is in the process of harmonizing regulations with EU regulations in all fields, including in the area of family law.

At the beginning of my presentation today, I will briefly refer to the current regulations that are applied in the field of family law in Serbia, and then I will share with you some problems that I have encountered in practice when it comes to the application of regulations, which I consider interesting and convenient for promotion. In the end, I will present examples of deviations from harmonization with international regulations that I have recognized and that I believe are important and that it is good to point them out.

Family law in Serbia is regulated by domestic and international sources of law.

1. Domestic sources of family law in Serbia are:

- Constitution of the Republic of Serbia

- Family law as a basic source of law, Other laws as a supplementary source of law (Law on Obligations, Law on Inheritance, Criminal Code, Labor Law)

2. International sources of law

- Confirmed international agreements

- Declarations and conventions of the UN, Conventions of the Council of Europe

What is interesting is that in Serbia, court decisions do not represent a formal source of law, unlike the Anglo-Saxon and precedent legal system. Some believe that judicial practice is not a source of law, because courts do not create law but apply it. Others believe that in the case of legal gaps, judicial practice essentially acts as an intermediate source of law. Others believe that judicial practice is a subsidiary source of law and that it acts as such when a regulation cannot be used.

Judicial practice in Serbia exists in the form of legally binding court decisions, legal understandings and principled legal positions. Legal interpretations are made by a judicial division within a court. A session of the department is convened if there is a disagreement between individual judicial panels regarding the application of regulations or if one panel deviates from the existing legal understanding accepted by other panels of judges. Legal understandings adopted in this way are binding on all councils in that department.

Bearing in mind that legal interpretations bind only the judges of the court in which such a legal interpretation was made (even in situations where it is the Supreme Court), and not the judges of all courts on the territory of the Republic of Serbia, in practice we come to the fact that judicial

practice is colorful and rather uneven when it comes to situations that are not provided for by law, i.e. for which there is a legal gap, which further leads to pronounced legal uncertainty.

In order to bring you closer to what I am talking about, I will present you a situation that I recently encountered in practice. A woman came to my law office who is the mother of three minor children and who divorced her ex-husband a few months before.

I will make a short digression by explaining the divorce procedure in Serbia in the shortest terms, all in order to bring you closer to the problems of the specific situation.

The family law of Serbia recognizes two ways in which a marriage can be divorced:

1. Divorce based on the agreement of the spouses

2. Divorce based on a divorce action

Now we will specifically deal with the divorce based on the agreement.

The divorce agreement must also contain:

1. Written agreement on the exercise of parental rights

2. Written agreement on the division of joint property

An agreement on the exercise of parental rights may take the form of:

1. Agreement on joint exercise of parental rights

2. Agreement on independent exercise of parental rights

- With the agreement on the joint exercise of parental rights, the parents of the child agree in writing that they will exercise parental rights and duties jointly, by mutual agreement, which must be in the best interest of the child.

An integral part of the agreement on the joint exercise of parental rights is also the agreement on what will be considered the residence of the child.

- The agreement on the independent exercise of parental rights includes the parents' agreement on entrusting the joint child to one parent, the agreement on the amount of child support contributions from the other parent and the agreement on how to maintain the child's personal relations with the other parent.

Therefore, the mandatory component of the Agreement on the joint exercise of parental rights is only the agreement on the child's place of residence, while the agreement on the amount of child support contributions is a mandatory part exclusively of the Agreement on the independent exercise of parental rights, which is precisely one of the biggest problems in practice.

I will now return to my case. As I said, my client divorced her ex-husband with whom she has three minor children. During the divorce, they concluded an Agreement on the joint exercise of parental rights and determined that the residence of the children will be at the address of the mother's residence. The court issued a judgment divorcing the marriage and establishing that the former spouses will jointly exercise parental rights over minor children, as well as that the children will live at the address of the mother's residence. The judgment does not oblige the father, with whom the children no longer live after the divorce, to pay maintenance. After the divorce, the father minimally participated in supporting the children, that is, my client financed most of the children's needs herself. However, after several attempts, they managed to agree on the amount of maintenance, but they wanted to have a court decision for it. Her request was that we issue a court decision by which the father will be obliged to pay maintenance on a monthly basis in the exact amount that corresponds to the needs of the children and in accordance with their agreement, as well as for the exercise of parental rights to remain joint. This case is interesting for several reasons which I will now explain.

Although the Family Law does not stipulate that the Agreement on joint exercise of parental rights must contain an agreement on the amount of contributions for child support, in practice (when the agreement is drawn up by lawyers) the Agreement always states the monthly amount to be paid by the parent with whom the child/children do not live the name of maintenance, regardless of the fact that the exercise of parental rights will be joint. Therefore, an integral part of the judgment, which was made on the basis of such an Agreement, is the obligation of child support on the part of the parent with whom the children do not live, as well as the amount of support and other details related to the payment of support.

Even when situations occur where the parties initiate divorce proceedings by agreement and draw up the agreements themselves and come to the hearing without a lawyer, the judge in most cases teaches them that they should also determine the amount of support that the parent with whom the child/children is obliged to pay do not live, in case they have agreed that the exercise of parental rights will be joint. All this precisely for the reason of preventing situations in which my client found herself.

In the specific case, my client and her ex-husband did not hire a lawyer during the divorce proceedings according to the agreement, but instead drew up the Agreement on the exercise of parental rights and the Agreement on the division of joint property, after which they submitted the divorce proposal to the court and attached these agreements. In the Agreement on the exercise of parental rights, they stated only that they will exercise parental rights jointly, without specifying anything regarding maintenance. At the hearing, the court read the agreements and issued a judgment divorcing the marriage and determines that the parties will exercise parental rights jointly, but without determining anything regarding maintenance. This judgment of the court was legal, given that the law does not provide for an agreement on the amount of contributions for child support as an essential part of the Agreement on the joint exercise of parental rights.

In such situations, the question arises as to how the parents will contribute to the maintenance of the children? How will it be known which parent and how much financially contributes to the maintenance of the child/children on a monthly basis?

The law did not exactly regulate this situation. The only thing that the law stipulates, when it comes to the joint exercise of parental rights, is that in an agreement on the joint exercise of parental rights, the child's parents agree in writing that they will perform parental rights and duties jointly, by mutual agreement, which must be in the best interest of the child.

So, in situations like this, we're essentially dealing with a legal vacuum when it comes to the part related to child support.

The question arises, what exactly does the part of the legal provision that reads "that parents will perform parental rights and duties jointly, by mutual agreement" mean? Does this mean that they will contribute to child support in equal monthly amounts, ie 50%-50%? Or does it mean that the parent with whom the children do not live will contribute more? Or does it mean that each of the parents will contribute according to their abilities?

When we come to a situation where the parent with whom the children do not live does not pay anything on the basis of support or pays an amount that he considers appropriate and which is not sufficient to meet the needs of the children, and the exercise of parental rights is shared, the question arises as to how we will enforce enforcement maintenance payments when we do not have a judgment in which the debtor and the amount of maintenance are determined?

The law did not foresee solutions for such situations, regardless of the fact that they are very rare in practice. For this reason, judicial practice is colorful and uneven and depends on the legal understanding of the court before which the proceedings are conducted.

My previous experience was that we resolved such situations by submitting a proposal to the court to determine the amount of contributions for child support, to which we attached an agreement on the amount of contributions signed by the former spouses, given that they agreed on the amount of contributions, and after which the court passed judgment in accordance with the agreement.

The logic was as follows. The initial act that initiates the proceedings before the court for amicable divorce is the proposal. Since this is also about the consequences of divorce and there is an agreement between the parties, applying the analogy, this procedure can also be initiated by a proposal. Ex-spouses can agree on the amount of maintenance, there are no disputed facts for the court and everything ends quickly.

Bearing in mind the previous practice, I advised the client to solve her situation in that way. However, we conducted the proceedings in another court compared to my other cases. The judge who judged this case was of the opinion that the Family Law does not recognize the Agreement on the amount of support as a separate institute. In her opinion, an agreement on the amount of

maintenance can only exist as part of an agreement on the independent exercise of parental rights, and never as a separate agreement. Therefore, she considered that our proposal was eligible for rejection. Her opinion was that the children, as maintenance creditors, should sue the father as the maintenance debtor, in which procedure it will be requested to determine the obligation and amount of maintenance, regardless of the fact that there is an agreement between the former spouses. I referred to the fact that I have the judgments of another court in which the court made a decision based on the proposal and agreement and proposed to submit these decisions in the proceedings. In addition, I explained that I believe that in this particular case the proceedings on the lawsuit further complicate and drag out the situation, considering that the minor children would be the plaintiffs, that as minors they are represented by the father and mother as legal representatives, considering that they jointly exercise parental rights and in order to get into a situation where the father is actually suing himself, because he is the legal representative of the plaintiffs and the defendant at the same time. The clients were, of course, confused. However, the judge was explicit that she can issue a verdict only if the proceedings are based on a claim and that this is the legal understanding of that court. I, of course, looked at the best interest of my client, and resolved the proceedings by saying that the proposal should be considered a claim, that the children are now the plaintiffs and that they are represented by the mother, because they live with her (which the mother confirmed at the hearing), and the father was designated as the defendant, and on that occasion he acknowledged the claim in its entirety.

All of the above only speaks of how much legal uncertainty exists in situations when a legal gap appears in the law, and judicial practice does not represent a source of law.

Therefore, I believe that it is necessary to regulate the part of the Family Law that refers to child support during divorce by agreement in a situation where the parents agree to exercise parental rights jointly. I believe that the agreement on the amount of contributions for child support should be an integral part of the agreement on the joint exercise of parental rights.

Otherwise, we come to the point that the outcome of the proceedings in identical situations depends on the court that judges the specific case, which creates a huge mistrust in the judicial system of a country.

This is just one of the problems I have encountered in practice when it comes to the application of domestic regulations. Now I will briefly refer to examples of deviations from harmonization with international regulations, which also refer to children's rights.

Namely, the twentieth, and then the twenty-first century represent a significant turning point in the understanding and conceptualization of the legal position of the child and in the recognition of specificities related to the child and his rights. The end of the twentieth century was crowned with the adoption of the Convention on the Rights of the Child, which marked the beginning of a new era in the regulation of children's rights - the era of children's rights. This does not mean that the attitude towards children has automatically changed everywhere in the world or that their

position has improved, but the process has begun and it should be hoped that over time it will lead to the eradication of many harmful customs and actions towards children.

Serbia ratified the UN Convention on the Rights of the Child in 1990, and it can be said that the provisions of this Convention as well as the provisions of the European Conventions concerning the rights of the child, regardless of whether Serbia ratified them, are mostly implemented in Serbian family law. However, there are some discrepancies with these Conventions.

For example, physical punishment of children is not expressly prohibited under Serbian law, although the Convention on the Rights of the Child is very clear on the matter.

The situation is similar with the right of a child who is capable of forming his own opinion to express that opinion in all matters that concern him. Serbian law does not guarantee that right of the child when it comes to decisions that concern him and are made in the family. For example, parents are not obliged to ask the child's opinion or consult him when making decisions related to a possible divorce or the adoption of someone else's child, relocation or other issues that also concern their child.

The Family Law obliges all authorities that make decisions concerning the child (judicial, administrative) to first listen to and take into account the opinion of the child, but it does not oblige the parents to take this into account.

The family law of Serbia did not foresee the right of close relatives to maintain personal contact with the child, but only the right of the child to contact with close relatives and persons with whom he has a special closeness. However, if the child is small and cannot exercise the right to contacts independently, nor to develop close relationships with them if the parent exercising parental rights does not approve them, contacts with relatives will be denied, because the law did not recognize the right to contacts as their independent right, which is not in accordance with the European Convention concerning contact with the child.

Regarding the other rights of the child, such as the right of the child to know about his origin, the right of the child to a personal name, the right of the child to live with his parents and to be cared for by his parents, the right to education, to consent to medical interventions , the right to citizenship as well as other children's rights discussed in the paper, it can be said that the highest European standards of children's rights are supplied in Serbia.

Bulgarian Family Law Perspectives and selected gaps

1. Married couple or no rights couple

Bulgarian Family Law does not recognize the cohabitation. The partnership between man and woman has legal recognition only in relation to parental rights. People who decide to live together do not have the right to inherit each other, the properties they have collected during the cohabitation belong only to the partner who put his name on. Once they separate there is no option for contribution claim like in case of marriage.

In relation to children – the parents have equal rights with the married parents. The Family Code has a provision that requests the court to take a decision about parental responsibility – one of the parents exercises the parental rights and lives with the child/children, the other parent has the right of access and pays the child support. The law puts difference concerning the right of the parent who exercises the parental rights to continue living with the children in the same home where the "family" used to live together. The parents who are divorced have that privilege.

The lack of regulation of the partnership grounds on the "national" fear that the same sex couples will have the right to register their cohabitation. 😊

2. No recognition of shared parental rights

In case of separation of the parents the court has the right to decide who is the better capacity parent. It can be only one of them. He/she gets the right to take decisions about everyday life of the child/children as well as to choose school, pediatrician, place of residence, etc.

The other parent is assumed as non-basic one and has the right of access.

After the separation the parents do not have equal rights.

The only option to have shared parental rights is to reach an agreement and the court to confirm it in a court decision.

N.B. The lack of regulation of shared custody and the legal requirement the court to take a decision on who is the better parent creates the parental conflicts actually.

3. Lack of effective remedy for execution of the court decisions on family matters

SPECIALIZED LAW OFFICE IN INTERNATIONAL AND FAMILY LAW
"BEKIRSKA § PARTNERS"
SOFIA, 2 "GRIGOR PURLICHEV" STR., FL. 5, TEL. +359 87 60 600 28,
OFFICE.BEKIRSKA@GMAIL.COM

The parents meet hugest problem to execute the court decision. Once the court decision enters into force, the responsibility for its execution belongs to the parents. However, in case one of them do not follow the decision provisions, the other one does not have an effective remedy to force it.

The most popular reason spread among the parents, who do not want their child to develop strong emotional relationship with the other parent, is to insist that the child does not want to see/meet the other one.

N.B. There are 5 judgements of European Court of Human Rights v. Bulgaria that find violation of art. 8 and art. 13 of ECHR (Aneva and others v. Bulgaria (application nos. 66997/13, 77760/14 and 50240/15)

The case concerned three different applications where a parent had been unable to have contact with their child, despite the existence of a court judgment granting the parent custody or visiting rights.

The first applicant, Vladimira Aneva (born 1981), is the mother of the second applicant, Mihail Ivanov (born 2002). At the start of 2005, after Mihail Ivanov made a visit to his father, the father drove away with him instead of returning him to Ms Aneva's home. The father has repeatedly refused to allow Ms Aneva to spend time with the child – despite this being ordered by the courts in the couple's divorce proceedings.

The third applicant, Slaveyka Kicheva (born 1972), was also granted custody of her son after she and the father separated. However, in September 2011 the father of the child refused to return him after a scheduled meeting, and since then Ms Kicheva has only seen her son on a few occasions (and always in an institutional setting).

The fourth applicant, Stanimir Drumev (born 1973), was granted contact rights with his child consisting of two weekends per month and one full month in the summer holidays. However, he claims that in June 2012 his ex-wife started preventing him from having contact with his child.

Relying in particular on Article 8 (right to respect for private and family life) of the European Convention on Human Rights, Ms Aneva, Ms Kicheva and Mr Drumev complained about the prolonged impossibility to have contact with their children, despite custody and/or contact being ordered by the courts in final judgments. Ms Aneva made the same complaint on behalf of her son, the second applicant, but to the effect of him not being provided with the opportunity and conditions to have contact with his mother.

Mihailova v. Bulgaria (Application no. 35978/02), 12 January 2006;

SPECIALIZED LAW OFFICE IN INTERNATIONAL AND FAMILY LAW
"BEKIRSKA § PARTNERS"
SOFIA, 2 "GRIGOR PURLICHEV" STR., FL. 5, TEL. +359 87 60 600 28,
OFFICE.BEKIRSKA@GMAIL.COM

Bevacqua and S. v. Bulgaria (Application no. 71127/01), 12 June 2008;
Mincheva v. Bulgaria (Application no. 21558/03), 2 September 2010;
Lyubenova v. Bulgaria (Application no. 13786/04), 18 October 2011;
Meirelles v. Bulgaria (Application no. 66203/10), 18 December 2012;
Aneva and Others v. Bulgaria (Applications no. 66997/13, 77760/14 and 50240/15), 6 April 2017;
X and Y v. Bulgaria (Application no. 23763/18) 6 February 2020;
Pavlovi v. Bulgaria (Application no. 72059/16) 1 February 2022.

4. Preliminary ruling within the divorce procedure/parental rights case

Divorce procedure goes along with the parental rights. The mediation is not obligatory yet. In case both parents want to exercise the parental rights, the procedure prolongation could be about 2 years per instance, 3 instances.

Pursuant to the Bulgarian Family Code at the request of the parent, the court shall determine temporary measures ruling in the best interests of the child after requesting an opinion from the Social Welfare Directorate. These measures enter into force immediately. They can be changed by the same court, that orders them.

The problem is that the court delivers the first instance decision and does not change the temporary measures usually. So, they continue to be in force during the appeal procedure. Their life is about 4 years long. The measures, supposed to be temporary, includes 2 weekends per month and some summer time usually.

During this period – just after the separation of the parents – the children do not have essential time with both parents. And the parent who exercises the parental rights for 26 days stays v. the other parent who has access to the children for 4 days per month.

N.B. The cause of our Family Law Office is to popularize the shared custody among society and to propose amendment in the law in order the institute to be legally recognized. These efforts last 10 years.

5. Right of the child to travel abroad

Bulgarian children can leave the border only with the mutual agreement of both parents. The questions related to travel abroad of a child and the issue of the required personal documents shall be decided in consent by the parents. Since 2010

SPECIALIZED LAW OFFICE IN INTERNATIONAL AND FAMILY LAW
"BEKIRSKA § PARTNERS"
SOFIA, 2 "GRIGOR PURLICHEV" STR., FL. 5, TEL. +359 87 60 600 28,
OFFICE.BEKIRSKA@GMAIL.COM

there is a legal provision that stays in case of lack of consent the dispute between the parents shall be resoled by the district court at the current address of the child. The proceedings shall start at the request of one of the parents. The court may allow preliminary enforcement of his decision.

The problem is that the court procedure takes about 3 years.

6. The different legal suits concerning the same child go to different judge

The fighting parents are used to initiate plenty of new legal suits – parental rights, domestic violence (it is a civil procedure, not criminal. In 24 hours, the victim gets the court ruling that decides to give or not an Immediate Protection Measures Order. Based on that legal opportunity each parent starts new court procedure on the same act on behalf of her/himself and on behalf of the minor children), travel permition case, the grandparents of each parent initiate access cases as well.

The main problem is that different judge is in charge of each case, so at the end we have for example 8 trails that have controversial decisions even.

YORDANKA BEKIRSKA, LL. M.
attorney-at-law | legal expert
SPECIALIZED LAW OFFICE IN INTERNATIONAL AND FAMILY LAW
"BEKIRSKA § PARTNERS"

BULGARIA
SOFIA
2 "Grigor Purlichev" Str., 5th floor, ap. 8
mobile: 00359 87 60 600 28

Be the change! Influencing and changing the law: strategic litigation and working for, in and against government

RACHAEL KELSEY

SKO Family Law Specialists
18 George Street
Edinburgh
Scotland
EH2 2PF

Tel: +44 (0)131 322 6669
Direct Dial: +44 (0)131 357 1132
Web: sko-family.co.uk

Rachael is a founding Partner of SKO Family Law Specialists- the largest niche family practice in Scotland. She is the only 'Hall of Fame' family lawyer in Scotland in the Legal 500 (2023 Edition); the only Scottish lawyer in band one of Chambers High Net Worth (2022) and the only Scottish lawyer in the Spears 500 Family Lawyers Guide (2022). Chambers and Partners describe Rachael as, '*the doyenne of Scots family law*'.

Rachael has recently been appointed by the Lord President to sit for a third term on the Family Law Committee of the Scottish Civil Justice Council. She is President Elect of the IAFL and was The Times Scottish Lawyer of the Week in July 2020. She is the only Scot to sit on the UK Ministry of Justice International Family Law Committee.

ARPI AVETISYAN

Head of Litigation
ILGA Europe

Email: Arpi@ilga-europe.org
Web: ilga-europe.org/
LinkedIn: View here

Arpi is responsible for ILGA-Europe's litigation. She works with ILGA-Europe members and partners to develop strategies for using litigation to protect LGBTI people's human rights across Europe.

Her tasks conducting international and comparative law research, drafting case submissions and bringing third party interventions to the European Court of Human Rights. She helps LGBTI groups build up the capacity they need to engage in strategic litigation in Europe and mobilise resources.

Background

Arpi is an international human rights lawyer with over 15 years of experience in research, publication, advocacy, capacity development and litigation before the European Court.

She began her career coordinating the CEDAW Promotion Campaign Project in Armenia. Next, she worked at the Democracy Today NGO — founded and led by the UN Special Rapporteur on Contemporary Forms of Slavery. She also provided research assistance to the UN Special Rapporteur on the Right to Health.

As a Legal Adviser at INTERIGHTS in London, she provided litigation advice to NGOs in the former Soviet Union and Central and Eastern Europe — and submitted strategically significant cases to the European Court. During her time at INTERIGHTS, Arpi developed several Guidance Manuals for Lawyers on the European Convention articles.

Prior to joining ILGA-Europe, Arpi managed a capacity-building project on human rights strategic litigation in Kosovo in collaboration with the Civil Rights Defenders.

Arpi holds a BA in Sociology (2001) and MA in Conflictology (2003) from Yerevan

State University, Armenia. She also holds an LLM in International Human Rights Law from the University of Essex, UK (2006).:

"The fact I can change people's lives through my work is enormously rewarding. Working on strategic litigation means being creative and working in collaboration with other like-minded people/organisations. I particularly enjoy working in partnerships and making new connections – like linking national LGBTI organisations so they can share their litigation practices or joining forces with European and International organisations to strengthen our voices. Strategic litigation is not an easy or quick fix; it usually takes years. Yet, when there is eventually a positive judgement, it makes me feel that what I do matters and gives me a boost of energy and inspiration."

Prof. JAKUB URBANIK

University of Warsaw
Poland

Web: urbanik.bio.wpia.uw.edu.pl/
IAFL Associate Fellow Profile: view here

Jakub Urbanik, born 1975 in Warsaw.

Legal historian specialising in legal awareness in Antiquity and legal tradition of marriage and family in the past and modern era. He especially focuses on juristic papyrology in the broadest sense combined with the elements of social history and the history of mentality (and within this sphere particularly interested in the phenomena of legal pluralism and multi-normativism in the Roman and Byzantine Antiquity).

Professor at the Faculty of Law and Administration of the University of Warsaw, Head of the Chair Roman Law and the Law of Antiquity.

Fellow at the Käte Hamburger Kolleg “Legal Unity and Pluralism” in Münster.

Co-editor of *The Journal of Juristic Papyrology* and the of the series of its supplements.

Corresponding Member of the German Archaeological Institute.

Studied and taught in Naples, Cologne, San Sebastian, Palermo, and Zürich.

A legal activist, part-taker of a number of strategic litigations focusing on LGBTQ+ rights, chair of the Board of Advisors of *Law Does Not Exclude Fund* within the *Love Does Not Exclude Association*.

MARGARET CASEY KC

Barrister
Auckland, New Zealand

IAFL Fellow Profile: view here

Margaret Casey went to the Bar in 1992. She specialised in all aspect of family law, with a particular focus on international aspects of family law. She has acted for children in parenting disputes and is appointed by the Central Authority in Hague Convention abduction cases.She has conducted many of the appeals in this area. Margaret has had a long interest in the practice of adoption law, domestic and international as well as in all aspects of surrogacy and assisted reproduction within and outside New Zealand.. She has been appointed to the Experts Group at the Hague on parentage/surrogacy in February 2016. Margaret also is a trained mediator and conducts many mediations throughout New Zealand mainly addressing relationship property and estate issues.

Margaret was appointed Queen's Counsel in July 2015.

MIA DAMBACH

Children's rights advocate
St Sulpice, Switzerland

Tel: +41 789 24 09 74
Email: rmdambach@netcourrier.com

PROFILE
Specialising in human rights of children with over 20 years' experience in promoting child sensitive solutions at the UN, regional and national contexts + close collaboration with CRC Committee, UNICEF and UN SR on sale and sexual exploitation + proven capacity to provide robust technical assistance (evaluation missions, legal and policy reforms, training) in multiple countries (Australia, Belgium, Cambodia, Canada, Cape Verde, Cote d'Ivoire, Denmark, Egypt, France, Ghana, Haiti, Italy, Morocco, Norway, Sudan, Switzerland, Ukraine, Viet Nam etc.) in alternative care, migration and refugee issues, adoption and surrogacy + capacity to leverage multi-stakeholder partnerships as reflected in several successful inter- agency initiatives + strategic planning to achieve sustainable results + expert in advisory groups.

EXPERIENCE
2021–present Executive Director • Child Identity Protection • Geneva
Lead advocacy, policy and research, including publications related to child identity rights + Strategic oversight of team of children's rights specialists and interns +Establish organisational structure including policies
20015–2021 Director • International Social Service/IRC • Geneva
Several years of executive level management + spearheaded advocacy campaigns for implementation of CRC, UN Guidelines for the Alternative Care of Children, 1993 and 1996 Hague Conventions + co-chair of international taskforces "Moving Forward", International Conference (400 participants), MOOC on alternative care (approx. 22 000 participants) and MOOC4COM (approx. 26 000 participants), MOOC on COVID-19 Adapting Child Protection Case Management (approx. 7 000 participants) + coordinator of expert group drafting international principles on protection of children in surrogacy arrangements + senior technical expertise in evaluations, training and law reform on alternative care, migration, adoption and surrogacy mostly mandated by UNICEF + fundraising of budgets up to 500K CHF etc.
2008 – 2015 Children's rights specialist • ISS/IRC • Geneva
Research/drafting of country situations + articles for Monthly Review + co- convener of NGO Working Group on Children Without Parental Care + evaluation missions on alternative care and adoption + Treaty Body mainstreaming (CRC, CESCR, CRPD, & CEDAW) etc.
2007- 2008 Policy and advocacy intern • UNICEF • Geneva
Prepared reports for CRC Committee, Human Rights Council and Universal Periodic Review identifying existing and emerging children's issues to support UNICEF country offices + ad hoc research and intern supervision etc.
2001 – 2006 Children's solicitor • Legal Aid • Sydney
Effectively represented children in over 400 legal proceedings at local, district and supreme court + represented Legal Aid in multiple law reform committees + duty solicitor visiting juvenile detention centres and adult bail court etc.
2001 – 2003 Children's solicitor • Macarthur Legal Centre • Sydney
Civil and administrative cases including non-discrimination, Ombudsman complaints, social security and family matters.

EDUCATION
2005 – 2007 Master of Laws by Research (LL.M Hons), University of Sydney
1998 – 2000 Bachelor of Laws with Honours (LL.B Hons), University of Sydney
1993-1996 Bachelor of Commerce (B.Com Hons), Triple major in Economics, Marketing & Accounting, University of Sydney
1990 – 1992 Higher School Certificate, Fort Street High School, Sydney

MICHAL KUBALSKI

Head of the family law unit
Commissioner for Human Rights
Warsaw, Poland

Email: michal.kubalski@gmail.com

Michał Kubalski, head of the family law unit at the Commissioner's for Human Rights Office, Poland, attorney-at-law, 20 years of practice in the area of parental responsibilities, children's rights, alimony, international child abduction, matrimony and divorce, adoption, foster families, incapacitation, rights of persons with disabilities.

Current responsibilities include :-

- Delegating tasks among officers,
- preparing legal opinions, court motions, correspondence with government and other chief offices,
- legal representation of the Ombudsman during court proceedings, answering to citizens' motions and petitions,
- case analysis at human and citizen rights angle,
- letters of intervention in individual cases and in general issues
- representation of the Ombudsman in international projects, conferences and workshops (Inclusion Europe 2002-2004, Peace Research Institute Oslo 2018-2019, Fundamental Rights Agency 2017)

- family law: parental responsibilities and authority, children's rights, alimony, international child abduction, matrimony and divorce, adoption, foster families
- civil law: incapacitation

Education :-

2010 – 2013 Attorney-at-law, Warsaw Bar Association https://www.oirpwarszawa.pl/
1997 – 2002 Master -of-law, Warsaw University, Faculty of Law and Administration https://www.wpia.uw.edu.pl/

Privacy rules in your jurisdiction and the enforceability of non-disclosure agreements

JAMIE KENNAUGH

Partner
Charles Russell Speechlys
London, England

Web: charlesrussellspeechlys.com

Jamie's experience includes a wide range of private family law proceedings, including contested divorces, civil partnership dissolution, financial relief, pre/post nuptial agreements and arrangements for children on separation.

Jamie acts for and against individuals across a broad range of industries and backgrounds – including the sports field, entrepreneurs and those with wider family wealth. She has clients based both in the UK and globally, with a reach beyond Europe in the Middle East and the U.S. She has a strong interest in dealing with complex trust assets on divorce.

Complementing her experience in dealing with finances on separation, Jamie is a particular specialist in private law children work and her cases are often cross jurisdictional. She advises individuals on wide-ranging arrangements for their children, including internal and external relocation. Jamie also has experience in dealing with complex domestic abuse matters.

She has contributed to various publications and legal sources, including the mainstream press.

Jamie joined the firm as a Trainee in 2007, qualified in 2009 and was promoted to Partner in 2018.

Jamie is a trained mediator and she is a member of Resolution. She is also routinely involved in doing pro bono work with the firm's charity partner, Safelives, including acting on pro bono cases referred by them.

LARRY GINSBERG

Harris Ginsberg LLP
Los Angeles, CA, USA

Email: lginsberg@harris-ginsberg.com
Tel: (310) 444-6333
Web: harris-ginsberg.com
IAFL Fellow Profile: View here

Mr. Ginsberg is a founder of the family law firm of Harris • Ginsberg LLP in Los Angeles, California. His firm represents parties in all aspects of family law, including property division, support, custody, parentage, prenuptial, post-nuptial, and cohabitation agreements. Mr. Ginsberg and his fourteen-attorney firm specialize in the representation of high net worth individuals in high conflict situations, while also being "mediation friendly".

Mr. Ginsberg is a Certified Family Law Specialist and a Fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. He has an AV rating by Martindale-Hubbell. He is a member of the Family Law sections of the American, California, Los Angeles County and Beverly Hills Bar Associations, and has been on the executive committees of both the California and Los Angeles County Bar Family Law sections.

Mr. Ginsberg has lectured to local, national and international organizations with regard to prenuptial and post-nuptial agreements, dissolution of marriage issues, and the future of family law, and is the author of several articles and a contributing editor to several Family Law publications.

He is actively involved in the community in Board work for the benefit of low income individuals in family law and domestic violence matters and the arts. He has been named as a Los Angeles Magazine "Super Lawyer" for 2004 through 2021 including being named as one of the Top 100 Super Lawyers in Southern California in all areas of practice in 2010 and 2011, and as one of the "Best Lawyers in America" for 2007 through 2021.

LUKAS DEPPENKEMPER

Certified family law specialist
WHL Weiss Hippler Leidinger
Düsseldorf, Germany

Email: deppenkemper@w-h-l.de
Tel: +49 211 4998860
Web: w-h-l.de

Lukas is a qualified German lawyer and certified family law specialist. He holds a German law degree from the University of Düsseldorf and a French Master II degree from the University of Cergy-Pontoise. After qualifying in 2016, he joined the boutique family and inheritance law firm WHL Weiss Hippler Leidinger in Düsseldorf where he advises clients on all aspects of German and international family law.

In recent years, he has gained extensive experience in cross-border cases, involving foreign jurisdictions such as the United Kingdom, France, several U.S. states, Spain, Hong Kong, India and Australia. Due to his background in corporate law he has a particular interest in cases involving complex property structures. Lukas is fluent in German, English and French.

NON-DISCLOSURE AGREEMENTS - FRANCE
IAFL IBIZA CONFERENCE FRIDAY, OCTOBER 14TH 2022
FRANCES GOLDSMITH, LIBRA AVOCATS

I. WHAT IS AN NDA?

Confidentiality agreements between individuals are intended to ensure the protection of information already known, in order to prevent its disclosure.

In France, these contracts go against the conception of law based on the idea that **the circulation of information is the principle and secrecy the exception**.

Confidentiality agreements between individuals are therefore rare, especially as some authors consider that there is more of a culture of conflict in this country than of compromise and avoidance of recourse to the judge, and thus where little room is given for such agreements.

French law does not provide any special regime for this type of contract, which is therefore subject to ordinary contract law. Thus, contractual freedom reigns here. Drafting of the agreement will essentially involve, on one hand, defining the confidential information transmitted, while setting the conditions for its use by the recipient and, on the other hand, characterizing the non-disclosure obligation.

When is an NDA appropriate:

- NDA are mainly intended to organise the exchange of sensitive information of which the contracting party is not yet aware.
- NDA are dedicated to the protection of information that will be transmitted, before the contract is formed, in order to protect its disclosure but also and above all its use.
- To protect the competitive nature of the information in the possession of the holder, to secure the transmission of information, which is often made imperative because of the imminent prospect of the conclusion of a contract.
- NDA then have a preventive and educational role and offer targeted and casuistic protection of confidential information.
- NDA may also, if necessary, be used as evidence when qualifying a business secret within the meaning of Law No. 2018-670 of July 30, 2018, which enshrines a special tort liability regime dedicated to the protection of said secret.

Contexts in which confidentiality agreements are made :

- NDA are usually entered into between economic actors, mainly in a commercial context. Labour Law (agreement between an employee and an employer), Mergers and Acquisitions, Intellectual property law. It is hardly seen in family law, and the closest field of law where they are widely used is labour law. The decisions issued for cases where an NDA was signed between an employee and the company can be used to make conclusions by analogy.

Contexts in which confidentiality agreements are excluded:

- Not possible to insert into pre-nuptial agreements or divorce agreements, especially when it is a question of compensating compliance (usually financially) with an obligation to refrain from disclosing information

- Obstacles in drafting a NDA are inherent to the limits to contractual freedom (in particular public policy and good morals – *bonnes moeurs*) as defined in Articles 6, 1102, and 1162 of the French Civil Code [1].

II. WHAT IS THE SCOPE OF AN NDA AND WHAT ETHICAL CONSIDERATIONS MUST BE TAKEN INTO ACCOUNT BY LAWYERS?

There are many difficulties associated with the drafting of confidentiality agreements.

First, it is difficult to determine the scope of information to be protected under the confidentiality agreement.

Indeed, if the confidentiality agreement is too general, vague and imprecise, it may be ineffective in the event of a dispute following the disclosure of information, because the person who disclosed the information may hide behind the fact that the agreement was not sufficiently precise as to the type of information not to be made known to a third party.

Either it risks containing a very detailed list of each piece of information to be protected, which will therefore be very long and tedious to establish, with a double risk:

- 1/ that the list omits one or more confidential information to be protected, thus making it easy for the opposing party to disclose the information not covered by the confidentiality agreement;
- 2/ that the opposing party refuses to sign the agreement and can therefore disclose all the information contained in the list. Only then would it run the risk of being prosecuted for its bad faith behaviour and would incur sanctions that would be far less than the damage caused by the disclosure of the information.

It is possible to stipulate that the obligation to confidentiality will last both during the term of the contract or will extend after its termination. If the clause is not limited in time and it's duration can be interpreted as lasting for perpetuity, there could be cause to have it nullified as such an obligation cannot create an undue burden. It is therefore advised to provide for a term, usually between five and ten years.

The possibility to award damages depends on the existence of harm and the proof of such harm. The parties may attach a penalty clause to the confidentiality clause in order to punish any breach and, at the same time, incite the debtor to perform. Violation of the confidentiality clause may constitute a sufficiently serious breach of contract to justify termination of the contract containing it.

Second, the lawyer must alert his or her client to the fact that the penalty for breaching a confidentiality agreement is often not a deterrent.

---

[1] **Article 6 – civil code :** "*One may not by private agreement derogate from laws that concern public order and good morals.*"
Article 1102 – civil code : "*Everyone is free to contract or not to contract, to choose his or her contracting party and to determine the content and form of the contract within the limits set by law.*
Freedom of contract does not permit derogation from the rules of public order."
Article 1162 – civil code : "*The contract may not derogate from public order either by its stipulations or by its purpose, whether or not the latter has been known to all parties.*"

Once the value of the confidential information has been definitively compromised, all that remains is a sum of money to compensate for the breach of the obligation of confidentiality. It is very difficult to assess the appropriate sum to be claimed since the impact of such disclosure is complex to evaluate and can be freely modified by the courts.

Thirdly, should a breach of the confidentiality agreement occur, the client should be advised to settle the dispute amicably, as the initiation of legal action carries with it the risk of having to disclose even more information than has already been disclosed, thereby increasing the harm unnecessarily.

III. RELATIVE EFFICIENCY IN FRANCE OF NDA

The penalty for breaching a confidentiality agreement is often not a deterrent, as the courts have complete discretion to modify the amount of the penalty clause to a point where it would no longer be dissuasive (and would be applied after the fact!).

As a general rule, the judge only intervenes once confidential information has been disclosed. The French court does not have the power to issue a preventive order, enjoining one of the spouses from disclosing information. The interim relief judge, being the only judge for emergency proceedings and who could order such an obligation not to disclose confidential information, has only investigative powers (ordering an expert opinion, injunctive powers (stopping unlawful damage) and the power to take precautionary measures (preventing the occurrence of imminent damage).

However, France has recently introduced a reform[2] in commercial matters to strengthen the powers of judges to enable them to prevent breaches of business secrets and which can be useful for family law cases involving family companies.

Article R152-1 of the French Commercial Code[3] provides that the judge, in order to prevent an imminent breach of a business secret, shall prescribe any proportionate provisional and protective measures, including a fine, to prohibit the performance of acts of use or disclosure of a business secret.

French courts may also authorise the continuation of the alleged unlawful use of a secret by making it subject to the defendant placing funds in escrow intended to ensure compensation to the holder of the secret. On the other hand, it is not allowed to authorise the disclosure of a business secret by making it conditional on the provision of such a guarantee.

---

[2] Loi n° 2018-670 du 30 juillet 2018 relative à la protection du secret des affaires qui est la **transposition de la Directive (UE) 2016/943** du Parlement européen et du Conseil du 8 juin 2016 sur la protection des savoir-faire et des informations commerciales non divulgués (secrets d'affaires) contre l'obtention, l'utilisation et la divulgation illégales ; Décret n° 2018-1126 du 11 décembre 2018 relatif à la protection du secret des affaires / Decree No. 2018-1126 of 11 December 2018 on the protection of business secrecy.

[3] Article R.152-1 – commercial code : "*I.-Where a case is brought before it for the purpose of preventing an imminent infringement […] of a business secret, the court may, on application or in summary proceedings, prescribe any proportionate provisional and protective measure, including a penalty payment. It may in particular :*

1° Prohibit the carrying out […] of acts of use or disclosure of a business secret ;

II- As an alternative to the provisional and protective measures referred to in 1° to 3° of Part I, the court may authorize the continuation of the alleged unlawful use of a business secret by making it subject to the provision by the defendant of a security intended to ensure the indemnification of the holder of the secret.

The court may not authorize the disclosure of a business secret by subordinating it to the provision of the security mentioned in the first paragraph."

French judgments, except for family law judgements are open to publication, intended as a guarantee to protect individuals against secret justice. In principle therefore lack of confidentiality. Excludes divorce proceedings and criminal proceedings [4]. Contrary to the debate for increased transparency in England, France maintains a lack of transparency to protect the private affairs of the parties divorcing. It is sometimes however possible to hide the identity of certain parties by the details in our Court of appeal proceedings.

The French concept based on the idea of the necessary circulation of information extends to allowing third parties access to the decisions rendered who can be issued with copies of judgments, as long as they are pronounced publicly (excepting divorce judgements which are anonymous).

Case Study in Labor Law

As NDA are rare in family law, it is possible to reason by analogy with decisions issued in the field of labor law and were public policy and general social principles also reign and where there is less contractual freedom than in commercial law.

Example, Paris Court of Appeal ruling of 5 July 2018 (RG n°14/03318):

Ms Beatrice was hired for an indefinite period from 2 October 1995 by DUCK with the status of manager. On July 21, 2014, Ms. Beatrice filed a petition with the Paris Labor Court (*Conseil de prud'hommes de Paris*) for the judicial termination of her employment contract at the expense of her employer.

A few months earlier, Ms Beatrice confided to her colleague Ms Isabelle that she was being sexually harassed by one of her managers, that she had informed her superiors several times and that nothing had been done to prevent further acts of sexual harassment.

Ms. Isabelle signed a memorandum of settlement with DUCK under which the parties undertook not to establish evidence against each other.

In the context of her action before the Paris Labour Court, Mrs Beatrice called Mrs Isabelle, now a former employee of the company DUCK, as a witness. Her testimony was admitted by the court even though the information provided was covered by an NDA signed between her and the company DUCK.

In general, if the information covered by the NDA is needed to demonstrate a party's defense in litigation, the information is typically admitted meaning that a breach of the NDA would not be characterized. This would also be true in family proceedings.

IV. CONFIDENTIALITY OF DEBATES AND PROCEEDINGS

As mentioned earlier, the French conception is based on the idea that the circulation of information is the principle. It therefore authorizes the publicity of the debates, which is one of the fundamental principles of French justice. This guarantee is intended to protect individuals against secret justice.

[4] **Article 306 – code of criminal procedure :** "*The hearing is public unless publicity would be dangerous for order or morality. In such a case, the court so declares by a ruling made in open court.*"

Therefore, the principle is that, in a trial, there is a lack of confidentiality. However, there are two exceptions:

- Criminal proceedings are held on video (article 306 of the Code of Criminal Procedure[5]). However, the conditions for obtaining it are strictly regulated ;
- The Civil Counsel's Chamber (Article 436 of the Code of Civil Procedure[6]), which allows the parties to explain themselves more freely and confidentially. This procedure is only used for certain procedures (companies in difficulty, swearings of bailiff's clerks, vacant estates, declarations of absence, rectifications of civil status, etc.) ;
- Family law proceedings where the public is not admitted, but other attorneys can be present as they are held to confidentiality.

Moreover, the French concept based on the idea of the necessary circulation of information extends to allowing third parties access to the decisions rendered, who can be issued with copies of judgments, as long as they are pronounced publicly.

Possibility of using arbitration to maintain confidentiality

Arbitration is an alternative to state courts that gives a third party the power to decide a dispute or difference of opinion. It is a form of private justice in which the will of the parties gives the arbitral tribunal the authority to decide between them by means of an award, which has the authority of res judicata and, after obtaining exequatur in a specific, is enforceable. This method of dispute settlement is currently relatively unknown in family law.

However, recourse to arbitration in family law is possible subject to compliance with articles 2059 and 2060 of the Civil Code[7], which define the contours of arbitrability, namely the free availability of rights (possibility to enter into an agreement on these rights) and the exclusion of matters of public order. Questions of status and capacity of persons and those relating to divorce and legal separation are thus formally excluded. Consequently, it is currently not possible for a private tribunal to pronounce the divorce.

Confidentiality in other alternative dispute resolution

There are also other methods of dispute settlement in France: mediation, participatory procedure and collaborative procedure.

In mediation, the confidentiality of exchanges is ensured, as is the collaborative process. This is a principle that is intrinsically attached to the very use of this type of alternative dispute resolution method and does not require the introduction of a specific clause. In addition, all correspondence

---

[5] **Article 306 – code of criminal procedure :** "*The hearing is public unless publicity would be dangerous for order or morality. In such a case, the court so declares by a ruling made in open court.*"

[6] **Article 436 – code of civil procedure :** "*In the judge's council chamber, the hearing will take place without the presence of the public."*

[7] **Article 2059 – civil code : "***All persons may enter into a compromise agreement on rights of which they have the free disposal."*
Article 2060 – civil code : "*One cannot enter into a compromise agreement about matters of status and capacity of the persons, matters relating to divorce and judicial separation or matters of disputes involving public bodies and institutions and more generally in all matters concerning public order.*
However, some categories of public institutions of an industrial or commercial character may be authorized by decree to enter into compromise agreements."

between attorneys is strictly confidential unless otherwise stated, which facilitates confidential exchanges.

On the other hand, neither the participatory process nor the settlement expressly imposes a duty of confidentiality on its participants. Confidentiality is here understood only as the non-publicity of the proceedings and the award. It is not absolute and runs against to the principle of transparency.

Confidentiality, however, is a favourable, and even essential, condition for the effective realisation of at least two other substantial fundamental rights of the parties: (i) the right to have their private and family life and (ii) their freedom of expression.

In the context of domestic arbitration, conciliation and mediation, confidentiality will therefore be imposed both on the persons concerned in the dispute, on their possible counsel, and on the third parties leading the alternative dispute settlement method (conciliator, mediator or arbitral tribunal). Failure by one of its debtors to comply with this requirement is a classic case of civil liability for fault.

In the context of a settlement where a dispute arises on the interpretation or enforcement, the French court controlling the settlement will no longer be limited to solely the validity of the settlement the actual interpretation and enforcement of the entire settlement and its terms. In this instance, the parties end up in the exact situation the settlement was trying to avoid. In doing so, one of the main reasons for favouring the settlement, namely the possibility for the parties to attach a confidentiality clause to it, is nullified by recourse to the judge, which de facto causes the settlement to lose its confidential character.

V. FIDUCIARY DUTIES

In France the term fiducia does not refer to "fiduciary duty laws between spouses ", but a type of contract to manage assets. Any duties similar to fiduciary duties in common law countries are set out by the French Civil Code.

In the context of divorce proceedings, the spouses must "*communicate to each other and to the judge, as well as to the experts and other persons designated by the judge pursuant to 9° and 10° of Article 255, all information and documents that are useful for determining benefits and pensions and for liquidating the matrimonial property regime*." (Article 259-3 of the French Civil Code).
In accordance with Article 272 of the French Civil Code, they must also provide the judge with a declaration on honor certifying the accuracy of their resources, income, assets and living conditions, so that the judge can set a compensatory allowance based on the spouses' assets.

These assets include the spouses' bank accounts. If one of the spouses does not produce his or her bank accounts, the judge may use his or her powers of investigation under Article 259-3, paragraph 2 of the French Civil Code to obtain his or her bank statements or to order him or her to produce them, without being able to invoke banking secrecy (as demonstrated above).

The only limitations placed by case law on this mandatory disclosure, namely the bank secrecy of third parties[8] , and that it cannot be extended to cohabitants[9] are not applicable in this case.

[8] Cass. com., 18 February 2004, no. 01-11.728
[9] CA Metz, 16 December 2009, n° 06/01433

As concerns the community of assets between spouses, Article 1477 of the Civil Code sets out the principle according to which "Any spouse who has entertained or concealed any effects of the community shall be deprived of his or her share in the said effects. Similarly, he who has knowingly concealed the existence of a common debt must assume it definitively. »

Under a community regime, the powers of each spouse over the communal assets must be exercised in full transparency, and the obligation to provide information and any concealment of these assets is punishable by that spouse being forced to give up their right to those assets.

There is therefore a duty of information and loyalty between spouses. In the event a spouse voluntarily conceals decisive information on the future of the company he or she manages, for example, elements that would have revealed the real value of the securities, that spouse commits concealment of community property. Concealment is not limited to the simple subtraction of property dependent on the common mass; it may also involve making certain omissions or falsely under valuating property (Cass. 1re civ., Jan. 26, 1994).

As regards the obligation to provide information, it is incumbent on the spouse, who transfers his or her securities prior to separation, to prove that he or she had informed his or her spouse of their real value (Cass. 1re civ., 1 June 2011, No. 10-30205).

Receiving stolen goods is only retained if the person claiming the penalty establishes both the material and the intentional element, which is obviously more difficult to prove. This proof, which falls within the discretionary powers of the court, will be admitted whenever the "omitted" property is the result of a suspicious concealment. The suspicion of concealment will be all the stronger when the "disappearance" involves liquid assets and especially when it occurred shortly before the divorce.

VI. EXAMPLE OF A CONFIDENTIALITY AGREEMENT

Example of a confidentiality agreement :

Confidentiality Agreement
Between the undersigned
- X
Hereinafter referred to as "X"
[or] Hereinafter referred to as "the holder".

AND
- Y
Hereinafter referred to as "Y"
[or] Hereinafter referred to as "the recipient" or "the holder".
on the other hand,

THE FOLLOWING IS STATED BEFOREHAND :

The preamble must be carefully drafted as it helps to define the objective pursued by the parties, which determines the limits of the use to be made of the information by the addressee.

Set out the reasons why the recipient is interested in the confidential information.

Specify the context in which the parties wished to exchange the confidential information and the purpose for which they wish to do so.

Examples of such information :

"The Registrant wishes to propose to the Recipient .....
In order to enable the recipient to assess the interest of .....,
[list the confidential information communicated, this may also include prototypes, samples .....
[It is also possible to provide a general clause at the end of the list if it is not exhaustive:]
- (...)
- In general, all documents and information relating to ....
Pending the conclusion of a possible contract between the parties, the parties wish to protect confidential information the transmission of which is necessary in the course of their negotiations".

Article 1: Definitions

Among the definitions, the most important is that of "Confidential Information".

Article 2: Obligations of the recipient or beneficiary

The recipient undertakes to :

- to keep strictly confidential the information that will be communicated to him by the holder, either orally or in writing, and not to disclose to third parties, by any means whatsoever, all or part of this information, without prior written authorization of the holder ;
- to take all necessary measures to preserve the confidential nature of the information, and to treat such information with the same degree of protection it accords to its own confidential information ;
- disseminate all or part of the information only to those members of its staff who are interested and required to acquaint themselves with it and use it, and on condition that they themselves are bound by an obligation of confidentiality;
- not to exploit the information directly or indirectly, without first signing a specific agreement with the holder;
- not to use this information as a basis for developing similar information [this last term is to be specified according to what the information relates to: know-how, invention, product];
- to return to the proprietor, on simple written request, and within a period not exceeding ..... days, all documents, samples, prototypes, etc. which will have been given to him within the framework of this agreement, which remain the property of the proprietor, and not to keep any copy thereof;
- not to divulge the content of oral interviews and written exchanges for any reason other than the finalisation of a contractual agreement between the holder and the recipient.

Article 3: Exclusions

The undertakings of the recipient, as defined in Article 2, shall not apply :

- information that is freely available to the public or becomes freely available to the public through no fault of the recipient;
- information of which the recipient can justify that he knew it before it was transmitted to him by the holder;
- information which is communicated to the recipient by a third party authorized to disclose it.

Article 4: Limitations

The information communicated by the holder to the addressee may only be used for the execution of the object of the present agreement, set out in the preamble. Any other use shall be subject to the prior written authorisation of the holder.
Nothing in this agreement shall be construed as establishing a collaboration between the parties or as granting the recipient an option, a license or more generally any privilege whatsoever on the information.

Article 5: (Optional - on the period of exclusivity and remuneration)

If the recipient wishes to.... ... [to be completed according to the nature of the contract being negotiated], he shall notify the holder at the latest .... days before the expiry of the period of exclusivity by registered letter with acknowledgement of receipt. The period of exclusivity shall then be extended by ..... days to allow the parties to negotiate and, where appropriate, conclude a contract of .....

Failing to be so notified within the above-mentioned period, the holder will automatically regain full freedom with regard to the addressee.

In consideration of this period of exclusivity, the Recipient shall pay to the Holder on the date of execution of this Agreement the sum of ……., which will be definitively acquired by the holder.

Nothing in this agreement implies an obligation for the parties to contractually bind themselves in the future.

Article 6: Duration

This agreement may be terminated by either party, by registered letter with acknowledgement of receipt, at any time and as of right, with a notice period of ..... days.
In the event of termination of this agreement, the addressee undertakes to return to the holder all the documents that will have been given to him/her within the framework of this agreement, which remain the property of the holder, and not to keep any copy of the said documents.
The confidentiality undertaking as provided for in Article 2 of this Agreement shall be binding on the Recipient for as long as the confidential information has not been made available to the public, without the Recipient being liable to the Holder.

Article 7: Applicable law

The present contract is subject to the provisions of French law, which will govern, more broadly, all matters relating to the formation, validity, interpretation, performance, non-performance and termination of the present commitment or its appendices.

Article 8: Competent Jurisdiction

In the event of difficulties in the interpretation or execution of this contract, the parties shall endeavour to resolve their dispute amicably.
In the event of persistent disagreement, any dispute, litigation or contestation relating to the formation, validity, interpretation, execution, non-execution and termination of this contract or its appendices will be brought exclusively before the French courts.

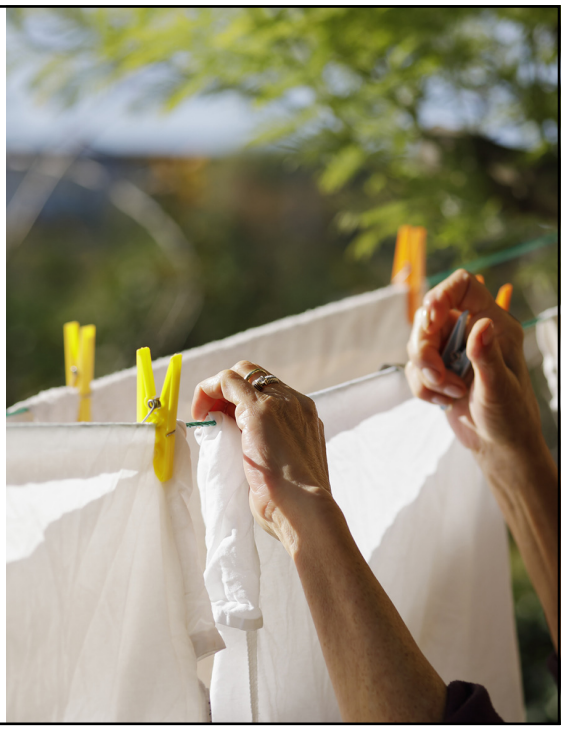
NB : It is possible to foresee that the confidentiality agreement will have to remain secret.

Done at
The ....

In .... original copies.

1

Don't wash your dirty laundry in public



CRS | CharlesRussell Speechlys

2

Legislation, procedure rules and practice *pre* Autumn 2021

- Section 12 Administration of Justice Act 1960
  12(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say (a) where the proceedings (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; (ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or (iii) otherwise relate wholly or mainly to the maintenance or upbring of a minor
- Section 97 Children Act 1989
  97(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify (a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or (b) an address or school as being that of a child involved in any such proceedings.
- Part 27 Family Procedure Rules 2010 "FPR" – See FPR 27.11
  27.11(2) When this rule applies, no person shall be present during any hearing other than … (f) duly accredited representatives of news gathering and reporting organisations; (ff) a duly authorised lawyer attending for journalistic, research or public legal educational purposes
- Court control and general practice

CRS | CharlesRussell Speechlys

3

Legislation, procedure rules and practice *post* Autumn 2021

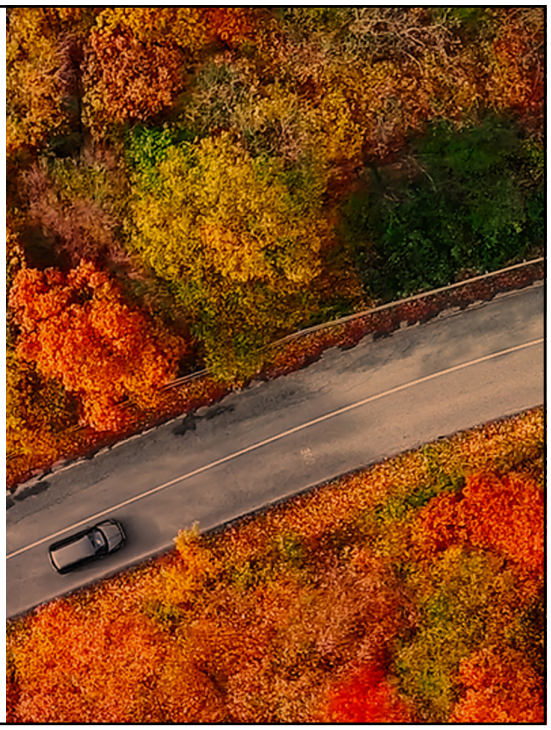
"The present system in the Family Courts whereby a journalist may attend any hearing but may not always report what they observe, is not sustainable …

… there needs to be a major shift in culture and process to increase transparency….

… the time has come for accredited media representatives to be able, not only to attend hearings, but to report publicly on what they see and hear. Any reporting must, however, be subject to very clear rules to maintain the anonymity of children and families, and must keep confidential intimate details of their private lives"

Sir Andrew McFarlane, President of the Family Division

CRS | CharlesRussell Speechlys



4

Recent case law

- BT v CU [2021] EWFC 87 (November 2021)
  "it should be clearly understood that my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations."

- A v M [2021] EWFC 89 (November 2021)
  "In step with the modern recognition of the vital public importance of transparency, my default position for the future will be to publish my financial remedy judgments in full without anonymisation, save as to the identity of children. Derogations from that default position will have to be distinctly justified."

- Xanthopoulos v Rakshina [2022] EWFC 30
  "the risk of indirect identification of children is always a consequence of any decision which is not anonymised. If that were a good reason for anonymisation then it would apply in almost every case, including most civil cases"

- Gallagher v Gallagher [2022] EWFC 52
  "… financial remedy proceedings are heard "in private". The correct interpretation of these rules, in the light of Scott v Scott, is that they do no more than to provide for partial privacy at the hearing. They prevent most members of the general public from physically watching the case. Those rules do not impose secrecy as to the facts of the case"

CharlesRussell Speechlys

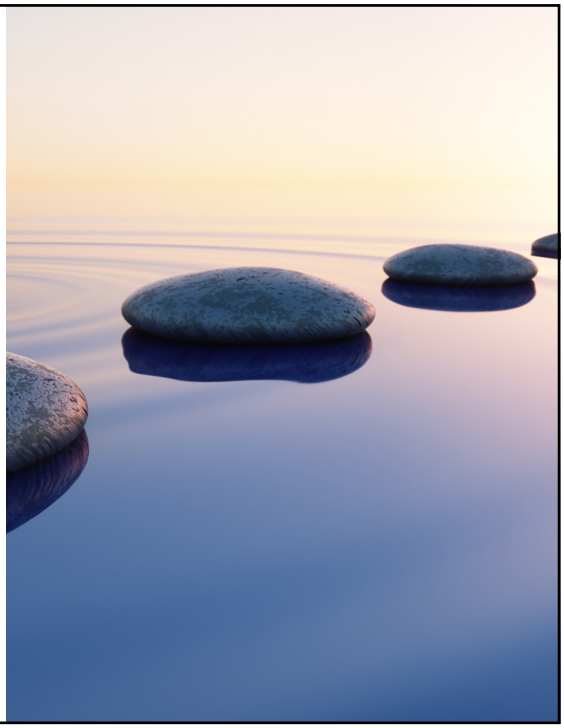
5

Correct approach as per Mostyn J

- In re S (FC) (a child) (Appellant) [2004] UKHL 47
- Balancing Articles 8 and 10 Human Rights Act 1998
- Article 8 - Right to respect for private and family life
  1. Everyone has the right to respect for his private and family life, his home and his correspondence.
  2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others
- Article 10 - Freedom of expression
  1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
  2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
- Four principles at para 17 of Re S – the ultimate balancing test

  "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test"

CharlesRussell Speechlys



6

What's in a name?

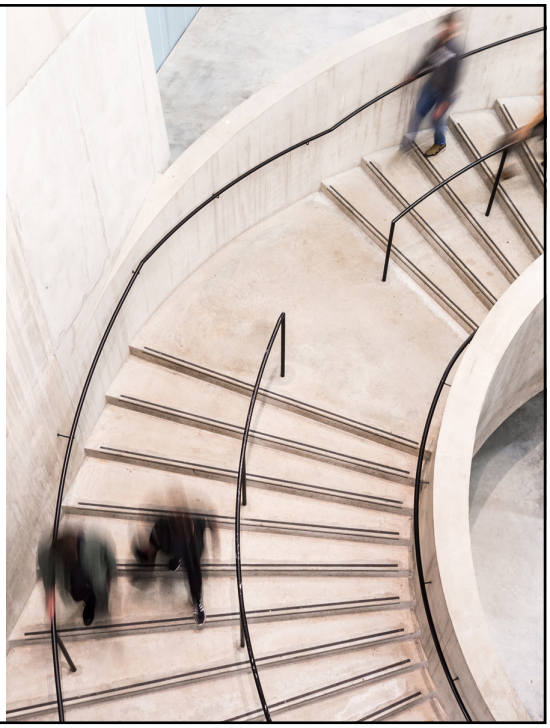
Gallagher v Gallagher [2022] EWFC 52

I disagree with these arguments. First and foremost, I agree with Mr Farmer that ***if very rich businessmen are in court fighting at vast expense with their ex-spouses over millions, then the public has the right to know who they are and what they are fighting about.*** *The judgment should therefore name names. Redactions can be made of commercially sensitive information, but only to the extent that they are strictly necessary …*

Fundamentally, Mr Webster's submissions fail to recognise that ***anonymisation is a direct derogation from the Art 10 rights of the public at large and must be treated as such. As is commonplace, the submissions suffer by tacitly asking the wrong question: "Why is it in the public interest that the parties should be named?" rather than the right one: "Why is it in the public interest that the parties should be anonymous?"*** *The submissions also pay no regard to the* ***requirement in s. 12(4) of the Human Rights Act 1998 which requires me to have "particular regard to the importance of the [Article 10] right to freedom of expression."***

I also agree with Mr Farmer that anonymisation provides an illusory protection against identification. He told me that he can almost always work out quickly and easily the identities of the parties in an anonymised judgment … ***The weakness of the protection conferred by anonymisation is an additional matter to be brought into the balancing exercise.***

CharlesRussell Speechlys



7

Where are we now?

The law is in a state of flux – we await:

- Results of the consultation on Standard Reporting Restriction Orders
- Work of the Transparency Implementation Group
- Amendments to the FPR or statute
- Adoption or otherwise of Mostyn J's cases; different judges have different opinions…

"This causes difficulties for District Judges and Circuit Judges upon whom judgments from High Court judges are important binding precedents. It would be inappropriate for me to set out any view of the law, but I note that ***I am not aware of a single reported case at any level below High Court Judge in which anonymity has not taken place****, although I accept that there may be one or two cases in which this may have occurred. In such circumstances it would be harsh to litigants, who had no real possibility of being aware that any reported judgment in their case would not be anonymous prior to the litigation commencing, to now make their names public"*

His Honour Judge Farquhar - X v C [2022] EWFC 79

"I believe this refers to proposed changes to the rules on anonymity in financial remedy proceedings but they are not in place yet. ***I am clear that, until I am told I have to permit publication, litigants are entitled to their privacy in the absence of special circumstances,*** *such as where they have already courted publicity for the proceedings which is not the case here"*

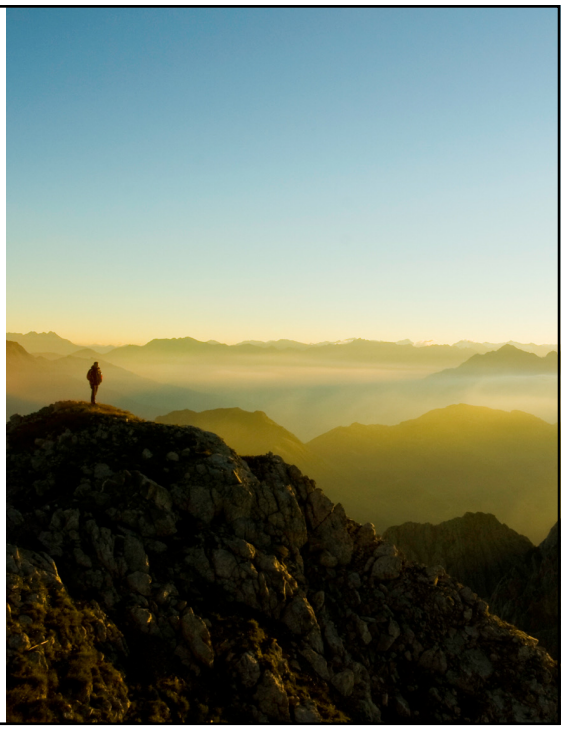
Mr Justice Moor – IR v OR [2022] EWFC 20

CharlesRussell Speechlys

8

Keeping away from prying eyes

- **Agreement**
- **Mediation**
- **Private hearings**
- **Arbitration**
- **NDAs and clauses in pre/post nuptial agreements**



CharlesRussell Speechlys

9

Conclusion

CharlesRussell Speechlys

charlesrusselspeechlys.com

10

CharlesRussell Speechlys

11

(1)

Where the Parties wish to have a confidentiality stipulation and protective order the parties in all civil cases, other than products liability cases, are encouraged to use this Stipulated Confidentiality Order Form as an initial working draft to save time.

Where this Stipulated Confidentiality Order Form is used, then any proposed stipulated confidentiality order submitted to the Court MUST be accompanied by a "redlined' or "compare" version of this Form, so that the Court may readily see ALL MODIFICATIONS that were made to this Form. This procedure is intended to save you and the Court time, and promote faster processing of these proposed orders.

This model form confidentiality stipulation and protective order (the "Stipulated Confidentiality Order Form") does not address, and may not be used in, products liability cases.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Plaintiffs, vs. Defendants.	Case No. LOS ANGELES MODEL STIPULATION AND PROTECTIVE ORDER – CONFIDENTIAL DESIGNATION ONLY

IT IS HEREBY STIPULATED by and between the Parties to Plaintiffs v. Defendants, (*list names of Plaintiffs and Defendants*), by and through their respective counsel of record, that in order to facilitate the exchange of information and documents which may be subject to confidentiality limitations on disclosure due to federal laws, state laws, and privacy rights, the Parties stipulate as follows:

1. In this Stipulation and Protective Order, the words set forth below shall have the following meanings:

a. "Proceeding" means the above-entitled proceeding (*specify case number*).

b. "Court" means the Hon. (*list name of judge*), or any other judge to which this Proceeding may be assigned, including Court staff participating in such proceedings.

c. "Confidential" means any information which is in the possession of a Designating Party who believes in good faith that such information is entitled to confidential treatment under applicable law.

d. "Confidential Materials" means any Documents, Testimony or Information as defined below designated as "Confidential" pursuant to the provisions of this Stipulation and Protective Order.

e. "Designating Party" means the Party that designates Materials as "Confidential."

f. "Disclose" or "Disclosed" or "Disclosure" means to reveal, divulge, give, or make available Materials, or any part thereof, or any information contained therein.

g. "Documents" means (i) any "Writing," "Original," and "Duplicate" as those terms are defined by California Evidence Code Sections 250, 255, and 260, which have been produced in discovery in this Proceeding by any person, and (ii) any copies, reproductions, or summaries of all or any part of the foregoing.

h. "Information" means the content of Documents or Testimony.

i. "Testimony" means all depositions, declarations or other testimony taken or used in this Proceeding.

2. The Designating Party shall have the right to designate as "Confidential" any Documents, Testimony or Information that the Designating Party in good faith believes to contain non-public information that is entitled to confidential treatment under applicable law.

3. The entry of this Stipulation and Protective Order does not alter, waive, modify, or abridge any right, privilege or protection otherwise available to any Party with respect to the discovery of matters, including but not limited to any Party's right to assert the attorney-client

privilege, the attorney work product doctrine, or other privileges, or any Party's right to contest any such assertion.

4. Any Documents, Testimony or Information to be designated as "Confidential" must be clearly so designated before the Document, Testimony or Information is Disclosed or produced. The parties may agree that the case name and number are to be part of the "Confidential" designation. The "Confidential" designation should not obscure or interfere with the legibility of the designated Information.

a. For Documents (apart from transcripts of depositions or other pretrial or trial proceedings), the Designating Party must affix the legend "Confidential" on each page of any Document containing such designated Confidential Material.

b. For Testimony given in depositions the Designating Party may either:

i. identify on the record, before the close of the deposition, all "Confidential" Testimony, by specifying all portions of the Testimony that qualify as "Confidential;" or

ii. designate the entirety of the Testimony at the deposition as "Confidential" (before the deposition is concluded) with the right to identify more specific portions of the Testimony as to which protection is sought within 30 days following receipt of the deposition transcript. In circumstances where portions of the deposition Testimony are designated for protection, the transcript pages containing "Confidential" Information may be separately bound by the court reporter, who must affix to the top of each page the legend "Confidential," as instructed by the Designating Party.

c. For Information produced in some form other than Documents, and for any other tangible items, including, without limitation, compact discs or DVDs, the Designating Party must affix in a prominent place on the exterior of the container or containers in which the Information or item is stored the legend "Confidential." If only portions of the Information or item warrant protection, the Designating Party, to the extent practicable, shall identify the "Confidential" portions.

5. The inadvertent production by any of the undersigned Parties or non-Parties to the Proceedings of any Document, Testimony or Information during discovery in this Proceeding without a "Confidential" designation, shall be without prejudice to any claim that such item is "Confidential" and such Party shall not be held to have waived any rights by such inadvertent production. In the event that any Document, Testimony or Information that is subject to a "Confidential" designation is inadvertently produced without such designation, the Party that inadvertently produced the document shall give written notice of such inadvertent production within twenty (20) days of discovery of the inadvertent production, together with a further copy of the subject Document, Testimony or Information designated as "Confidential" (the "Inadvertent Production Notice"). Upon receipt of such Inadvertent Production Notice, the Party that received the inadvertently produced Document, Testimony or Information shall promptly destroy the inadvertently produced Document, Testimony or Information and all copies thereof, or, at the expense of the producing Party, return such together with all copies of such Document, Testimony or Information to counsel for the producing Party and shall retain only the "Confidential" designated Materials. Should the receiving Party choose to destroy such inadvertently produced Document, Testimony or Information, the receiving Party shall notify the producing Party in writing of such destruction within ten (10) days of receipt of written notice of the inadvertent production. This provision is not intended to apply to any inadvertent production of any Information protected by attorney-client or work product privileges. In the event that this provision conflicts with any applicable law regarding waiver of confidentiality through the inadvertent production of Documents, Testimony or Information, such law shall govern.

6. In the event that counsel for a Party receiving Documents, Testimony or Information in discovery designated as "Confidential" objects to such designation with respect to any or all of such items, said counsel shall advise counsel for the Designating Party, in writing, of such objections, the specific Documents, Testimony or Information to which each objection pertains, and the specific reasons and support for such objections (the "Designation Objections"). Counsel for the Designating Party shall have thirty (30) days from receipt of the written Designation Objections to either (a) agree in writing to de-designate Documents, Testimony or Information pursuant to any or

all of the Designation Objections and/or (b) file a motion with the Court seeking to uphold any or all designations on Documents, Testimony or Information addressed by the Designation Objections (the "Designation Motion"). Pending a resolution of the Designation Motion by the Court, any and all existing designations on the Documents, Testimony or Information at issue in such Motion shall remain in place. The Designating Party shall have the burden on any Designation Motion of establishing the applicability of its "Confidential" designation. In the event that the Designation Objections are neither timely agreed to nor timely addressed in the Designation Motion, then such Documents, Testimony or Information shall be de-designated in accordance with the Designation Objection applicable to such material.

7. Access to and/or Disclosure of Confidential Materials designated as "Confidential" shall be permitted only to the following persons:

a. the Court;

b. (1) Attorneys of record in the Proceedings and their affiliated attorneys, paralegals, clerical and secretarial staff employed by such attorneys who are actively involved in the Proceedings and are not employees of any Party. (2) In-house counsel to the undersigned Parties and the paralegal, clerical and secretarial staff employed by such counsel. Provided, however, that each non-lawyer given access to Confidential Materials shall be advised that such Materials are being Disclosed pursuant to, and are subject to, the terms of this Stipulation and Protective Order and that they may not be Disclosed other than pursuant to its terms;

c. those officers, directors, partners, members, employees and agents of all non-designating Parties that counsel for such Parties deems necessary to aid counsel in the prosecution and defense of this Proceeding; provided, however, that prior to the Disclosure of Confidential Materials to any such officer, director, partner, member, employee or agent, counsel for the Party making the Disclosure shall deliver a copy of this Stipulation and Protective Order to such person, shall explain that such person is bound to follow the terms of such Order, and shall secure the signature of such person on a statement in the form attached hereto as Exhibit A;

d. court reporters in this Proceeding (whether at depositions, hearings, or any other proceeding);

e. any deposition, trial or hearing witness in the Proceeding who previously has had access to the Confidential Materials, or who is currently or was previously an officer, director, partner, member, employee or agent of an entity that has had access to the Confidential Materials;

f. any deposition or non-trial hearing witness in the Proceeding who previously did not have access to the Confidential Materials; provided, however, that each such witness given access to Confidential Materials shall be advised that such Materials are being Disclosed pursuant to, and are subject to, the terms of this Stipulation and Protective Order and that they may not be Disclosed other than pursuant to its terms;

g. mock jury participants, provided, however, that prior to the Disclosure of Confidential Materials to any such mock jury participant, counsel for the Party making the Disclosure shall deliver a copy of this Stipulation and Protective Order to such person, shall explain that such person is bound to follow the terms of such Order, and shall secure the signature of such person on a statement in the form attached hereto as Exhibit A.

h. outside experts or expert consultants consulted by the undersigned Parties or their counsel in connection with the Proceeding, whether or not retained to testify at any oral hearing; provided, however, that prior to the Disclosure of Confidential Materials to any such expert or expert consultant, counsel for the Party making the Disclosure shall deliver a copy of this Stipulation and Protective Order to such person, shall explain its terms to such person, and shall secure the signature of such person on a statement in the form attached hereto as Exhibit A. It shall be the obligation of counsel, upon learning of any breach or threatened breach of this Stipulation and Protective Order by any such expert or expert consultant, to promptly notify counsel for the Designating Party of such breach or threatened breach; and

i. any other person that the Designating Party agrees to in writing.

8. Confidential Materials shall be used by the persons receiving them only for the purposes of preparing for, conducting, participating in the conduct of, and/or prosecuting and/or defending the Proceeding, and not for any business or other purpose whatsoever.

9. Any Party to the Proceeding (or other person subject to the terms of this Stipulation and Protective Order) may ask the Court, after appropriate notice to the other Parties to the Proceeding, to modify or grant relief from any provision of this Stipulation and Protective Order.

10. Entering into, agreeing to, and/or complying with the terms of this Stipulation and Protective Order shall not:

a. operate as an admission by any person that any particular Document, Testimony or Information marked "Confidential" contains or reflects trade secrets, proprietary, confidential or competitively sensitive business, commercial, financial or personal information; or

b. prejudice in any way the right of any Party (or any other person subject to the terms of this Stipulation and Protective Order):

i. to seek a determination by the Court of whether any particular Confidential Material should be subject to protection as "Confidential" under the terms of this Stipulation and Protective Order; or

ii. to seek relief from the Court on appropriate notice to all other Parties to the Proceeding from any provision(s) of this Stipulation and Protective Order, either generally or as to any particular Document, Material or Information.

11. Any Party to the Proceeding who has not executed this Stipulation and Protective Order as of the time it is presented to the Court for signature may thereafter become a Party to this Stipulation and Protective Order by its counsel's signing and dating a copy thereof and filing the same with the Court, and serving copies of such signed and dated copy upon the other Parties to this Stipulation and Protective Order.

12. Any Information that may be produced by a non-Party witness in discovery in the Proceeding pursuant to subpoena or otherwise may be designated by such non-Party as "Confidential" under the terms of this Stipulation and Protective Order, and any such designation by a non-Party shall have the same force and effect, and create the same duties and obligations, as if made by one of the undersigned Parties hereto. Any such designation shall also function as a consent by such producing Party to the authority of the Court in the Proceeding to resolve and

conclusively determine any motion or other application made by any person or Party with respect to such designation, or any other matter otherwise arising under this Stipulation and Protective Order.

13. If any person subject to this Stipulation and Protective Order who has custody of any Confidential Materials receives a subpoena or other process ("Subpoena") from any government or other person or entity demanding production of Confidential Materials, the recipient of the Subpoena shall promptly give notice of the same by electronic mail transmission, followed by either express mail or overnight delivery to counsel of record for the Designating Party, and shall furnish such counsel with a copy of the Subpoena. Upon receipt of this notice, the Designating Party may, in its sole discretion and at its own cost, move to quash or limit the Subpoena, otherwise oppose production of the Confidential Materials, and/or seek to obtain confidential treatment of such Confidential Materials from the subpoenaing person or entity to the fullest extent available under law. The recipient of the Subpoena may not produce any Documents, Testimony or Information pursuant to the Subpoena prior to the date specified for production on the Subpoena.

14. Nothing in this Stipulation and Protective Order shall be construed to preclude either Party from asserting in good faith that certain Confidential Materials require additional protection. The Parties shall meet and confer to agree upon the terms of such additional protection.

15. If, after execution of this Stipulation and Protective Order, any Confidential Materials submitted by a Designating Party under the terms of this Stipulation and Protective Order is Disclosed by a non-Designating Party to any person other than in the manner authorized by this Stipulation and Protective Order, the non-Designating Party responsible for the Disclosure shall bring all pertinent facts relating to the Disclosure of such Confidential Materials to the immediate attention of the Designating Party.

16. This Stipulation and Protective Order is entered into without prejudice to the right of any Party to knowingly waive the applicability of this Stipulation and Protective Order to any Confidential Materials designated by that Party. If the Designating Party uses Confidential Materials in a non-Confidential manner, then the Designating Party shall advise that the designation no longer applies.

17. Where any Confidential Materials, or Information derived from Confidential Materials, is included in any motion or other proceeding governed by California Rules of Court, Rules 2.550 and 2.551, the party shall follow those rules. With respect to discovery motions or other proceedings not governed by California Rules of Court, Rules 2.550 and 2.551, the following shall apply: If Confidential Materials or Information derived from Confidential Materials are submitted to or otherwise disclosed to the Court in connection with discovery motions and proceedings, the same shall be separately filed under seal with the clerk of the Court in an envelope marked: "CONFIDENTIAL – FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER AND WITHOUT ANY FURTHER SEALING ORDER REQUIRED."

18. The Parties shall meet and confer regarding the procedures for use of Confidential Materials at trial and shall move the Court for entry of an appropriate order.

19. Nothing in this Stipulation and Protective Order shall affect the admissibility into evidence of Confidential Materials, or abridge the rights of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Court concerning the issue of the status of Protected Material.

20. This Stipulation and Protective Order shall continue to be binding after the conclusion of this Proceeding and all subsequent proceedings arising from this Proceeding, except that a Party may seek the written permission of the Designating Party or may move the Court for relief from the provisions of this Stipulation and Protective Order. To the extent permitted by law, the Court shall retain jurisdiction to enforce, modify, or reconsider this Stipulation and Protective Order, even after the Proceeding is terminated.

21. Upon written request made within thirty (30) days after the settlement or other termination of the Proceeding, the undersigned Parties shall have thirty (30) days to either (a) promptly return to counsel for each Designating Party all Confidential Materials and all copies thereof (except that counsel for each Party may maintain in its files, in continuing compliance with the terms of this Stipulation and Protective Order, all work product, and one copy of each pleading filed with the Court [and one copy of each deposition together with the exhibits marked at the deposition)]*, (b) agree with counsel for the Designating Party upon appropriate methods and

certification of destruction or other disposition of such Confidential Materials, or (c) as to any Documents, Testimony or other Information not addressed by sub-paragraphs (a) and (b), file a motion seeking a Court order regarding proper preservation of such Materials. To the extent permitted by law the Court shall retain continuing jurisdiction to review and rule upon the motion referred to in sub-paragraph (c) herein. *[The bracketed portion of this provision shall be subject to agreement between counsel for the Parties in each case.]

22. After this Stipulation and Protective Order has been signed by counsel for all Parties, it shall be presented to the Court for entry. Counsel agree to be bound by the terms set forth herein with regard to any Confidential Materials that have been produced before the Court signs this Stipulation and Protective Order.

23. The Parties and all signatories to the Certification attached hereto as Exhibit A agree to be bound by this Stipulation and Protective Order pending its approval and entry by the Court. In the event that the Court modifies this Stipulation and Protective Order, or in the event that the Court enters a different Protective Order, the Parties agree to be bound by this Stipulation and Protective Order until such time as the Court may enter such a different Order. It is the Parties' intent to be bound by the terms of this Stipulation and Protective Order pending its entry so as to allow for immediate production of Confidential Materials under the terms herein.

This Stipulation and Protective Order may be executed in counterparts.

Dated:

By:_____
Attorneys for Plaintiffs

Dated:

By:_____
Attorneys for Defendants

ORDER

GOOD CAUSE APPEARING, the Court hereby approves this Stipulation and Protective Order.

IT IS SO ORDERED.

Dated: _____

_____
THE HONORABLE _____

EXHIBIT A

CERTIFICATION RE CONFIDENTIAL DISCOVERY MATERIALS

I hereby acknowledge that I, _____[NAME], _____ [POSITION AND EMPLOYER], am about to receive Confidential Materials supplied in connection with the Proceeding, **(INSERT CASE NO.)**. I certify that I understand that the Confidential Materials are provided to me subject to the terms and restrictions of the Stipulation and Protective Order filed in this Proceeding. I have been given a copy of the Stipulation and Protective Order; I have read it, and I agree to be bound by its terms.

I understand that Confidential Materials, as defined in the Stipulation and Protective Order, including any notes or other records that may be made regarding any such materials, shall not be Disclosed to anyone except as expressly permitted by the Stipulation and Protective Order. I will not copy or use, except solely for the purposes of this Proceeding, any Confidential Materials obtained pursuant to this Protective Order, except as provided therein or otherwise ordered by the Court in the Proceeding.

I further understand that I am to retain all copies of all Confidential Materials provided to me in the Proceeding in a secure manner, and that all copies of such Materials are to remain in my personal custody until termination of my participation in this Proceeding, whereupon the copies of such Materials will be returned to counsel who provided me with such Materials.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this _____ day of _____, 20__, at _____.

DATED:_____ BY: _____
Signature

_____
Title

_____
Address

_____
City, State, Zip

_____
Telephone Number

(2)

HARRIS · GINSBERG LLP
Jessica M. Spiker (State Bar No. 251421)
jspiker@harris-ginsberg.com
Randi M. Akasaki (State Bar No. 272449)
rakasaki@harris-ginsberg.com
6420 Wilshire Boulevard
Sixteenth Floor
Los Angeles, California 90048

Telephone: (310) 444-6333

Attorneys for Respondent,
[redacted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re Marriage of

Petitioner: [redacted]

and

Respondent: [redacted]

[redacted]

DECLARATION OF JESSICA M. SPIKER IN SUPPORT OF RESPONDENT'S REQUEST TO SET ASIDE THE PROTECTIVE ORDER RE CONFIDENTIAL MATERIAL

Date: TBD
Time: 8:30 a.m.
[redacted]

I, JESSICA M. SPIKER, declare as follows:

1. I am an attorney at law duly licensed to practice law in all courts of the State of California and a partner of the law firm of Harris • Ginsberg LLP, counsel for Respondent, [redacted] I have firsthand, personal knowledge of the facts contained herein and, if called as a witness, I could and would competently testify to the facts set forth below under oath. I submit this declaration in support of Respondent's Request for Order to set aside the parties' Stipulation and Protective Order re Confidential Material filed with the Court on July 9, 2020 ("Protective Order") and set aside/modify a portion of its prior sealing orders by unsealing the parties' Income and Expense Declarations.

///

CURRENT PROTECTIVE ORDER

2. In March 2020, the parties executed a Stipulation and Protective Order re Confidential Material which was entered on July 9, 2020 ("Protective Order"). A true and correct copy of the Protective Order is attached as **Exhibit A.**

3. Pursuant to the terms of the Protective Order, the parties are prohibited from disclosing not only confidential documents/materials, but also "any information copied or extracted from Protected Material," any "summaries or compilations," and "any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material." *See* Exhibit A at paragraph 2.

4. The Protective Order prospectively designates broad categories of documents as "Confidential," including but not limited to Income and Expense Declarations, all tax documents such as K-1s and W-2s, and all account statements such as bank statements, credit card statements, and mortgage statements. *See* Exhibit A at paragraph 3. In order to use said documents, or any information derived from the documents, in any court filings the parties are required to simultaneously file a Motion to Seal, **which neither party is permitted to oppose**. *See* Exhibit A at paragraph 8.

5. With respect to the parties' ability to modify the Protective Order, the Protective Order contains two conflicting provisions, as was raised in connection with Respondent's prior RFO to modify the Protective Order. Paragraph 16 of the Protective Order provides the following clause permitting either party to seek relief from the Order:

> Entering into, agreeing to, and/or complying with the terms of this Order shall not: . . . c. Prejudice in any way the right of any Party (or any other person subject to the terms of this Order): . . . ii. To seek relief from the Court on appropriate notice to all other parties to the Proceeding from any provision(s) of this Order, either generally or as to any particular document.

6. At the same time, however, Paragraph 23 of the Protective Order provides in relevant part that "This Order may be amended only by written instrument duly executed by both parties."

7. On April 6, 2022, the Court denied Respondent's request to modify the Protective Order (relying upon the provision Paragraph 23) without prejudice to Respondent's right to move

to set aside the Protective Order completely.

PREJUDICIAL EFFECT OF CURRENT PROTECTIVE ORDER

8. One example of the actual realization of prejudice to Respondent by the current Stipulated Protective Order is what occurred in connection with Petitioner's recent filing on November 23, 2021 of the FL-306 form titled "Request to Continue Hearing" regarding Respondent's RFO for attorney fees. I was unable to inform the Court of the income and assets at Petitioner's disposal in my response and opposition to continuing Respondent's RFO for attorney fees given that I was not afforded even 24 hours notice of Petitioner's intent to seek a continuance of that hearing and the filing of the form by Petitioner to request same. I did not have time to lodge an unredacted copy of a Declaration, prepare and file a Motion to Seal, etc., for the opposition, which precluded Respondent from presenting to the Court even the most basic of the parties' financial facts and circumstances in a timely manner.

9. Respondent anticipates additional *pendente lite* Requests for Order which pertain to financial issues will be necessary to which the modifications to the Protective Order as requested would apply.

DOCUMENTS THAT HAVE ALREADY BEEN SEALED OR FOR WHICH A SEALING REQUEST IS PENDING

10. As a result of the Protective Order, a number of documents regarding the parties' finances have already been sealed:

a. On February 17, 2022, the Court sealed (i) all references to any financial information in the declarations submitted by Respondent in November 2021 in support of her RFO re Attorney Fees, and (ii) an exhibit to the declaration of Respondent's forensic accountant, the contents/topic of which Respondent is not disclosing here in conformity with the Protective Order.

b. On February 25, 2022, the Court sealed (i) all references to any financial information in the declarations and Memorandum of Points and Authorities submitted by Petitioner in December 2021 in opposition to Respondent's *Borson* motion, other than reference to the amount of attorney fees incurred by Respondent, (ii) all information regarding the parties' incomes contained in a report from Petitioner's vocational evaluator, Philip Sidlow, (iii) all references to any financial

information of the parties in exhibits which consisted of correspondence between counsel, (iv) the parties' bank and investment statements (which were redacted entirely, with the sealed versions appearing as entirely black pages), and (v) Petitioner's Income and Expense Declaration submitted in December 2021 other than with respect to the amount of attorney fees incurred by him.

c. On March 23, 2022, the Court sealed (i) all references to any financial information in the declarations submitted by Respondent in September 2021 in support of her RFO re Attorney Fees, (ii) all financial information in Respondent's Income and Expense Declaration other than with respect to the amount of attorney fees incurred by her, (iii) an exhibit which consisted of Petitioner's Schedule of Assets and Debts, and (iv) an exhibit which consisted of Respondent's Motion to Compel regarding trust documents.

11. Currently, there are two additional pending motions to seal, one filed by each party. Petitioner's request to seal filed on March 10, 2022, if granted in full, would result in sealing all references to any financial information in the declarations and Memorandum of Points and Authorities submitted by Petitioner in response to Respondent's RFO re attorney fees, and would also seal all financial information in Petitioner's Income and Expense Declaration other than the attorney fees he has incurred. Respondent's request to seal filed on March 16, 2022, if granted in full, would similarly result in sealing all references to financial information in the documents submitted by Respondent in her reply re attorney fees.

ALTERNATIVE REQUEST FOR MODIFICATION

12. As set forth in Attachment 8 to the FL-300, if the Court is not inclined to set aside the entire Protective Order, Respondent requests that the Court set aside the portion of Paragraph 23 that prohibits modification without the agreement of the parties. Upon setting aside that portion of Paragraph 23, Respondent requests that the Court modify the Protective Order and adopt the proposed orders set forth in **Exhibit B**, which is a proposed revised protective order that incorporates Respondent's modification requests and which is based upon the existing Protective Order. The requested modifications are as follows:

Paragraph 1:

- Strike the entirety of the definition of "CONFIDENTIAL".

- Define "Documents" to mean " any 'Writing,' 'Original,' and 'Duplicate' as those terms are defined by California Evidence Code Sections 250, 255, and 260."

Paragraph 2:

- Strike the portion of the paragraph that extends the protections of the order beyond Protected Material.
- Add that the protections of the order do not cover "general income, asset, and expense information required, whether by statute or rule of court, to be disclosed to the Court in connection with this dissolution action, including but not limited to Income and Expense Declarations and the information set forth therein."

Paragraph 3:

- Strike the entirety of the existing Paragraph 3.
- Insert new Paragraphs 3, 4, and 5 as follows:

"3. Any party to this action and any third-party required to disclose information in this action shall have the right to designate as 'CONFIDENTIAL' any materials it produces in discovery which it believes in good faith to constitute: (i) proprietary information, (ii) confidential business information or trade secrets, including, without limitation, those that relate to the subject matters listed in the Uniform Trade Secret Act, California Civil Code § 3426.1(d), (iii) information with an extremely high degree of current commercial sensitivity and/or would provide a competitive advantage to its competitors if disclosed, and or (iv) confidential, private or sensitive **identifying information** about individual persons or entities, such as account numbers and social security numbers; AND concerning which (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest.

"4. Any Documents, Testimony or Information to be designated as 'Confidential' must be clearly so designated before the Document, Testimony or Information is Disclosed or produced,

except that Documents, Testimony, or Information produced prior to this Order may be retroactively designated as 'Confidential.' The 'Confidential' designation should not obscure or interfere with the legibility of the designated information.

"5. In the event that counsel for a Party receiving Documents, Testimony or Information in discovery designated as 'Confidential' objects to such designation with respect to any or all of such items, said counsel shall advise counsel for the Designating Party, in writing, of such objections, the specific Documents, Testimony or Information to which each objection pertains, and the specific reasons and support for such objections (the 'Designation Objections'). Counsel for the Designating Party shall have fifteen (15) days from receipt of the written Designation Objections to either (a) agree in writing to de-designate Documents, Testimony or Information pursuant to any or all of the Designation Objections and/or (b) file a motion with the Court seeking to uphold any or all designations on discovery Documents, Testimony or Information addressed by the Designation Objections (the 'Designation Motion'). Pending a resolution of the Designation Motion by the Court, any and all existing designations on the discovery Documents, Testimony or Information at issue in such Motion shall remain in place. The Designating Party shall have the burden on any Designation Motion of establishing the applicability of its 'Confidential' designation. In the event that the Designation Objections are neither timely agreed to nor timely addressed in the Designation Motion, then such discovery Documents, Testimony or Information shall be de-designated in accordance with the Designation Objection applicable to such material."

Former Paragraph 6, now Paragraph 7: Modify the first sentence of subsection a. such that it reads: "Basic Principles. Except as otherwise set forth in this Order, a Receiving Party may use Protected Material that is disclosed or produced by a Party or third party in connection with this action solely for this litigation and any related appeals, or in attempting to settle this litigation."

Former Paragraph 8:

- Strike the entirety of the existing Paragraph 8.
- Insert what will now be Paragraph 9: "Where any Confidential Materials, or Information derived from Confidential Materials, is included in any motion or other proceeding governed by California Rules of Court, Rules

2.550 and 2.551, the party shall follow those rules."

- Insert new Paragraphs 10 and 11 as follows:

"10. The Parties shall meet and confer regarding the procedures for use of Confidential Materials at trial and shall move the Court for entry of an appropriate order.

"11. Notwithstanding any other provision of this Order, Parties and Counsel must not include, or must redact where inclusion is necessary, the following identifiers from all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court:

"i. Social security numbers (if an individual's social security number is required in a pleading or other paper filed in the public file, only the last four digits of that number may be used);

"ii. Financial account numbers (if financial account numbers are required in a pleading or other paper filed in the public file, only the last four digits of these numbers may be used);

"iii. The Parties' residential and business street addresses and any street addresses of third parties (however, the Parties may refer in general terms to the neighborhood, city, state, and/or country where the Parties or third parties reside or do business, and may move to seal the information pursuant to California Rules of Court 2.550 and 2.551 where greater specificity is required); and

"iv. Specific information reflecting the location of tangible assets, e.g., address and unit number of a safe deposit box or storage unit (however, the Parties may refer in general terms to the neighborhood, city, state, and/or country where the assets are located, and may move to seal the information pursuant to California Rules of Court 2.550 and 2.551 where greater specificity is required)."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 2, 2022 at Los Angeles, California.

Jessica M. Spiker

JESSICA M. SPIKER

HARRIS · GINSBERG LLP
Jessica M. Spiker (State Bar No. 251421)
jspiker@harris-ginsberg.com
Randi M. Akasaki (State Bar No. 272449)
rakasaki@harris-ginsberg.com
6420 Wilshire Boulevard
Sixteenth Floor
Los Angeles, California 90048

Telephone: (310) 444-6333

Attorneys for Respondent,
[redacted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re Marriage of

Petitioner: [redacted]

and

Respondent: [redacted]

[redacted]

RESPONDENT'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S REQUEST FOR ORDER TO SET ASIDE PROTECTIVE ORDER RE CONFIDENTIAL MATERIAL

[Reply Declaration of Jessica M. Spiker in Support of Respondent's Request for Order to Set Aside Protective Order Re Confidential Material is filed concurrently herewith]

Date: August 3, 2022
Time: 8:30 a.m.
[redacted]

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

MEMORANDUM OF POINTS AND AUTHORITIES

Respondent, [redacted], submits this Reply Memorandum of Points and Authorities in support of her Request for Order to set aside the protective order regarding confidential material ("Protective Order").

I. The Documents [redacted] Seeks to Unseal Are Relevant and Have Been or Will Be Relied Upon in Adjudicating Substantive Issues

As an initial matter, Petitioner, [redacted], appears in his responsive papers to be conflating and confusing the issue of setting aside the Protective Order with the issue of unsealing records. [redacted] will address primarily the issue of unsealing in this section – despite [redacted] seemingly arguing these points in favor of the Protective Order remaining in place – because the case law that [redacted] cites generally addresses the issues of whether to seal or unseal records. In other words, [redacted] contends that the various arguments tha[redacted]makes about financial records being irrelevant are themselves irrelevant to the issue of whether the Protective Order should be set aside, and are only relevant to the question of whether certain records should be unsealed.

[redacted] argument that his financial records are particularly protected because they are "not relevant" is faulty both in its premise and with respect to the underlying "facts". With respect to the latter, [redacted] conspicuously ignores in his responsive declaration that [redacted] has filed (and served upon his counsel) a Request for Order to modify child support and spousal support. In connection with said RFO, as well as at trial, [redacted] financial information is certainly going to be relevant to the orders that the Court makes.

In particular, child support orders require a finding as to the guideline amount even in an extraordinarily high income earner case per Family Code § 4056(a), which provides:

> To comply with federal law, the court shall state , in writing or on the record, the following information whenever the court is ordering an amount for support that differs from the statewide uniform guideline formula amount under this article: (1) The amount of support that would have been ordered under the guideline formula.

Similarly, with respect to spousal support, the Court "shall" consider, among other factors, "[t]he ability of the supporting party to pay spousal support." Family Code § 4320(c). Even if [redacted] had not filed her Request for Order, child support and spousal support would be issues requiring

adjudication at trial, therefore requiring consideration of [redacted] financial information set forth in his Income and Expense Declarations (**which are the only documents that [redacted] is seeking to unseal**). [redacted] claim that his financial records and/or Income and Expense Declarations are irrelevant is simply untrue.

As for the division of the community estate, [redacted] prior acknowledgment that "most" of the assets are "likely" separate property is not the same thing as conceding that there is no community property at all, or a waiver of her rights and [redacted] obligation to sufficiently trace and address commingled accounts. [redacted] is entitled to put on her case regarding the existence of community property, and the existence of the protective orders have nothing to do with those property claims other than to the extent the orders add an additional burden on [redacted] in presenting her case.

Indeed, [redacted] relies on speculative and unfounded accusations that [redacted] will disseminate his information to third parties or submit a "tsunami" of new information on the Court. These are completely baseless claims, as [redacted] has never improperly used any of [redacted] financial information – with or without protective orders – and has already filed multiple Requests with this Court containing only appropriate and relevant information and exhibits. Setting aside the protective orders would simply allow [redacted] to litigate this case the same as any other party and not be forced to file motions to seal such common family law documents as an Income and Expense Declaration, nor hamstring her accountants' and attorneys' ability to provide relevant information in declarations in a manner readily and easily accessible to the Court.

[redacted] accusation about a "tsunami" of discovery materials being forthcoming after removal of the Protective Order demonstrates that the Protective Order is indeed burdening [redacted] and preventing her from presenting all of the information and evidence necessary to support her claims. There would be no reason for [redacted] to be afraid of a tsunami of documents if he did not think that the Protective Order was in some way holding [redacted] back like a seawall from effectively and efficiently presenting her case.

The phrasing of "tsunami of discovery materials" appears to have been borrowed by [redacted] (without citation) from *Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th

471, 500. The facts of *Overstock* are a stark contrast from the instant case and reflect the unique situation in which the court found itself:

> Plaintiffs submitted a veritable mountain of confidential materials in opposition to defendants' motions for summary judgment. Entire documents were submitted, when only a page or two were identified as containing matter relevant to the issues. Multiple documents were submitted to support a claim, when one would have sufficed. The parties made no mention at all of hundreds of the exhibits. Inundating the trial court with this deluge of confidential materials was brute litigation overkill . . . . While defendants' umbrage at plaintiffs' "shock and awe" document strategy was understandable, their motions to seal were, in turn, breathtaking in scope.

Id. at 498-499 (internal citations omitted). Neither party in the instant litigation has engaged in this type of behavior, such that [redacted] claims that [redacted] will do so if the protective order is voided is completely baseless.

[redacted] claims that [redacted] will increase the cost of litigation by generating fees is similarly baseless, as he is the party insisting on maintaining the draconian protective order that forces the parties – and in particular [redacted] as the out spouse – to file an extra RFO for each and every pleading wherein she may wish to so much as mention [redacted] financial situation, not to mention being forced to move to seal ordinary documents such as Income and Expense Declarations and declarations containing general financial information. A perfect example is that there are presently **three** motions to seal that are set to be heard concurrently with this Request for Order.

As to the underlying reasoning of [redacted] argument, the majority of cases cited by [redacted] on the first page of his Memorandum of Points and Authorities come from a variety of federal and foreign jurisdictions, which presumably do not have the same right to access to public records that California enshrines in its Constitution at Art. I, Sec. 3. *See, e.g., Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597 ("[T]he people's right of access to information in public settings now has state constitutional stature, grounding the presumption of openness in civil court proceedings with state constitutional roots."). [redacted] citations also include an unpublished case in violation of California Rule of Court 8.1115(a).

The one published California case that [redacted] cites, *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, does **not** stand for the proposition that "access to irrelevant documents does not

promote goals of public access" as [redacted] asserts. Instead, the central issue in *Mercury* was "a rather narrow one: the applicability of the sealed records rules to discovery material designated confidential pursuant to a protective order and later filed with the court **and not used at trial or submitted as a basis for adjudication**." *Id.* at 104 (emphasis added).

The *Mercury* court held that merely attaching discovery materials as exhibits to a Complaint, where judgment was thereafter entered by demurrer for plaintiffs' lack of standing, did not result in the materials being "submitted as a basis for adjudication" such that there was not a presumption of public access to those particular materials. *Id.* at 103, 105. The court emphasized that "Our holding is not meant to encourage the filing of complaints or other pleadings under seal, nor is it intended to suggest that pleadings should not, as a general rule, be open to public inspection." *Id.* at 104.

The *Mercury* holding is clearly inapplicable in the instant case as the records that [redacted] seeks to unseal have already been used as a basis for adjudication or have been submitted for the purposes of adjudication on substantive issues such as support and attorney fees.

As for '[redacted] fundamental right to privacy under article I, section 1 of the California Constitution," the conflict between said right of privacy and the public right to access of court records was already addressed and resolved in the context of family law litigation in *In re Marriage of Burkle [Burkle I]* (2006) 135 Cal.App.4th 1045, which [redacted] cited extensively in her moving papers and which clearly provided:

> Mr. Burkle argues that "financial privacy" is "an 'inalienable right' now enshrined in the California Constitution" and was not at issue in NBC Subsidiary. Moreover, when the California Constitution was amended in 2004 to expressly provide for the broad construction of statutes furthering the people's right of access to information concerning the conduct of the people's business, the amendment specifically provided that it did not modify the constitutional right of privacy or affect the construction of any statute protecting the right to privacy. From this, Mr. Burkle deduces the *NBC Subsidiary* test should not be used to evaluate the constitutionality of section 2024.6. We do not agree . . . . We scarcely need note that state constitutional privacy rights do not automatically "trump" the First Amendment right of access under the United States Constitution.

Id. at 1059. As for the cases cited by [redacted] in support of his right to privacy, *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652 is inapplicable as it addresses the issue of **third party privacy**, not the privacy of a party to the litigation. *Id.* at 654 (although a litigant may, via discovery,

obtain from a bank "information disclosed to it in confidence by a customer," the bank "must first take reasonable steps to locate the customer, inform him of the discovery proceedings, and provide him a reasonable opportunity to interpose objections and seek appropriate protective orders"). The case also pre-dates the sealed records rules set forth in the California Rules of Court.

As for the *Overstock* case, as set forth above, both parties were engaging in bad behavior that has not been observed in the instant case. 231 Cal.App.4th at 498-499. The issue in *Overstock* was whether the massive amount of documents containing confidential third party financial information should be sealed, based primarily on whether the information was relevant to the plaintiffs' summary judgment opposition. *Id.* at 506.

[redacted] reliance upon *Marriage of Tamir* (2021) 72 Cal.App.5th 1068, is also faulty, as is his recitation of the facts in *Tamir*. As an initial matter, the Attorney General moved to unseal the parties' court records, but there is no indication that the Attorney General requested that the parties' protective orders be set aside. *Id.* at 1077-1078 (in summarizing the facts of the case, the appellate court references the Attorney General filing two motions to unseal court records but nothing about a request that the protective orders being lifted although the trial court did order that relief). Indeed, on appeal the Attorney General did not assert that the set aside of the protective order was proper. *Id.* at 1091.

The *Tamir* court found that the trial court had authority to unseal the court records (*id.* at 1084), that the Attorney General need not show that its access to the records "relate to the public's interest in monitoring the courts" (*Id.* at 1085-1086), the Attorney General had standing to seek to unseal the records on behalf of the public (*Id.* at 1087), and that substantial evidence supported the family court's decision to unseal the compensation and financial records (*id.* at 1089).

Similar to *Overstock*, the **only** grounds upon which the trial court's unsealing motion was remanded was that the record submitted on appeal by the parties did not provide the court with adequate information about whether the documents to be unsealed were used in trial or submitted as a basis for adjudication as required by the unsealing rules. *Id.* at 1090-91 ("Unfortunately, the record submitted by the parties to this court does not provide further insight into the issues giving rise to the motions to seal or the documents under seal. Accordingly we find it appropriate to reverse

the family court's order granting the Attorney General's motion to unseal, and remand to the family court to assess, in the first instance, whether the documents subject to the motions to unseal were used in trial or submitted as a basis for adjudication.").

In contrast, the relevance of a parties' Income and Expense Declaration – which, again, are **the only documents that [redacted] is requesting be unsealed**[1] – are not in question as these are documents that the parties are **required** to file with the Court in connection with the issues of support and attorney fees per California Rule of Court 5.92(b) and (g).

II. There is No Requirement of Showing Changed Circumstances for the Court to Unseal Any Previously Sealed Records

There is no "changed circumstances" requirement for records to be unsealed. [redacted] has created this requirement himself. The plain language of California Rule of Court 2.551(h) regarding unsealing of a record reflects that there is **no** reference to any requirement that the moving party make a showing of changed circumstances before a record is unsealed.

Certainly there were no different circumstances in the *Nicholas* case when records were unsealed, other than a new judge being assigned to adjudicate the issue of sealing. *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1569-1574. Indeed, the *Nicholas* court expressly stated that "**No showing of changed circumstances is necessary on a motion to unseal.**" *Id.* at 1577. [redacted] blatant bad faith argument and misrepresentation to the Court of the clear law set forth in the *Nicholas* case is sanctionable, although Vicki acknowledges this RFO does not address sanctions.

III. The Prior Restraint is on Vicki's Free Speech and Due Process Rights, Not Just Discovery and Dissemination Rights

[redacted] appears to misunderstand [redacted] arguments regarding prior restraint as set forth in the section of his argument pertaining to *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20. In *Rhinehart*, the trial court compelled plaintiffs to produce certain documents but also issued a

[1] As set forth in Respondent's moving papers, the request to unseal documents is just a small, specific request in addition to the broader request to set aside the Protective Order, the overbroad provisions of which have hampered Respondent from being able to present her case. As an example, Respondent is prohibited by the current Protective Order from filing a trial brief or exhibit list in preparation for the Trial Setting Conference without having to redact and move to seal same.

protective order that prohibited the defendant newspaper from "publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case." *Id.* at 27. The U.S. Supreme Court held that this restriction did not violate the First Amendment. *Id.* at 37.

Similarly, in *Coalition Against Police Abuse v. Superior Court* (1985) 170 Cal.App.3d 888, the plaintiffs argued that they held a First Amendment right to retain and disseminate discovery material that had been produced in the case, after the case had settled. The "thrust" of the protective order issued by the trial court was "to gather the discovered documents together, in a secure place and manner to be approved by the court, where they will be available to the parties for several years subject to the order of the court." *Id.* at 903-904. The court held that this so-called "return order" did not offend the First Amendment and was not an abuse of discretion, although the order was amended to permit plaintiffs to retain copies of documents and disseminate information if such documents or information had already been disclosed or disseminated to the public. *Id.* at 904-906.

In contrast, [redacted] is not arguing that she has a constitutional right to freely disseminate anyone's financial information anywhere besides in this litigation. Rather, as set forth in [redacted] moving papers, her constitutional rights are trampled upon by the portions of the Protective Order that (i) prevent her from opposing any motion to seal, and (ii) create an unreasonable burden on her ability to present her case. The Protective Order in question here is **more restrictive** than that ordered by the trial court in *Rhinehart,* as the parties in *Rhinehart* had no restriction on their ability to use the materials to prepare for and try the case.

[redacted] argues that the Los Angeles Model Stipulation and Protective Order also requires that a motion to seal be filed if "confidential materials" are to be filed. This is accurate, however [redacted] ignores that the parties' Protective Order includes the additional restriction that prohibits either party from opposing these sealing motions, and also prohibits [redacted] from so much as referencing any information **derived from** documents marked "confidential". **To reiterate, the following is the universe of documents that are <u>automatically</u> marked "confidential" requiring motions to seal and redacted pleadings for so much as referencing information derived from them (and not just the documents themselves)**: all tax returns (including K-1s, W-2s, and 1099s); all signed trust agreements, operating agreements, lease agreements, retainer agreements, and promissory notes; all

statements from bank accounts, brokerage accounts, insurance policies, capital accounts, credit cards, retirement accounts, mortgages, and loans; and all financial statements including general ledgers, cash flows, and reconciliations.

With respect to the type of material that may be designated as "confidential," although the Model Protective Order does not explicitly reference such limitations, that does not mean that parties can freely deem any and all documents to be confidential. As illustrated by *Burkle I*, as briefed in [redacted] moving papers, the treatment of **all** financial information as confidential is not narrowly-tailored and is not the least-restrictive means to protect any privacy interests, in violation of the public policy of open court records.

Although *Burkle I* may differ slightly in its facts in that the subject of *Burkle I* was a statute regarding sealing rather than a stipulation, the broad policy and constitutional considerations set forth therein remain relevant to this case. As set forth in the moving papers, and a point which [redacted] has not refuted, parties cannot reach agreements that violate public policy, and any such purported agreements are void. *In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 989.

IV. [redacted] is Not Seeking to Disclose Third Party Information

[redacted] implies that [redacted] intends to infringe upon third party privacy if not for the Protective Order. However, [redacted] is not seeking to disseminate information about third parties (or [redacted]) in any forum. [redacted] is seeking the relief set forth in her moving papers just so that she can litigate this case the same as every other family law litigant, for example being able to argue about [redacted] financial status in the context of support and attorney fees.

Dated: July 27, 2022

HARRIS · GINSBERG LLP

By: *Jessica M. Spiker*
JESSICA M. SPIKER
Attorneys for Respondent
[redacted]

regarding the parties' marital relationship, including their respective property and spousal support, shall be the internal laws of the State of California (without reference to the law of any other state or territory of the United States or any foreign jurisdiction and without regard to choice of law principles).

B. The parties intend and agree that the provisions of this Article and of the aforementioned internal laws of the State of California shall be binding in all respects regardless of where the parties marry, regardless of the locus of each party's current or future ownership of any property or interest of any kind whatsoever or nature whatsoever and regardless of each party's present or future domicile or residence, including, but not limited to, at the time of an Operative Event.

ARTICLE 17. Confidentiality.

A. Each party represents and warrants to the other that this Agreement, and the exhibits attached hereto, and the financial information exchanged by them and their respective attorneys in connection with the negotiation of this Agreement, are and will remain private and confidential, subject to the right of the parties to utilize this Agreement to assert or defend any and all claims or causes of action arising under this Agreement or to enforce a party's rights herein, including the right to specific performance.

B. Each party covenants and agrees that, during the lifetimes of both of them, neither party shall disparage the other party or the other party's family, portray the other party or the other party's family in a negative light, or take any action that is likely to have an adverse effect on the personal or professional reputation of the other party or the other party's family, in any public manner or forum (or in any manner or forum that is likely to become public).

WITHOUT PREJUDICE

C. In the event a party breaches any of the foregoing covenants in this Article 17, the other party shall retain all of his or her rights under law or equity, including, without limitation, injunctive relief and rights to be compensated for legal fees and any and all damages resulting from such breach. In addition, in the event of any such breach by a party, such party hereby consents to the granting of a temporary or permanent injunction against him or her by any court of competent jurisdiction prohibiting him or her from violating the terms of this Article 17, and without the necessity of posting bond or other security. In any proceeding for any injunction and upon any motion for a temporary or permanent injunction, each party agrees that his or her ability to answer in damages shall not be a bar or interposed as a defense to the granting of such temporary or permanent injunction. The parties further agree that neither will have an adequate remedy at law in the event of any breach by the other hereunder and he or she will suffer irreparable damage and injury in the event of any such breach in addition to any damages that may be compensable.

D. The parties agree that a breach of this Article 17 by either party shall not affect in any way whatsoever the validity of any of the terms and provisions of this Agreement (including those terms and provisions outside of this Article 17), or the enforceability by either party (including a party in breach of this Article 17) of any of the terms and provisions of this Agreement (including those terms and provisions outside of this Article 17), and in all events this Agreement and all of the terms and provisions herein shall remain valid, legal and enforceable and in full force and effect.

ARTICLE 18. Acknowledgement/Further Acts.

Each party acknowledges receipt of a signed original of this Agreement. The parties agree to perform all further acts as may be required for the purpose of giving full effect to this

(4)

[redacted]

[redacted]

10. **CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT**

10.1 Each Party shall maintain complete confidentiality regarding the terms and provisions of any threatened civil claims, the facts underlying those threatened civil (non-family law) claims, and the settlement of the same. Neither Party shall disclose, duplicate, distribute or otherwise reproduce to any person or entity any of the substance, import, or facts regarding or underlying Petitioner's threatened civil claims and the settlement thereto (including but not limited to those stemming from Respondent's interview with *Playboy*) for any reason, other than their lawyers, accountants, business managers, tax advisors and estate planners (and only to those people as necessary to effectuate the purpose of the relationship). Although it may constitute a restraint on speech, each Party agrees that the Court may issue restraining orders against the other in the event of a breach of the terms and provisions of this Section of the Stipulated Judgment and Petitioner agrees that the payment to her of $2,625,000 by Respondent constitutes consideration for the confidentiality provision set forth herein.

[redacted]

HARRIS · GINSBERG LLP
Larry A. Ginsberg (State Bar No. 125556)
Jessica M. Spiker (State Bar No. 251421)
6420 Wilshire Boulevard
Sixteenth Floor
Los Angeles, California 90048

Telephone: (310) 444-6333

Attorneys for Respondent,
[redacted].

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re Matter of Petitioner: [redacted] and Respondent: [redacted]	[redacted] **STIPULATED PROTECTIVE ORDER**

Petitioner [redacted], and Respondent [redacted] (collectively "the Parties"), by and through their respective counsel of record, in order to facilitate the exchange of sensitive financial information and documents, hereby stipulate and agree as follows:

1. In this Stipulated Protective Order, the words set forth below shall have the following meanings:

a. "Proceeding" means the above-entitled proceeding also known as [redacted].

b. "Court" means any judicial officer to which this Proceeding may be assigned, including Court staff participating in such proceedings.

c. "Confidential" means any information which is in the possession of a Designating Party who believes in good faith that such information is entitled to confidential treatment under applicable law.

d. "Confidential Materials" means any Documents, Testimony or Information as defined below designated as "Confidential" pursuant to the provisions of this Stipulated Protective Order.

e. "Designating Party" means the Party that designates Materials as "Confidential."

f. "Disclose" or "Disclosed" or "Disclosure" means to reveal, divulge, give, or make available Materials, or any part thereof, or any information contained therein.

g. "Documents" means (i) any "Writing," "Original," and "Duplicate" as those terms are defined by California Evidence Code Sections 250, 255, and 260, which have been produced in discovery in this Proceeding by any person, and (ii) any copies, reproductions, or summaries of all or any part of the foregoing.

h. "Information" means the content of Documents or Testimony.

i. "Testimony" means all depositions, declarations or other testimony taken or used in this Proceeding.

2. The Designating Party shall have the right to designate as "Confidential" any Documents, Testimony or Information that the Designating Party in good faith believes to contain non-public information that is entitled to confidential treatment under applicable law.

3. The entry of this Stipulated Protective Order does not alter, waive, modify, or abridge any right, privilege or protection otherwise available to any Party with respect to the discovery of matters, including but not limited to any Party's right to assert the attorney-client privilege, the attorney work product doctrine, or other privileges, or any Party's right to contest any such assertion.

4. Any Documents, Testimony or Information to be designated as "Confidential" must be clearly so designated before the Document, Testimony or Information is Disclosed or produced. The parties may agree that the case name and number are to be part of the "Confidential" designation. The "Confidential" designation should not obscure or interfere with the legibility of the designated Information.

a. For Documents (apart from transcripts of depositions or other pretrial or trial proceedings), the Designating Party must affix the legend "Confidential" on each page of any Document containing such designated Confidential Material.

b. For Testimony given in depositions the Designating Party may either:

i. identify on the record, before the close of the deposition, all

"Confidential" Testimony, by specifying all portions of the Testimony that qualify as "Confidential;" or

ii. designate the entirety of the Testimony at the deposition as "Confidential" (before the deposition is concluded) with the right to identify more specific portions of the Testimony as to which protection is sought within 30 days following receipt of the deposition transcript. In circumstances where portions of the deposition Testimony are designated for protection, the transcript pages containing "Confidential" Information may be separately bound by the court reporter, who must affix to the top of each page the legend "Confidential," as instructed by the Designating Party.

The Designating Party shall pay all additional Confidential treatment related expenses of the reporter providing the services requested by such Designating Party.

c. For Information produced in some form other than Documents, and for any other tangible items, including, without limitation, compact discs, zip drives, USBs, or DVDs, the Designating Party must affix in a prominent place on the exterior of the container or containers in which the Information or item is stored the legend "Confidential." If only portions of the Information or item warrant protection, the Designating Party, to the extent practicable, shall identify the "Confidential" portions.

5. The inadvertent production by any of the undersigned Parties or non-Parties to the Proceedings of any Document, Testimony or Information during discovery in this Proceeding without a "Confidential" designation, shall be without prejudice to any claim that such item is "Confidential" and such Party shall not be held to have waived any rights by such inadvertent production. In the event that any Document, Testimony or Information that is subject to a "Confidential" designation is inadvertently produced without such designation, the Party that inadvertently produced the document shall give written notice of such inadvertent production within twenty (20) days of discovery of the inadvertent production, together with a further copy of the subject Document, Testimony or Information designated as "Confidential" (the "Inadvertent Production Notice"). Upon receipt of such Inadvertent Production Notice, the Party that received the inadvertently produced Document, Testimony or Information shall promptly destroy the

[redacted]

inadvertently produced Document, Testimony or Information and all copies thereof, or, at the expense of the producing Party, return such together with all copies of such Document, Testimony or Information to counsel for the producing Party and shall retain only the "Confidential" designated Materials. Should the receiving Party choose to destroy such inadvertently produced Document, Testimony or Information, the receiving Party shall notify the producing Party in writing of such destruction within ten (10) days of receipt of written notice of the inadvertent production. This provision is not intended to apply to any inadvertent production of any Information protected by attorney-client or work product privileges. In the event that this provision conflicts with any applicable law regarding waiver of confidentiality through the inadvertent production of Documents, Testimony or Information, such law shall govern.

6. Nothing in this Stipulated Protective Order precludes either party from designating a document previously produced in this matter as "Confidential". Should either party choose to designate a previously produced document as "Confidential", the procedure delineated in Paragraph 5 above shall be followed by the Designating Party and the receiving Party.

7. In the event that counsel for a Party receiving Documents, Testimony or Information in discovery designated as "Confidential" objects to such designation with respect to any or all of such items, said counsel shall advise counsel for the Designating Party, in writing, of such objections, the specific Documents, Testimony or Information to which each objection pertains, and the specific reasons and support for such objections (the "Designation Objections"). Counsel for the Designating Party shall have thirty (30) days from receipt of the written Designation Objections to either (a) agree in writing to de-designate Documents, Testimony or Information pursuant to any or all of the Designation Objections and/or (b) file a motion with the Court seeking to uphold any or all designations on Documents, Testimony or Information addressed by the Designation Objections (the "Designation Motion"). Pending a resolution of the Designation Motion by the Court, any and all existing designations on the Documents, Testimony or Information at issue in such Motion shall remain in place. The Designating Party shall have the burden on any Designation Motion of establishing the applicability of its "Confidential" designation. In the event that the Designation Objections are neither timely agreed to nor timely addressed in the Designation Motion, then such

Documents, Testimony or Information shall be de-designated in accordance with the Designation Objection applicable to such material.

8. Access to and/or Disclosure of Confidential Materials designated as "Confidential" shall be permitted only to the following persons:

a. the Court and its personnel;

b. (1) Attorneys of record in the Proceedings and their affiliated attorneys, paralegals, clerical and secretarial staff employed by such attorneys who are actively involved in the Proceedings and are not employees of any Party.

c. Court reporters in this Proceeding and their staff (whether at depositions, hearings, or any other proceeding);

d. any deposition, trial or hearing witness in the Proceeding who previously has had access to the Confidential Materials, or who have signed an Acknowledgment and Agreement to be Bound (Exhibit A);

e. Experts who have been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action.

f. The Parties to the action for viewing only in his/her attorney of records office, or virtually by a share screen feature, and only after signing an Acknowledgment and Agreement to be Bound (Exhibit A). The Parties shall not take photographs or other imaging, electronic or otherwise, of the Confidential Documents in the course of the viewing process.

. The Parties to this action shall not receive, and shall not have the right to receive, copies, including but not limited to electronic copies or attachments to email, of Confidential Material.

9. Confidential Materials shall be used by the persons receiving or viewing them only for the purposes of preparing for, conducting, participating in the conduct of, and/or prosecuting and/or defending the Proceeding, and not for any business or other purpose whatsoever. Confidential Materials shall not be disclosed or used for any purpose or in any manner or form other than as explicitly provided in this Stipulated Protective Order.

10. Any Party to the Proceeding (or other person subject to the terms of this Stipulated Protective Order) may ask the Court, after appropriate notice to the other Parties to the Proceeding,

to modify or grant relief from any provision of this Stipulated Protective Order.

11. Entering into, agreeing to, and/or complying with the terms of this Stipulated Protective Order shall not:

a. operate as an admission by any person that any particular Document, Testimony or Information marked "Confidential" contains or reflects trade secrets, proprietary, confidential or competitively sensitive business, commercial, financial or personal information; or

b. prejudice in any way the right of any Party (or any other person subject to the terms of this Stipulated Protective Order):

i. to seek a determination by the Court of whether any particular Confidential Material should be subject to protection as "Confidential" under the terms of this Stipulated Protective Order; or

ii. to seek relief from the Court on appropriate notice to all other Parties to the Proceeding from any provision(s) of this Stipulated Protective Order, either generally or as to any particular Document, Material or Information.

12. Any Party to the Proceeding who has not executed this Stipulated Protective Order as of the time it is presented to the Court for signature may thereafter become a Party to this Stipulated Protective Order by its counsel's signing and dating a copy thereof and filing the same with the Court, and serving copies of such signed and dated copy upon the other Parties to this Stipulated Protective Order.

13. Any Information that may be produced by a non-Party witness in discovery in the Proceeding pursuant to subpoena or otherwise may be designated by such non-Party as "Confidential" under the terms of this Stipulated Protective Order, and any such designation by a non-Party shall have the same force and effect, and create the same duties and obligations, as if made by one of the undersigned Parties hereto. Any such designation shall also function as a consent by such producing Party to the authority of the Court in the Proceeding to resolve and conclusively determine any motion or other application made by any person or Party with respect to such designation, or any other matter otherwise arising under this Stipulated Protective Order.

14. If any person subject to this Stipulated Protective Order who has custody of any Confidential Materials receives a subpoena or other process ("Subpoena") from any government or other person or entity demanding production of Confidential Materials, the recipient of the Subpoena shall promptly give notice of the same by electronic mail transmission, followed by either express mail or overnight delivery to counsel of record for the Designating Party, and shall furnish such counsel with a copy of the Subpoena. Upon receipt of this notice, the Designating Party may, in its sole discretion and at its own cost, move to quash or limit the Subpoena, otherwise oppose production of the Confidential Materials, and/or seek to obtain confidential treatment of such Confidential Materials from the subpoenaing person or entity to the fullest extent available under law. The recipient of the Subpoena may not produce any Documents, Testimony or Information pursuant to the Subpoena prior to the date specified for production on the Subpoena.

15. Nothing in this Stipulated Protective Order shall be construed to preclude either Party from asserting in good faith that certain Confidential Materials require additional protection. The Parties shall meet and confer to agree upon the terms of such additional protection.

16. If, after execution of this Stipulated Protective Order, any Confidential Materials submitted by a Designating Party under the terms of this Stipulated Protective Order is Disclosed by a non-Designating Party to any person other than in the manner authorized by this Stipulated Protective Order, the non-Designating Party responsible for the Disclosure shall bring all pertinent facts relating to the Disclosure of such Confidential Materials to the immediate attention of the Designating Party.

17. This Stipulated Protective Order is entered into without prejudice to the right of any Party to knowingly waive the applicability of this Stipulated Protective Order to any Confidential Materials designated by that Party. If the Designating Party uses Confidential Materials in a non-Confidential manner, then the Designating Party shall advise that the designation no longer applies.

18. All pleadings or other court papers and filings, including but not limited to interrogatory answers, Income and Expense Declarations, Schedule of Assets and Debts, produced documents and any other pleadings or court filings in which Confidential Material is attached or

disclosed, shall be subject to the following procedure:

a. The Party that intends to file the Protected Material and/or the content thereof shall place the Protected Material in a sealed envelope or other container marked "Confidential Pursuant to Stipulation for Protective Order."

b. Neither Party shall contest the other Party's filing a Motion to Seal; and

c. The Motion to Seal may be filed concurrently with a Request for Order or other applications for orders to be set for hearing and heard by the Court on the date of the hearing relating to the Request for Order or other application.

d. Should a Party wish to disclose Protected Material at a hearing or trial in this proceeding, counsel for that Party shall not oppose a request that all persons who are not entitled to Protected Material under the terms of this Order be excluded from the courtroom.

19. Nothing in this Stipulated Protective Order shall affect the admissibility into evidence of Confidential Materials, or abridge the rights of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Court concerning the issue of the status of Protected Material.

20. This Stipulated Protective Order shall continue to be binding after the conclusion of this Proceeding and all subsequent proceedings arising from this Proceeding, except that a Party may seek the written permission of the Designating Party or may move the Court for relief from the provisions of this Stipulated Protective Order. To the extent permitted by law, the Court shall retain jurisdiction to enforce, modify, or reconsider this Stipulated Protective Order, even after the Proceeding is terminated.

21. Upon written request made within thirty (30) days after the settlement or other termination of the Proceeding, the undersigned Parties shall have thirty (30) days to either (a) promptly return to counsel for each Designating Party all Confidential Materials and all copies thereof (except that counsel for each Party may maintain in its files, in continuing compliance with the terms of this Stipulated Protective Order, all work product, and one copy of each pleading filed with the Court and one copy of each deposition together with the exhibits marked at the deposition), (b) agree with counsel for the Designating Party upon appropriate methods and certification of

destruction or other disposition of such Confidential Materials, or (c) as to any Documents, Testimony or other Information not addressed by sub-paragraphs (a) and (b), file a motion seeking a Court order regarding proper preservation of such Materials. To the extent permitted by law, the Court shall retain continuing jurisdiction to review and rule upon the motion referred to in sub-paragraph (c) herein.

22. After this Stipulated Protective Order has been signed by the parties and counsel for all Parties, it shall be presented to the Court for entry. Counsel and the parties agree to be bound by the terms set forth herein with regard to any Confidential Materials that have been produced before the Court signs this Stipulated Protective Order, and further bound by the terms set forth herein with regard to any Confidential Materials that have been produced or will be produced pending the Court's entry of this Stipulated Protective Order and/or notwithstanding the Court's entry of this Stipulation.

23. The Parties and all signatories to the Acknowledgment and Agreement to be Bound hereto as Exhibit "A" agree to be bound by this Stipulated Protective Order pending its approval and entry by the Court. In the event that the Court modifies this Stipulated Protective Order, or in the event that the Court enters a different Protective Order, the Parties agree to be bound by this Stipulated Protective Order until such time as the Court may enter such a different Order. It is the Parties' and counsel's intent to be bound by the terms of this Stipulated Protective Order pending its entry so as to allow from the production of Confidential Materials under the terms herein without delay.

24. If any term or other provision of this Stipulated Protective Order is invalid, illegal or incapable of being enforced under any applicable law or public policy, all other terms and provisions of this Order shall nevertheless remain in full force and effect.

25. This Stipulated Protective Order shall benefit and be binding upon the Parties and their respective successors.

26. This Order shall be governed and construed in accordance with the laws of the State of California.

27. This Stipulated Protective Order may be executed in signed counterparts, each of which shall be deemed to be an original. A facsimile and/or electronic copy of the signature pages of this Stipulation shall be deemed an original pursuant to California Civil Code, Section 1633.7 This Order is effective upon the signature of all parties and counsel. The last signature date is the effective date.

IT IS SO STIPULATED.

[redacted]

APPROVED AS CONFORMING TO THE AGREEMENT OF THE PARTIES:

[redacted]

[redacted]

IT IS SO ORDERED.

DATED:

JUDGE/COMMISSIONER OF THE SUPERIOR COURT

EXHIBIT "A"

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I hereby acknowledge that I, _____, [NAME, POSITION AND EMPLOYER], am about to receive or otherwise view Confidential Materials supplied in connection with the Proceeding, Los Angeles Superior Court, Case No. [redacted].

I certify that I understand that the Confidential Materials are provided to me subject to the terms and restrictions of the Stipulated Protective Order filed in this Proceeding. I have been given a copy of the Stipulated Protective Order. I have read it, and I agree to be bound by its terms.

I understand that Confidential Materials, as defined in the Stipulated Protective Order, including any notes or other records that may be made regarding any such materials, shall not be Disclosed to anyone except as expressly permitted by the Stipulated Protective Order. I will not copy or use, except solely for the purposes of this Proceeding, any Confidential Materials obtained pursuant to this Protective Order, except as provided therein or otherwise ordered by the Court in the Proceeding.

I further understand that I am to retain all copies of all Confidential Materials provided to me in the Proceeding in a secure manner, and that all copies of such Materials are to remain in my personal custody until termination of my participation in this Proceeding, whereupon the copies of such Materials will be returned to counsel who provided me with such Materials.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed _____ [DATE} at _____ [PLACE OF SIGNING].

By: _____

Print Name: _____

Print Title: _____

Print Address: _____

Print Telephone Number: _____

WHL
Weiss | Hippler | Leidinger
Kanzlei für Familien- und Erbrecht

Privacy rules and non-disclosure agreements – Germany
IAFL Ibiza Conference, October 14th 2022

Lukas Deppenkemper, WHL Weiss Hippler Leidinger, Düsseldorf, Germany
Fachanwalt für Familienrecht (certified family law specialist)

A. Confidentiality of debates and procedures

- Family court proceedings in Germany are private by law (§ 170 GVG).

  This extends to all debates, deliberations and hearings in court.
  Very few exceptions.

- Court records are protected and cannot be accessed by third parties.

  Circulation of court records in the public by parties to the proceedings are subject to strict privacy and personal rights laws. Such laws also apply to out-of-court correspondence between parties.

- Most information regarding financial assets is private, notably real property records ("*Grundbuch*" in Germany).

- On the flipside, confidentiality is generally not an argument against disclosure of financial documents, such as P&L statements.

- The confidentiality of court proceedings eliminates the need for private judging for reasons of privacy.

B. Confidentiality clauses in German family law

- Difficult to enforce and therefore uncommon.

  In pre- or post-nuptial agreements, they are mostly, if at all, used in the sense of a memorandum of understanding rather than a penalty-bearing obligation. Clauses are often too abstract or vague to be enforceable. Courts would have to balance the interest in secrecy against personal freedom to speak openly about one's life. When too strict, clauses can be contrary to public policy and good morals ("*sittenwidrig*").

- Cease-and-desist letters/actions may help to protect against unwanted dissemination of information, but are only a reactive tool.

Young Lawyers' Award Winners Papers

IAFL European Chapter Young Lawyers Award 2020

- Brexit and International Family Law -

Introduction

1. The implications for relations between the United Kingdom ('UK') and the rest of the European Member States ('the EU27') in family matters as a result of Brexit is a topic fraught with uncertainty. About the only thing we can advise our clients with any certainty at the moment is that the future is uncertain.

2. Following the recent UK general election, the plan is for the UK to cease to be a member of the EU from 11pm on 31 January 2020. A 'transition period' is intended until December 2020 during which a 'deal' for future relations can be agreed, and the current rules will remain in force throughout this period. There is scope (but little political appetite in the UK) for extending that deadline. There is a lot to be achieved in a short space of time and there is still a possibility of a 'no deal' situation at the end of the transition period.

3. There is a great deal that can be said about this topic that would touch on the nature of future relations between the UK and EU27 but time (wordcount) does not permit a very detailed exploration. A lot has been published in the UK (and, no doubt, within the EU27) on the topic of Brexit and family law, but the writer's main resources and experiences are in England.

4. The writer has been fortunate to be involved in discussions on the UK side between professional bodies and with the UK's Ministry of Justice as part of the 'no deal' planning in case of that eventuality. She has presented papers to lawyers in England about the implications of a 'no deal' outcome and spoke at the IAFL conference in Stuttgart in 2018 on this issue, also hearing the views of EU colleagues. It has been possible to explore from such opportunities the various questions, thoughts, reactions (including fears) of different lawyers, albeit generally only in an anecdotal way. The writer hopes to continue her involvement in this work; accordingly, this paper is written from a neutral, rather than personal perspective.

5. The future of relations between the UK and EU in the family law world will no doubt be impacted as a result of Brexit. An analysis of our journey to the current EU family law regime, of its advantages and disadvantages, and the legal and practical implications of

Brexit, may help in considering whether the impact will be positive or negative. Whilst family law is unlikely to be close to the top of the political agenda, it is plain that families will continue to be created, and separate, across borders, and that we will have to work hard for our clients to achieve the best outcome we can for them in uncertain times.

Development of EU Family Law

6. The UK acceded to what was previously the European Economic Community in 1973 and ever since there has been an increased effect of EU rules on life in the UK, as well as for the other EU countries, as integration into the European 'club' has progressed. The range of international instruments has evolved over time, from the Brussels Convention (brought into English law in 1982) to Brussels I (2002), to Brussels II – later superseded by Brussels IIa (2005) and then on to the Maintenance Regulation (2011) as well as others which play a part but are not mentioned here. The writer's entire legal career at the Bar of England and Wales has taken place under the operation of Brussels IIa and she has seen the entry into force of the Maintenance Regulation from early on in her practice.

7. The aforementioned intra-EU instruments have existed alongside the various Hague Conventions, most particularly: the 1970 Hague Convention regarding recognition of divorce, the long-established and well-known 1980 Hague Convention concerning child abduction, the so-called 'child protection' 1996 Hague Convention and the 2007 Hague Convention concerning maintenance obligations. Each has had a different path when it comes to ratification/accession by the various EU Member States – either individually or together *en bloc* as part of EU membership. Of those mentioned, only the 1970 Convention does not apply to all EU Member States. In relation to the others, the Brussels IIa Regulation and Maintenance Regulation take precedence over the 1996 and 2007 Hague Conventions and 1980 Hague is supplemented by Brussels IIa.

8. All of this has meant considerable adaptation for the older generation of lawyers as time has gone on and a fascinating web of inter-linked provisions for the newer lawyers to learn as they progress.

9. Some family practitioners in England have struggled to adopt the more civil-minded concepts with the advent of the EU Regulations, but so too may the civil minds of European practitioners have considered it odd to merge with our discretionary-based approach. It is evident from various adaptations made for the UK e.g. continuing use of 'domicile' rather than 'habitual residence' as a connecting factor or the opt-outs e.g. from applicable law

provisions, that efforts have been made to respect the different legal traditions. However, such points also apply to some of the Hague Conventions as well, which must accommodate an even greater number of legal systems. Relations have developed across the board.

Advantages and Disadvantages

10. Stepping back to consider what this long period of development internationally has done to affect relations, there is no doubt mixed opinion as to what is 'best' or 'right', but there has now been a settled period during which lawyers in both the UK and EU27 have become more accustomed to this system and the understanding and jurisprudence has developed accordingly.

11. Perhaps a larger shift in approach of UK lawyers was required when applying the EU Regulations than for our European counterparts, but there are certainly advantages of the EU family law system: there is a cohesive system of rules aimed at providing legal certainty, predictability and mutual trust, with inter-country cooperation to achieve swift recognition and enforcement of orders across borders. However, disadvantages include the 'race to issue,' which can be seen as arbitrary, unfair and undermines prospects of reconciliation/mediation, with varying application of the Regulations between Member States and scope for parties still to argue e.g. about habitually residence.

12. Both 'sides' would accept that neither system is perfect. Those less keen on the EU system say that there is a perfectly good system using the Hague Conventions. On the one hand, the EU Regulations do sometimes provide odd results e.g. the case of *Liberato v Grigorescu* (16.1.19) [1] in which the CJEU held that the recognition of a judgment of a court second seised, which had continued in breach of the *lis pendens* provisions, could not be refused on the basis that to do so would be manifestly contrary to public policy. This is not the place for a detailed consideration of the reasons, but many may be confused by the outcome in a system which is supposed to avoid parallel litigation and inconsistent decisions. On the other hand, an understandable criticism is made of the discretionary '*forum conveniens'* approach of the common law system: whilst the aim is laudable in seeking the most appropriate forum, to have the opportunity in each of the many intra-EU family cases to argue about which country should hear it, when there may be genuine connections on each side, and with different tests applied in each country to that question, also generates increased litigation, cost, delay and stress to our clients. So there are already tensions which exist in our cross-border relationship.

Reactions to Brexit

13. The implications of the UK government's initial 'Withdrawal Bill' were notable for family law: it intended to bring the EU *acquis* into English law without any guarantee of reciprocity, which would make many of the provisions ineffective. The IAFL, together with the English barristers' and solicitors' associations, commissioned a paper in late 2017, composed by the writer of this paper, explaining the effect of the UK government's approach and exploring other possible approaches [2].

14. The aforementioned paper had not had the opportunity (due to time) to set out the perspective of mainland EU family lawyers and a second paper was prepared shortly thereafter in early 2018 summarising the responses to 12 questions of practitioners in 16 jurisdictions in the EU (other than England) [3]. In summary, the responses demonstrated overwhelming support for the general conclusion that the (then) proposed approach of the UK government was the worst of all possible outcomes. The writer is aware of a letter prepared by the *Societat Catalana d'Advocats de Familia* [4] setting out its support for the main paper and some additional ideas. Whatever the feelings about whether the vote for Brexit was right or wrong – or what the relationship should look like in future – it was encouraging that a number of family law practitioners both in the UK and EU Member States wished to make a contribution with regard to the future relationship between the UK and EU in family law.

15. It is interesting to note some examples of judicial attitudes and responses to Brexit. In a Polish case (12.4.17) [5] a father sought the return of his daughter from Poland after she had been wrongfully removed there from England. The mother sought to argue a grave risk of harm if the child were returned due to separation from her. The court appears to have accepted that argument, and part of the reasoning was that there were uncertainties for the mother as a Pole, post-Brexit.

16. Conversely in the English case of *L v F* (2017) [6] a relocation case (proposed from the UK to Italy) the first appeal judge felt that the trial judge should have considered Brexit and the uncertainties ahead as to residence status in the UK (which had not been considered at all). At the second appeal stage, the English Court of Appeal was clear that such an approach would have been unhelpful and due to the uncertainty, "there is no sound basis on which courts can factor in the hypothetical possibility that an EU national's immigration position might at some future date become precarious. The task for trial judges of deciding these cases is difficult enough without adding imponderables of this kind."

17. There have evidently been tensions arising out of the uncertainties ahead. Will the difficulties encountered so far contribute to a hardening of attitudes in considering what the future relationship will be?

Implications of Brexit for Family Law

18. The UK, once it leaves the EU, will be regarded by the EU as a 'third state.' Other international instruments will apply if there is no other 'deal' to be agreed, and there are mixed views as to whether they would be sufficient. Will there be enough appetite to work out a new, special, arrangement going forwards and if so, will that even be achievable given the status of family law on the political agenda?

19. It is therefore worth considering what the implications of a 'no deal' scenario would be – do we need to fight it out as to what any such new 'deal' would be or are the Hague Conventions adequate for family law purposes? A small selection of the implications of 'no deal' are noted below. The effect on relations going forward will depend on the degree of change and strength of feeling in relation to each aspect.

    a. **Divorce**: with 'no deal', we will lose the *lis pendens* rules between the UK and EU27 and the UK will return to the *forum conveniens* considerations vis-à-vis the EU27. The anecdotal evidence available, also highlighted by all respondents in the IAFL Mainland EU response paper, is that post-Brexit, "English family proceedings would be ignored [by the EU27] if there are other rival proceedings pending in their own jurisdiction and these proceedings were issued first. However, if the English proceedings were issued first, the opinions were divided". Some answered that it would be considered case by case. All respondents said that the English should have jurisdiction based on internationally accepted standards.

    So what does this mean for our international relations? Without rules governing which country should proceed, will the English seek to use 'Hemain' injunctions ordering a party not to proceed in the other country and how will such injunctions be received in that other country? Most respondents felt they would not be enforceable. Surely comity will suffer if countries start ignoring orders from other competent countries.

    Does it mean that being the first to issue will in fact still be very important, thus perpetuating the problem of the race to court?

b. **Maintenance**: at present, maintenance jurisdiction based on a sole domicile [nationality] divorce petition is prohibited under the Maintenance Regulation but that limitation will be lifted in the UK in the event of 'no deal'. However, if UK citizens seek recognition and enforcement in the EU27 of English decisions based on such jurisdiction, then how will they be received? Article 20(f) of the 2007 Hague Convention provides that a maintenance decision shall be recognised and enforced if "the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the *nationality* of one of the parties" – it does not refer to domicile. Might there be divergent interpretations in future, considering that 'sole nationality' should include 'sole domicile' (as it does in both Brussels IIa and the Maintenance Regulation)? Might the EU adopt a reservation in relation to Article 20(f)? This may lead to tensions unless catered for in some form of bespoke arrangement.

c. **Children:** whilst many say that the 1996 Hague Convention is a good substitute for Brussels IIa, a curiosity is how the UK and EU will contend with the loss of *perpetuatio fori* which applies under Brussels IIa, but which does not under the 1996 Hague Convention. Under Art 5(2) of the 1996 Convention, a state loses jurisdiction over a child once the child's habitual residence changes. Under Brussels IIa, proceedings continue. Who will decide if/when the child's habitual residence changes? Will we see tactical behaviour before/during proceedings and what about the possibility of increased cost and delay in resolving proceedings if they must be started afresh in a new country? The 1996 Convention (Art 10) does not permit prorogation of jurisdiction unless there are linked divorce proceedings: without such a link, there cannot even be the prospect of agreeing to continued jurisdiction (as under Art 12(3) of Brussels IIa). This may well cause difficulties for continued smooth relations absent an agreement to combat this in some way.

20. One significant feature posing a major threat to future relations is the political 'red line' of the UK that it wishes to be free of the CJEU. Currently, the CJEU achieves consistent application of the rules that apply in the Member States when it is asked to determine problems of interpretation. A notable example is the *A v B* case (16.7.15) [7] where the CJEU held that in relation to Art 3(c) and (d) of the Maintenance Regulation, a case concerning child maintenance is 'ancillary' only to parental responsibility proceedings (ongoing in one country) and not to the divorce proceedings (ongoing in the other country). This leads to a bifurcation of maintenance proceedings. The UK Supreme Court may well have decided this point differently, but the interpretation of the CJEU must be applied

across all EU Member States. It is unclear what the model will be for resolution of disputes in relation to the provisions of any instruments created as a result of a 'deal'. There may well then be divergent interpretations and approaches in the UK vs the EU27 which would again be likely to put strains on the UK/EU family law relationship.

21. In practice, the writer observes the time it has taken to educate practitioners about the EU Regulations as each came into force. There will be significant education and training in relation to whatever the future arrangements will be – deal or no deal – and great potential for uncertainty and mistakes. Will practitioners take advantage of oversights in new legislation, will appeals of the new law be the playground of the rich, even if it makes bad law? Who will help those who do not have funds for specialist international lawyers to help them untangle the knotty legal web that we face?

Conclusion

22. Change is always difficult: it can be exciting but it can also bring about fear and suspicion. Uncertainty about what the changes will be is unhelpful, particularly for lawyers when it comes to advising our clients. We have seen the pitfalls of our current system, our more experienced colleagues can help us consider the difficulties that existed in the 'old' system, and we can explore the ramifications of a 'no deal' scenario. We should learn from this as we contribute on each side to the future negotiations (insofar as we are permitted) and to help us reflect on what the various options would mean for our future relationship.

23. Family lawyers see their clients going through some of the most challenging times of their lives and we all know how costly and difficult – emotionally and financially – prolonged litigation can be. It is very much hoped that there will be a desire across the board to contribute proactively to the discussions on both sides to ensure that the future relationship between the UK and EU in matters of family law is as positive as possible, whilst respecting the nature of the break that is to be achieved. Whatever one's view about Brexit, there is clearly a lot of hard work to be done to pave as smooth a path going forwards as possible. It is very positive that organisations such as the IAFL exist, given how well positioned it is to help to continue uniting the lawyers across borders as friends and colleagues in the hope that it helps as we try to navigate the inevitably tricky waters ahead.

Eleri Jones
Barrister, 1GC | Family Law – London (UK)
13 January 2020

References (*excluded from word count*)

---

[1] *Liberato v Grigorescu* (Case C-386/17, CJEU, 16.1.19)

[2] *Brexit and Family Law*, Eleri Jones (October 2017), commissioned by the Family Law Bar Association, International Academy of Family Lawyers and Resolution.

[3] IAFL European Chapter Mainland Response, IAFL European Chapter Brexit Committee (S Verburgt, I Rein-Lescastereyres, K Niethammer-Jürgens and T Amos QC) (12.2.18)

[4] Letter from Societet Catalana d'Advocats de Familia, Barcelona, to Mr Daniel Eames (20.3.18)

[5] District Court in Suwałki, 12.4.17

[6] *L v F* [2017] EWCA Civ 2121

[7] *A v B* (Case C-184/14, CJEU, 16.7.15)

The Hague Convention of 1980 is an extraordinary tool designed to prevent international child abduction with no less than 101 Contracting States. In 2015, almost 3.000 children were involved in a return application, and 45% of them were returned[1].

However, the instrument is still perfectible. This article will focus on issues which cause the most difficulties during litigation: (I) the unfortunate absence of a definition of the concept of "habitual residence" and a proposed definition ; (II) the unfairness of the starting point of the one-year period with regards to the settlement of the child exception and a proposed starting point and (III) the dangers of a broad interpretation of the grave risk of harm exception and proposed express limitations.

I- <u>A proposed definition of "habitual residence"</u>

The Hague Convention has omitted a definition of "habitual residence", in order to let Member States make their own determinations. The absence of a definition "*has helped courts avoid formalistic determinations but has also caused considerable confusion as to how courts should interpret 'habitual residence*[2] *"*".

The concept of habitual residence is central to the application of the Hague Convention remedy. If a child is found not to have their habitual residence in another Member State, the Convention will not apply and return will not be available. Judges of the Requested State have jurisdiction to determine the child's habitual residence.

This absence of definition fails to offer legal certainty for the left-behind parent. Absent a global definition, a child could be abducted to a foreign country which applies a fundamentally different interpretation to the one applied at home. Since the left-behind parent, by definition, has no control over which State their child will be abducted to, it follows that parents can never figure out for sure what would be taken into account to consider that their child has acquired or abandoned a habitual residence.

This is particularly problematic given the diversity of interpretations used throughout the years and among the different countries. The most striking difference being whether one should focus the inquiry on the particular circumstances of the child, VS on the intention of their parents.

A. Study of case law interpretation

Focus on the child. In Canada, most cases will give more importance to the reality of the child, the fact that they have remained in one place for some time prevailing over parental intention[3]. Similar approaches prevail in Germany[4] and Switzerland[5].

[1] Report from The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017, p.3
[2] Holder v Holder, 392 F.3d 1009 (9th Cir 2004), HC/E/USf 777
[3] See, for example: Québec Court of Appeals (1996) Droit de la famille 2454, No 500-09-002645-968, HC/E/CA 746; Montreal Court of Appeals (2000) Droit de la famille 3713, No500-09-010031-003, HC/E/CA 651 ; M.P. c. J.K Droit de la famille 0957, Cour supérieure de Montréal, 8 janvier 2009 QCCS 141, HC/E/CA 1093.
[4] See Bundesverfassungsgericht, 2 BvR 1206/98, 29 October 1998, HC/E/DE 233
[5] Federal Supreme Court of Switzerland, Decision of the Federal Supreme Court 5A_846/2018 of 6 November 2018, HC/E/CH 1448

In France[6], it was recently held that the common intention of the parents at the time of birth to have the child live in a specific country was not enough to overlook the fact that the infant had lived with their mother in a another State, considering that the main "center of life" of an infant revolves around the person(s) they are living with. Therefore, habitual residence of the child was established absent the father's consent. Continuous physical presence trumped initial common intention of the parents, which was criticized[7]. Previously, heavy weight was given to the parents' common intention[8].

In the United States (federal level), the inquiry used to focus on the child in the leading case *Friedrich*[9], until it was reversed in *Mozes*[10] in favor of a focus on parental intention.

Focus on the intention of parents. Some states focus solely on the parents' common intention, sometimes ignoring duration of the stay (2,3[11], 4 years[12]). The test in the United States derives from *Mozes*[13] under which settled intention to abandon one's prior habitual residence is a crucial part of acquiring a new one. The reasoning being: "*the function of a court is not to determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child's life*" considering that the easier it is to shift a child's habitual residence without both parents' consent, the greater the incentive to try, and that children can quickly adapt to a new environment.

In Australia[14] and New Zealand[15], common intention of the parents also trumps the child's reality. Similar weight was given to common intention in the United Kingdom[16], until the Supreme Court[17] applied the test adopted by the CJEU, "*with the purposes and intentions of the parents being merely one of the relevant factors*".

---

[6] Arrêt n°462 du 12 juin 2020 (19-24.108) – Cour de cassation – Première chambre civile, HC/E/FR 1454
[7] Cass. Civ. 1, 12 juin 2020 n°19-14.108, AJ fam.2020.423, obs. A Boiché
[8] Cass. Civ. 1ère, 26 octobre 2011, n°10-19.905, 1015, HC/E/FR 1130 ; Cass. Civ. 1ère 4 mars 2015, Yc. X, N. 14-19015, HC/E/FR 1373
[9] Friedrich v. Friedrich, 983 F.2d 1396, 125 ALR Fed. 703 (6th Cir. 1993), HC/E/USf 142
[10] Mozes v Mozes, 239 F.3d 1067 (9th Cir. 2001), HC/E/USf 301
[11] USCA for the 11th Cir., Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004), HC/E/USf 780: Tsarbopoulos v. Tsarbopoulos, 176 F. Supp.2d 1045 (E.D. Wash. 2001), HC/E/USf 482
[12] USCA for the 9th Cir., Holder v Holder, 392 F.3d 1009 (9th Cir. 2004), HC/E/USf 777
[13] Mozes v Mozes, 239 F.3d 1067 (9th Cir. 2001), HC/E/USf 301, followed in Delvoye v. Lee, 329 F.3d 330 (3rd Cir. 2003), HC/E/USf 529;Larbie v Larbie, 690 F.3d 295 (5th Cir. 2012), HC/E/US 1236; Darin v. Olivero-Huffman, 746 F.3d 1 (1st Cir. 2014), HC/E/US 1275;
[14] D.W. & Director-General, Department of Child Safety [2006] FamCA 93, (2006) FLC 93-255; (2006) 34 Fam LR 656, HC/E/AU 870; Kilah v. Director-General, Department of Community Services [2008] FamCAFC 81, (2008) FLC 93-373; (2008) 39 Fam LR 431, HC/E/AU 995; Paterson, Department of Health and Community Services v. Casse (1995) FLC 92-629, [1995] FamCA 71, HC/E/AU 229; Laing v. Central Authority (1996) FLC 92-709, 21 Fam LR 24; Director-eneral of the Department of Community Services, v. M.S. 15 Octber 1998, transcript, Family Court of Australia (Sydney) [1998] FamCA 2066
[15] H. v H. [1995] 12 FRNZ 498, HC/E/NZ 30 ; RCL v APBL [2012] NZHC 1292, HC/E/NZ 1231; S. v. O.D. [1995] NZFLR 151, HC/E/NZ 250.
[16] Re B. (Child Abduction: Habitual Residence) [1994] 2 FLR 915, [1995] Fam Law 60, HC/E/Uke 42; Re F. (Minors) (Abduction: Habitual Residence) [1992] 2 FCR 595, HC/E/Uke 204 ; Re H (Children) (Jurisdiction: Habitual Residence) [2014] EWCA Civ 1101, HC/E/BD 1287
[17] A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 60 [2013] 3 WLR 761, HC/E/PK 1233

Mixing both findings. The leading case from the European Court of Justice is that of *Mercredi*[18], which proposes a definition[19] which takes into account not only intention but also factual integration of the child.

In Israel, the Supreme Court has held that both factors should be taken into account[20], not giving independent weight to parental intent[21]. A recent case considered both and determined parental intent through the child's reality[22] (kindergarten, health insurance…).

Mozes was sometimes altered, using common intention as a first step to a two-step analysis where acclimatization of the child to their new environment could trump parental intent[23]. State Circuits have also developed their own case law, blending the perspective of the child with circumstantial evidence showing parental intent, in *Feder*[24] and *Silverman*[25].

A South African court[26] held that if parents have a shared intention it will determine habitual residence, failing that, the child's perspective should prevail.

Common ground. Most states consider habitual residence is a factual concept[27], and consider the stability[28] and duration of the stay (without a fixed minimal duration except in Switzerland[29]), as well as the child's age[30].

B. Proposition of a global definition

Proposal (article 3§4).

---

[18] CJEU, A. (C-523/07), HC/E/1000, 2 April 2009

[19] "(…) *the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case*".

[20] Supreme Court of Israel (2009) LM v MM Nevo, RFamA 2338/09, HC/E/IL 1037

[21] Supreme Court of Israel (2013), L.S. v G.S, RFam 7784/12, HC/E/IL 1301

[22] Family Appeal 10701-04-20 R. v. BR., HC/E/IL 1466

[23] For example in Guzzo v ; Cristofano, 719 F.3d 100 (2nd Cir. 2013), HC/E/US 1212

[24] Feder v Evans-Feder, 63 F.3d 217 (3d Cir. 1995), HC/E/USf 83, followed by Villalta v. Massie, No 4:99cv312-RH (N.D. Fla. Oct. 27, 1999)

[25] Silverman v Silverman, 338 F.3d 886 (8th Cir. 2003)

[26] Central Authority, RSA v OCI [2010] JOL 25947 (GSJ)

[27] For example, Federal Supreme Court of Switzerland, Decision of the Federal Supreme Court 5A_846/2018 of 6 November 2018, HC/E/CH 1448, as per the Pérez-Vera Report, §66

[28] For example, **European Union** CJEU, A. (C-523/07), HC/E/1000, 2 April 2009; **Belgium** Brussels Court of Appeal (2019), C.L. / Procureur général, agissant à la demande de l'Autorité centrale, HC/E/BE 1431 ; **England & Wales** Re P.-J (Children) (Abduction: Habitual Residence: Consent) [2009] EWCA Civ 588, [2010] 1 W.L.R. 1237, HC/E/Uke 1014; Re H (Children) (Jurisdiction : Habitual Residence) [2014] EWCA Civ 1101, HC/E/BD 1287; **France** Cass. Civ. 1ère 4 mars 2015, Yc. X, N. 14-19015, HC/E/FR 1373

[29] For example in 5A_346/2012, Ile Cour de droit civil, arrêt du TF du 12 juin 2012, HC/E/CH 1293

[30] For example, **United States** USCA Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006), HC/E/USf 879; **England & Wales** Re G. (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence) [2007] EWHC 2807 (Fam), HC/E/Uke 966; **Australia** Full Court of the Family Court of Australia, Kilah v. Director-General, Department of Community Services [2009] FamCAFC 81, (2008) FLC 93-373; (2008) 39 Fam LR 431, HC/E/AU 995; **South Africa** Central Authority, RSA v OCI [2010] JOL 25947 (GSJ), HC/E/ZA 1202

"*The habitual residence mentioned in sub-paragraph a) above, is a notion of fact, which shall be determined through the agreement of both parents to establish stable settlement of their child in that State for an unlimited duration.*
Common intention shall be assessed at the time of the move, and demonstrated, among other facts, by the reasons for the move, its intended duration and the stability of the stay.
Absent common intention, the perspective of the child should prevail, taking into account (but not limited to) the duration of the stay, the child's age, attendance at school, language spoken, as well as family and social relations."

Explanation. This definition is a compromise, inspired by the different interpretations. It provides discretion to consider particular circumstances, while setting a framework.

It makes clear that unilateral intention is not enough to modify a child's habitual residence, as per the Convention aim to protect children against wrongful removal or retention. It intends to avoid "trapping" parents who have gone abroad with their children for a limited duration ("sabbatical year", attempted reconciliation with a spouse). It contemplates that children adapt quickly to a new environment while still benefitting from stability being maintained. It rejects a potential last step of the analysis[31] allowing habitual residence to be modified through settlement, since this issue relates to the Article 12 exception.

II- <u>The starting point of the settlement exception</u>

Under Article 12(2), the court may not order the return of the child if a year has elapsed since the wrongful removal/retention and the child is found settled. Giving weight to settlement of the child into the environment of the wrongful retention/removal goes against the aim of the Convention (deter abduction), and allows the position of the abducting parent to consolidate over time.

Abducting parents also sometimes claim settlement of the child as a defense, even before the time period has lapsed[32], despite the Hague Judge not having jurisdiction over the welfare of the child.

However, the rationale is that after one year, the focus shifts from the policy aims of the Convention to an inquiry more focused on the child[33].

In practice, the courts will most often find after one year that the child has settled, applying a broad test, and rule against return <u>unless</u> the child was hidden by the abducting parent and living secretly, preventing them from acquiring stability.

In that case, the left-behind parent can sometimes search for years before finding them, which prevents filing within the limit. Even if they manage to find the child shortly before a year, the

[31] For example in Guzzo v ; Cristofano, 719 F.3d 100 (2nd Cir. 2013), HC/E/US 1212
[32] For example, in Switzerland, 51.582/2007 Bundersgericht, II. Zivilabteilung, 04 décembre 2007, HC/E/CH 986
[33] Re C. (Abduction: Settlement) [2004] EWHC 1245, HC/E/Uke 596: "*Established settlement after more than one year since the wrongful removal or retention is the juncture in a child's life where the Hague judge's legitimate policy objective shifts from predominant focus on the Convention's aims (…) to a more individualized and emphasized recognition that the length and degree of interaction of the particular child in his or her new situation deserve qualitative evaluation, free of Hague Convention considerations and constraints*".

length of the proceedings and inadequate legal advice[34] may exclude return. Courts have sometimes circumvented the one-year rule, holding the child was "not settled" even after a long time (up to seven years[35]!), or applying the equitable tolling doctrine, while other countries have refused to bend the rules, accepting an unfair result for the left-behind parent.

A. Case law study

Children almost always found settled after one year. Showing a child has settled into their new environment after one year is an easy burden. In Australia[36] , it was held that the onus is not difficult to discharge and mere adjustment to surroundings will suffice. Similar success in Canada[37], France[38], Israel[39], Luxembourg[40], United States[41].

In the United Kingdom however, "emotional" integration as well as mere adjustment to surroundings[42] was required, since "*the interest of the child in not being uprooted must be so cogent that it outweighs the primary purpose of the Convention*[43]". This threshold was relaxed[44] in 2007[45] where settlement was considered from the child's perspective : "*felt integrated into their new environment and now wanted to remain there*".

Exception: hidden children. Abducting parents can sometimes conceal the child hoping the other parent won't find them. "Hiding places", will usually not amount to settlement, whether in the United Kingdom[46], Switzerland[47], United States[48], or Canada[49]. These children might not attend school or develop relationships due to concealment, or courts use these cases as a deterrent policy (see latter case).

---

[34] Rapport sur les déplacements illicites d'enfant 2016, Commission des lois, des règlements et des affaires consulaires, 24e session Mars 2016, M. GOUPIL, p.34,n) ; p.39

[35] Canada, J.E.A. v. C.L.M. (2002), 220 D.L.R. (4th) 577 (N.S.C.A.), HC/E/CA 754

[36] Director-General Department of Families, Youth and Community Care v. Moore, (1999) FLC 92-841; [1999] FamCA 284, HC/E/AU 276; Townsend & Director-General, Department of Families, Youth and Community (1999) 24 Fam LR 495, [1999] FamCA 285, (1999) FLC 92-842, HC/E/AU 290; Secretary, Attorney-General's Department v. TS (2001) FLC 93-063, [2000] FamCA 1692, 27 Fam LR 376, HC/E/AU 823; State Central Authority v. CR [2005] Fam CA 1050

[37] P. (N.) v. P.(A.), 1999 CanLII 20724 (QCCA) (Droit de la Famille – 3193) SOQUIJ AZ-99011344, HC/E/CA 764 ; Kubera v. Kubera, 2010 BCCA 118, HC/E/CA 1041

[38] CA Paris, 27 octobre 2005, n°05/15032, HC/E/FR 814 ; Cass. Civ. 1, 12 décembre 2006, n°06-13177, HC/E/FR 892 ; CA Paris, 19 octobre 2006, n° de RG 06/12398, HC/E/FR 1008 ;CA Lyon, 17 janvier 2011, n° de RG 09/05813, HC/E/FR 1084 ; CA Paris 11 décembre 2012, n°12/13919, HC/E/FR 1186

[39] Family Appeal 548/04, Plonit v Ploni, HC/E/IL 838

[40] Tribunal d'arrondissement de et à Luxembourg, 19 décembre 2012, Référé n° 882/2012, HC/E/LU 740

[41] Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014), HC/E/US 1262; Broca v Giron 2013 WL 867276 (E.D.N.Y), HC/E/US 1264f

[42] Re N. (Minors) Abduction [1991] 1 FLR 413, HC/E/UKe 106, followed in Re M. (Abduction: Acquiescence) [1996] 1 FLR 315, HC/E/Uke 21

[43] Soucie v. Soucie 1995 SC 134, HC/E/UKs 107, Incadat comment

[44] In S. v. S. & S. [2009] EWHC 1494 (Fam), HC/E/Uke 1016: "*Reviewing earlier case law the trial judge held that the English interpretation of settlement which had previously been considered to be restrictive had been relaxed following the decision of the House of Lords*" – Incadat comment

[45] Re M. (Children) (Abduction : Rights of Custody) [2007] UKHL 55 [2008] 1 AC 1288, HC/E/Uke 937

[46] Re L. (Abduction : Pending Criminal Proceedings) [1999] 1 FLR 433, HC/E/Uke 358; Re H. (Abduction: Child of 16) [2000] 2 FLR 51, HC/E/Uke 476

[47] Justice de Paix du cercle de Lausanne (Magistrates' Court), decision of 6 July 2000, J 765 CIEV 112E, HC/E/CH 434

[48] Lops v. Lops, 140 F.3d 927 (11th Cir. 1998), HC/E/US 125

[49] J.E.A. v. C.L.M. (2002), 220 D.L.R (4th) 577 (N.S.C.A.), HC/E/CA 754

Perverse effect of article 12(2) when the child's location is unknown. A parent who ignores the location cannot initiate proceedings, not knowing in which country to do so. In a French case, the holding of the Appellate Court that less than one year had elapsed between the time the mother learned the location of the children and the application was reversed, holding that the starting point was the time of removal, not the time the mother had found out the location[50]. This solution is logical per the letter of the Convention, but unfair for the parent who finds themselves without a remedy despite their best efforts to search for the children. Similar outcomes appear in Canada[51], United Kingdom[52], United States[53].

Attempted solutions. In the United States, equitable tolling[54] is sometimes applied (it allows the delay to start running after the parent finds out the location of the child if one can show that the child was concealed and the delay in filing was due to concealment[55]), while the Supreme Court have refused to do so[56]. Some States have rejected this doctrine while still using a more stringent burden in case of concealment[57], taking into account the reason behind the delay in filing, refusing to let an abductor rely upon their ability to hide[58]. Some have held that when the delay in the proceedings was engineered by the taking parent in order to invoke article 12(2), return should be ordered[59].

These solutions contradict the letter of the current Convention.

B. Proposition: a different starting point

Upon finding settlement, a court can still exercise discretion and order the return nonetheless[60]. However, this power is not always used, and the practice of refusing to find settlement when it is clearly existent, in order to circumvent article 12(2) and obtain a "fair" result should not perpetuate.

Modifying the starting point could diminish the arbitrariness[61] of the one-year period, and adapt to obstacles faced by parents (child concealment, heaviness of proceedings, unsuitable legal advice).

Therefore, article 12(1) could be modified as follows:

---

[50] Cass. Civ. 1, 9 juillet 2008, n°07-15.402, HC/E/FR 977, Commentaire Mélina DOUCHY-OUDOT, Contentieux familial, Déplacement illicite d'enfant : point de départ du délai d'un an de saisine du juge, Procédures n°10, Octobre 2008, comm. 273

[51] Droit de la famille 2785, No500-09-005532-973, HC/E/CA 747 ;

[52] Re C. (Abduction: Settlement) [2004] EWHC 1245, HC/E/Uke 596

[53] Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014), HC/E/US 1262; Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013), HC/E/US 1267

[54] Furnes v. Reeves, 362 F.3D 702 (11th Cir. 2004), HC/E/USf 578; Duarte v Bardales, 526 F.3d 563 (9th Cir. 2008), HC/E/US 741;

[55] In re : B. DEL C.S.B., (minor), Mendoza v Miranda, 559 F.3d 999 (9th Cir. 2009), HC/E/US 1260

[56] Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014), HC/E/US 1262

[57] Cannon v. Cannon [2004] EWCA CIV 1330, HC/E/UKe 598 and C. v C. [2008] CSOH 42, 2008 S.C.L.R. 329, HC/E/UKs 962

[58] Re H. (Abduction: Child of 16) [2000] 2 FLR 51, HC/E/Uke 476

[59] Canada, Lozinska v. Bielawski (1998), 56 O.T.C. 59 (Gen. Div. (Div. Ct.)), HC/E/CA 761

[60] It is made clear by the Pérez-Vera Report, §112, despite contrary interpretation in Australia, State Central Authority v Ayob (1997) FLC 92-746, 21 Fam. LR 567, HC/E/AU 232

[61] "*Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard*" §107 Pérez-Vera Report

> "*Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the moment the left-behind parent has discovered the location of the child, the authority concerned shall order the return of the child forthwith.* (…)"

This will allow this article to be applied only in cases where parents have voluntarily or negligently let one year elapse before filing.

III- Limitations to the grave risk exception

This exception is almost always raised by the abducting parent, resulting in being nicknamed "*talon d'Achille*"[62] of the Convention. The Pérez-Vera Report recognizes the exceptions must be interpreted restrictively if the Convention is not to become "*a dead letter*"[63].

Hague Judges have no jurisdiction over the welfare of the child, and this exception interpreted broadly could grant such power. Abducting parents indeed sometimes raise matters related to the welfare of the child, asking the Judge to determine where the child would be happier – staying or returning – or make grave and unfounded accusations against the left-behind parent hoping for the exception to apply.

The abducting parent will usually raise arguments based on their own refusal to return with the child.

One must keep in mind that the return order commands the child to return to the country of their habitual residence, not always to the home of their other parent[64]. The abducting parent is therefore free to accompany their child, smoothing their return, and it is their refusal to do so, as well as their decision to wrongfully remove the child which inflicts the harm.

A. Case law study

Evolution from permissive to strict interpretation. Case law has sometimes evolved from a permissive interpretation amounting to an assessment of the welfare of the child to stricter analysis: at the ECHR, from *Neulinger*[65] to *K.J.*[66]. In France, precedent also went from a permissive approach[67] to restrictive interpretation, refusing to take into account adaptation issues and difficulties to organize visitation with the mother[68].

---

[62] S. TOUGNE ; A. BOICHÉ, Dalloz Référence, Droit et Pratique du divorce, Chap. 241, Modalités d'exercice de l'autorité parentale, 241.233
[63] Pérez-Vera Report, §34
[64] For example, in Hadissi v. Hassibi, 1994 Carswell Ont 2076 [1995] WDFL 001, HC/E/CA 1117; Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999), HC/E/USf 216
[65] ECHR, Neulinger and Shuruk v. Switzerland, July 6, 2010, n°41615/07
[66] ECHR, K.J. v. Poland, March 1, 2016, n°30813/14
[67] For example, Cass. Civ. 1, 12 juill. 1994, Rev. Crit. 84 (1995), HC/E/FR 103 ; Cass. Civ. 1, 21 nov. 1995, n°93-20140, HC/E/FR 514 ; Cass. Civ. 1, 12 dec. 2006, n°05-22119, HC/E/FR 891; CA Rouen 9 mars 2006, n°05/04340, HC/E/FR 897
[68] Cass. Civ. 1, 13 févr. 2013, n°11-28.424, HC/E/FR 1203

Residual permissive interpretation has sometimes denied return on the basis of article 13(1) instead of 12(2), relying on time spent in the new country and the best interest of the child[69].

Absence of grave risk. Hague Judges are confronted with welfare arguments and have been firm about what cannot constitute grave risk of harm or an intolerable situation, applying strict standards. Violence must be established through repetition[70] and cannot be limited to "minor domestic squabbles[71]".

(i)Adaptation issues. Issues inherent to return cannot be taken into account or else they would negate the purposes of the Convention (prompt return). Therefore, mere adaptation issues linked to changing homes are not grave risks[72].

(ii)Separation with parent/sibling. This should not constitute grave risk since the abducting parent is the one creating this situation by removing the child, as was held in England[73], Canada[74], Israel[75], United States[76], Switzerland[77] and ECHR[78].

The mental state of the mother upon return with the child should only be considered if it would cause a situation which the child should not be required to endure[79]. Separation with siblings has sometimes[80] been considered grave risk. Where separation with the mother was deemed intolerable enough to deny return[81], the Canadian Supreme Court Justice added that this should happen only "in the rarest of cases".

(iii)Potential protection by the State of return. Courts have taken into account the capacity of the State of return to protect the child/parent from violence and abuse[82], while some have refused to do so[83].

---

[69] Re D. (A Child) (Abduction: Rights of Custody) [2006] UKHL 51, HC/E/Uke 880; Cass. Civ. 1, 17 oct. 2007, HC/E/FR 946

[70] Finizio v. Scoppio-Finizio (1999), 46 O.R. (3d) 226 (C.A.) HC/E/CA 752

[71] Norinder v Fuenters, 657 F.3d 526 (7th Cir. 2011), HC/E/US 1138

[72] **Canada** TV c. MB, Droit de la famille 1222, 2012 QCCA 21, HC/E/CA 1158 ; **France**Cass. Civ. 1ère 20 janv. 2010, 08-18085, HC/E/FR 1036 ; **Israel** Reshut ir'ur ezrachi (leave for appeal) 7994/98 Dagan v Dagan 53 PD.F. (3) 254, HC/E/IL 807; **United States** England v England, 234 F.3d 269 (5th Cir. 2000) HC/E/USf 393; **Switzerland** 5A_105/2009,II. Zivilrechtliche Abteilung, arrêt du TF du 16 avril 2009, HC/E/CH 1057 ; 5A_436/2010,II. Zivilrechtliche Abteilung, arrêt du TF du 8 juillet 2010, HC/E/CH 1060 ; Decision of the Federal Supreme Court 5A_440/2019 of 2 July 2019, HC/E/CH 1445

[73] Re B. (Children) (Abduction: New Evidence) [2001] 2 FCR 531, HC/E/Uke 420; Re C. (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478, HC/E/Uke 421

[74] M.G. v. R.F. 2002 R.J.Q 2132, HC/E/CA 762

[75] Motion forLeave to Appeal (Family Matters) 5690/10, HC/E/1290 (2010); LM v MM Nevo, FRamA 2338/09 HC/E/IL 1037 (2009); DZ v YVAMVD, RFamA 2270/13, HC/E/IL 1211; Family Appeal 10701-04-20 R. v. B.R., HC/E/IL 1466

[76] Nunez-Escudero v. Tice-Menley, 58F 3d. 374 (8th Cir. 1995), HC/E/USf 98

[77] 5P_65/2002/bnm, II. Zivilabteilung, arrêt du TF du 11 avril 2002, HC/E/CF 789 ; 5P_367/2005/ast,II. Zivilabteilung, arrêt du TF du 15 novembre 2005, HC/E/CH 841

[78] ECHR, K.J. v. Poland, March 1, 2016, n°30813/14

[79] Re S. (A Child) (Abduction: Grave Risk of Harm) [2002] 3 FCR 43, [2002] EWCA Civ 908, HC/E/Uke 469

[80] Re T. (Abduction: Child's objections to return) [2000] 2 F.L.R. 192, HC/E/Uke 270

[81] Thomson v.Thomason [1994] 3 SCR 551, 6 RFL (4th) 290, HC/E/CA 11

[82] **England** Re M. (A Minor), 28 July 1993, transcript, Court of Appeal (England), HC/E/Uke 164; CA Bordeaux, 28 juin 2011, RG n°11/01062, hC/E/FR 1128; **Israel** Leave for Family Appeal 6390/13, Plonit v Ploni, HC/E/IL 1316; **United States** Nunez-Escudero v. Tice-Menley, 58F 3d. 374 (8th Cir. 1995), HC/E/USf 98; Pliego v. Hyayes, 843 F.3d 226 (6th Cir. 2016), HC/E/US 1386; **Switzerland** Decision of the Federal Supreme Court 5A_440/2019 of 2 July 2019, HC/E/CH 1445

[83] Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008), HC/E/US 1142

(iv)Risk not specific to the particular child. Return should not be refused due to the country of return being less secure (for example: Israel[84], Zimbabwe[85]), the question not being whether there is war in that country, but whether the child would suffer a grave risk of harm upon return[86]. Similarly, covid-19 is not a risk specific to that child, although one must check whether treatment is available in the return State[87].The risk must be on the child, not on a third party such as a sibling[88] or the unhappiness of the taking parent[89].

"Actual" grave risk of harm. Restrictive interpretation still allows for applications. For example, if a mother suffering from PTSD and battered woman syndrome will find herself upon return in such a mental state she will not be fit to care for her child[90]; if a child displays physical symptoms of trauma at the idea of returning to where he suffered violence[91]; if a child was very young and "wholly dependent" on a mother who was unable to return[92]; or sexually abused by the father[93]; or would suffer PTSD upon return[94] or in extraordinary circumstances involving the mafia prostitution issues and human trafficking[95]. In one very surprising case, it was held that the existence of a default judgment which found that the father had killed the mother was not clear and convincing evidence that the children would face a grave risk of harm if returned, absent any allegation he had ever harmed the children[96].

B. Proposed addition to article 13(1)b)

> "*Separation with the abducting parent and mere adaptation issues shall not be construed as grave risks or intolerable situations absent particular circumstances, as they can be prevented by restraining from abduction*".

The Convention relies on the principle that the courts of the habitual residence of the child are better fitted to rule on welfare[97]. This commands return in almost all cases unless there is an actual grave risk of harm. Disadvantages to return should therefore be excluded from this

[84] Re S. (A Child) (Abduction: Grave Risk of Harm) [2002] 3 FCR 43, [2002] EWCA Civ 908, HC/E/Uke 469; Silverman v Silverman, 312 F.3d 914 (8th Cir. 2002), HC/E/USf 483
[85] Re M. (Children) (Abduction: Rights of Custody) [2007] UKHL 55 [2008] 1 AC 1288, HC/E/Uke 937
[86] Re S. (A Child) (Abduction: Grave Risk of Harm) [2002] 3 FCR 43, [2002] EWCA Civ 908, HC/E/Uke 469
[87] Family Appeal 10701-04-20 R. v. B.R., HC/E/IL 1466
[88] Re K. (Abduction: Psychological Harm) [1995] 2 FLR 550, HC/E/Uke 96; Re C. (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478, HC/E/Uke 421; Chalkey v. Chalkey (1995) ORFL (4th) 422; leave refused [1995] SCCA No. 33, HC/E/CA 14; Cannock v.Fleguel [2008] O.J. NO. 4480, HC/E/CA 852
[89] Re Medhurst and Markle; Attorney General of Ontario Intervenor, (1995) 26 OR (3d) 178, HC/E/CA 15
[90] Re S. (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2. A.C. 257 HC/E/Uke 1147
[91] Re F. (A Minor) (Abduction: Custody Rights Abroad)[1995] Fam 224, [1995] 3 WLR 339 [1995] Fam Law 534, HC/E/Uke 8; CA Paris, 14 oct. 2010, 10/17238, HC/E/FR 1132
[92] Re M. (Abduction: Leave to Appeal) [1999] 2 FLR 550, HC/E/Uke 263; Pollastro v. Pollastro [1999] 45 R.F.L. (4th) 404 (Ont. C.A.) HC/E/CA 373; 5A_105/2009,II. Zivilrechtliche Abteilung, arrêt du TF du 16 avril 2009, HC/E/CH 1057
[93] Ortiz v.Martinez, 789 F.3d 722 (7th Cir. 2015), HC/E/US 1343
[94] Blondin v Dubois, 238 F.3d 240 (2d Cir. 2001), HC/E/USf 585
[95] P.(N), v. P(A), 1999 CanLII 20724 (QCCA) (Droit de la famille – 3193) SOQUIJ AZ-99011344, HC/E/CA 764
[96] March v. Levine, 249 F.3d 462 (6th Cir. 2001), HC/E/USf 386
[97] For example, Jabbaz v. Mouammar (2003), 226 D.L.R. (4th) 494 (Ont. C.A.) HC/E/CA 757; CA Rouen, 20 janvier 2005, N°04/03822, HC/E/FR 1007 ; CA Bordeaux, 28 juin 2011, N°11/01062, HC/E/FR 1128 ; DZ v. YVAMVD, RFamA 2270/13 (2013) HC/E/IL 1211, Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996), HC/E/USf 82; LM v MM Nevo, RFamA 2338/09 hC/E/IL 1037 (2009)

Article, in order to deter parents from systematically raising very violent accusations which will eventually annihilate any dialogue between the parents, against the best interest of the child[98].

To conclude, while forty years in, the Hague Convention has improved the situation of many children and families, rethinking these remaining issues would make the instrument even more efficient. While the three themes studied seem particularly relevant to problems faced in practice, broader issues could also be discussed in the future, such as opening the return remedy to third party States, raising awareness with professionals, encouraging mediation…

[98] S. TOUGNE ; A. BOICHÉ, Dalloz Référence, Droit et Pratique du divorce, Chap. 241, Modalités d'exercice de l'autorité parentale, 241.233

‘Inter-country adoption is in decline. Discuss. What is your point of view about this statement?’

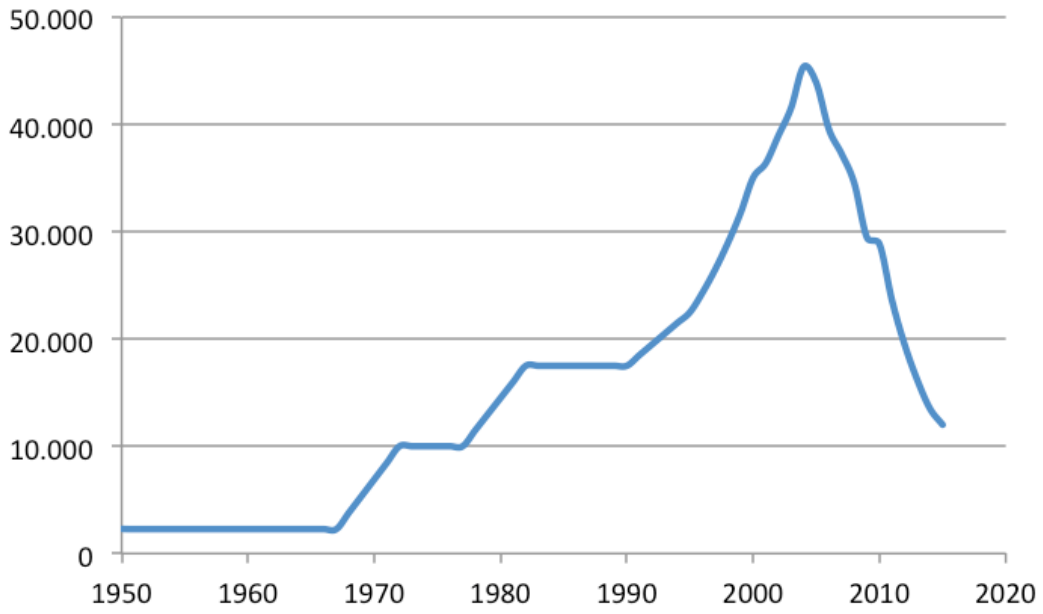
Introduction

Inter-country adoption (ICA) is the process by which a child, habitually resident in one country, is adopted by an individual(s) habitually resident in another country.[1] The country of origin is often referred to as the ‘sending country’, while the country of destination is often referred to as the ‘receiving country’. The statistics are clear; ICA is in steep decline. The question is, why? The writer will address this question by drawing on the experiences of ICA lawyers from around the world, prominent academics in the field and Dr Peter Selman, a Specialist Advisor of Statistics to The Hague Conference on Private International Law (HCCH).

The statistics

In his 2012 report, Selman found that ‘*in 1998, there were just under 32,000 adoptions; by 2004 this number had risen to over 45,000; by 2009, the world total had fallen to under 30,000 … and the decline continued in 2010*’[2] (see Figure 1).

Figure 1[3]



[1] ‘Intercountry Adoption and the 1993 Hague Convention’, (*HM Courts & Tribunal Service*, 2016), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717285/a21-eng.pdf> accessed 8 March 2022.
[2] Peter Selman, ‘Global Trends in Intercountry Adoption: 2001-2010’ (2012) 44 Adoption Advocate, PL 1.
[3] Jean-François Mignot, ‘Will international adoption be replaced by surrogacy?’, *Niussp*, Fertility and Reproduction, 2017, <https://www.niussp.org/fertility-and-reproduction/will-international-adoption-be-replaced-by-surrogacyla-gestation-pour-autrui-va-t-elle-remplacer-ladoption-internationale/> accessed 1 March 2022.

Selman's most recent report for the HCCH is dated February 2022. It provides comprehensive ICA statistics based on data from 24-28 receiving countries.

Selman's first table illustrates the steep decline of ICA amongst *all* receiving countries (see Figure 2).

Figure 2[4]

Table 1: RECEIVING STATES 2004-20 - Ranked by total adoptions in period

8-2-2022	25 Receiving States 2004-2020																	
COUNTRY	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2004-2020
USA	22.988	22.735	20.671	19.605	17.467	12.753	12.149	9.320	8.668	7.094	6.441	5.648	5.372	4.714	4.059	2.970	1.622	184.276
Italy	3.402	2.874	3.188	3.420	3.977	3.964	4.130	4.022	3.106	2.825	2.206	2.216	1.872	1.439	1.394	1.205	669	45.909
Spain	5.541	5.423	4.472	3.648	3.156	3.006	2.891	2.573	1.669	1.191	827	801	574	542	456	375	195	37.340
France	4.079	4.136	3.977	3.162	3.270	3.017	3.508	2.003	1.569	1.343	1.069	815	956	685	615	421	244	34.869
Canada	1.949	1.858	1.568	1.715	1.614	1.695	1.660	1.516	1.162	1.243	905	895	790	621	658	576	416	20.841
TOP FIVE	37.959	37.026	33.876	31.550	29.484	24.435	24.338	19.434	16.174	13.696	11.448	10.375	9.564	8.001	7.182	5.547	3.146	323.235
Sweden	1.109	1.083	879	800	793	912	728	630	542	450	408	400	342	297	262	170	92	9.897
Netherlands	1.307	1.185	816	782	767	682	705	528	488	401	354	304	214	210	156	145	70	9.114
Germany	744	720	661	783	716	606	513	624	452	288	227	200	196	96	91	85	81	7.083
Norway	706	582	448	426	304	344	343	304	239	144	152	132	126	125	95	89	40	4.599
Denmark	528	586	450	426	395	496	419	338	219	176	124	97	84	79	64	46	23	4.550
TOP TEN	42.353	41.182	37.130	34.767	32.459	27.475	27.046	21.858	18.114	15.155	12.713	11.508	10.526	8.808	7.850	6.082	3.452	358.478
Belgium	470	471	383	358	364	439	388	351	260	178	156	137	121	124	104	75	52	4.431
Switzerland	567	389	410	394	259	288	293	238	194	159	92	92	73	75	52	62	35	3.672
Australia	370	434	421	405	270	269	222	217	157	138	114	83	82	69	65	57	37	3.410
Ireland	398	366	313	392	422	307	201	188	117	72	34	82	54	53	41	33	29	3.102
UK	333	369	363	356	225	200	173	153	120	124	68	58	64	60	71	52	53	2.842
Finland	289	308	218	176	157	187	160	163	175	141	142	93	58	70	54	67	27	2.485
Israel	226	191	176	218	150	120	114	115	88	69	42	37	22	17	17	11	6	1.619
N.Zealand	339	30	20	49	39	16	13	19	25	42	22	12	22	23	18	13	12	714
Malta	46	39	60	64	53	34	42	50	57	19	11	18	6	45	53	31	n/a	628
Luxembourg	56	41	45	23	28	36	32	25	32	17	13	18	19	16	12	18	5	436
Iceland	29	41	19	18	13	17	18	19	17	8	11	20	5	6	5	5	5	256
Slovenia		3	15	3	6	14	21	18	35	15	14	15	11	14	14	15	5	218
Cyprus	3	3	0	19	16	12	4	12	1	2	2	4	0	0	0	0	n/a	78
Andorra	3	1	4	6	5	7	9	2	1	4	2	0	2	2	0	3	0	51
Monaco	n/a	0	0	1	3	4	1	2	1	4	1	3	0	1	1	0	3	22
TOTAL	45.482	43.868	39.577	37.248	34.466	29.421	28.736	23.428	19.393	16.143	13.436	12.177	11.065	9.382	8.356	6.524	3.718	382.420
No. of states	23	24	23	25	25	25	25	25	25	25	25	24	23	24	23	23	22	22-25
%. To USA	50,5%	51,8%	52,2%	52,6%	50,7%	43,3%	42,3%	39,8%	44,7%	43,9%	47,9%	46,4%	48,5%	50,2%	48,6%	45,5%	43,6%	48,2%

[4] Peter Selman, 'Statistics based on data provided by 24-28 receiving States' (*Hague Conference on Private International Law*, February 2022) <'https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf> accessed 21 February 2022.

Selman's second table illustrates the steep decline of ICA amongst *nearly all* sending countries (see Figure 3).

Figure 3[5]

Table 2: TOP 20 STATES OF ORIGIN 2004-20 - Ranked by number adopted to 27 States

1-2-2022	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2004-2020
China (Mainland)	13.412	14.484	10.765	8.749	5.879	5.004	5.427	4.371	4.136	3.405	2.943	3.059	2.678	2.211	1.798	1.065	250	89.636
Russia	9.450	7.569	6.837	4.926	4.169	4.061	3.424	3.420	2.674	1.838	1.058	766	486	355	284	228	45	51.590
Ethiopia	1.534	1.799	2.184	3.041	3.917	4.564	4.385	3.446	2.734	1.997	1.056	676	330	485	245	22	13	32.428
Guatemala	3.425	3.870	4.230	4.851	4.172	784	58	36	11	27	32	13	7	4	1	5	0	21.526
Colombia	1.749	1.500	1.681	1.643	1.613	1.404	1.815	1.591	931	570	536	522	485	552	565	607	387	18.151
TOP 5	29.570	29.222	25.697	23.210	19.750	15.817	15.109	12.864	10.486	7.837	5.625	5.036	3.986	3.607	2.893	1.927	695	213.331
Ukraine	2.119	2.035	1.077	1.623	1.601	1.500	1.097	1.068	722	640	608	381	399	277	328	365	277	16.117
South Korea	2.239	2.118	1.813	1.225	1.366	1.395	1.127	950	815	219	506	433	376	401	321	259	266	15.829
Viet Nam	492	1.199	1.363	1.691	1.719	1.500	1.265	700	214	296	407	428	405	380	307	240	108	12.714
Haiti	1.169	949	1.108	822	1.313	1.215	2.496	229	374	552	556	276	396	399	389	252	209	12.704
India	1.067	864	831	987	751	714	608	614	399	387	359	345	491	580	646	545	262	10.450
TOP 10	36.656	36.387	31.889	29.558	26.500	22.141	21.702	16.425	13.010	9.931	8.061	6.899	6.053	5.644	4.884	3.588	1.817	281.145
Philippines	410	509	483	568	581	545	494	491	411	538	454	391	363	332	248	222	111	7.151
Kazakhstan	899	849	735	817	768	682	516	218	5	28	63	34	20	17	9	10	3	5.673
Thailand	535	491	423	467	398	359	298	280	282	308	264	261	289	224	249	233	114	5.475
Brazil	487	488	529	490	490	458	375	347	328	238	129	137	120	117	67	64	55	4.919
Poland	407	406	393	371	399	393	315	292	244	303	303	296	328	153	53	14	7	4.677
TOP 15	39.394	39.130	34.452	32.271	29.136	24.578	23.700	18.053	14.280	11.346	9.274	8.018	7.173	6.487	5.510	4.131	2.107	309.040
Bulgaria	395	149	112	100	140	228	237	311	357	413	414	426	374	302	303	273	173	4.707
China (Taiwan)	186	242	269	273	373	397	416	326	299	199	188	180	170	156	121	154	122	4.071
South Africa	241	268	263	255	272	307	220	202	170	221	219	217	147	162	131	141	59	3.495
Congo RD	15	45	61	69	62	153	190	353	521	599	241	384	635	54	47	32	3	3.464
Nigeria	100	102	105	82	221	184	268	246	266	243	183	196	161	216	213	148	118	3.052
TOP 20 >	40.331	39.936	35.262	33.050	30.204	25.847	25.031	19.491	15.893	13.021	10.519	9.421	8.660	7.377	6.325	4.879	2.582	327.829
USA	132	168	176	181	261	257	177	250	232	171	172	174	175	109	159	82	89	2.965
Hungary	70	67	100	142	118	131	139	157	151	112	135	163	174	235	244	241	158	2.537
Nepal	269	227	452	261	413	22	170	157	3	0	4	2	5	1	1	1	3	1.991
Peru	117	173	189	171	153	139	175	135	111	109	97	81	100	66	58	67	32	1.973
Uganda	17	22	16	59	61	74	80	225	249	296	211	237	208	60	29	35	26	1.905
TOP 25 >	40.936	40.593	36.195	33.864	31.210	26.470	25.772	20.415	16.639	13.709	11.138	10.078	9.322	7.848	6.816	5.305	2.890	339.200
All States	45.482	43.868	39.577	37.244	34.486	29.412	28.732	23.428	19.393	16.143	13.436	12.177	11.065	9.382	8.356	6.525	3.718	382.424

The statistics are clear; ICA is in steep decline.

Why is ICA in steep decline?

The writer has identified the following reasons for the decline (and in no particular order):

1. Strengthening of domestic policy and legislation;
2. Shift in focus towards domestic adoptions;
3. The greater ability to have a genetically related child;
4. Ratification of the Convention;[6]
5. Scandals, bad press and politics; and
6. Miscellaneous.

The writer will explore each of these reasons below.

[5] ibid.
[6] Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 (The Hague Convention).

Strengthening of domestic policy and legislation

The strengthening of domestic policy and legislation has made ICA harder. It is becoming increasingly difficult for prospective foreign adopters to find a child, and the available children tend to have 'special needs'.

Many countries have placed moratoriums on their ICA programs, which has caused numbers to plummet. In some cases moratoriums are voluntary, and in others, they are forced, largely due to concerns of child trafficking, transfer of custody without approval, questionable practices by adoption service providers and fraud.[7] Moratoriums on ICA from Cambodia were established by several countries, including the USA in 2001.[8] In Guatemala, a moratorium was introduced in 2008 due to concerns over the sale of children, illegal payments to birth mothers and abduction.[9] ICA fell from 4,172 in 2008 to 0 in 2020 (Figure 3). In Romania, a moratorium was imposed in 2001, and then again in 2004, '*making international adoption virtually impossible'*.[10] In 2007, Nepal introduced a moratorium whilst it made changes to its processes, intending to resolve serious issues of malpractice.[11] Today, ICA in Nepal has virtually stopped; 261 children were sent in 2007, whilst only 3 were sent in 2020 (Figure 3). In 2011, Ethiopia announced that it would drastically reduce ICA and in 2017, the country introduced a moratorium; 1,534 children were sent in 2004, while only 13 were sent in 2020 (Figure 3).

Countries have increasingly imposed stringent eligibility requirements on prospective foreign adopters, making it harder for them to adopt. China requires prospective adopters to sign statements that they are not gay or lesbian, and China does not allow single people to adopt, or those who are obese, taking psychotropic drugs, over the age of 50, or who are poor.[12] The writer interviewed Roll Chunhakasikarn who explained that in Thailand, only married heterosexual couples may apply for ICA, along with single women who can only adopt special needs children. In addition, the adopter must be at least 25, and if they wish to adopt a special needs child they must be healthy, have no criminal record or psychological problems.[13]

A change in political ideology can increase ICA, or cause numbers to dramatically fall. O'Halloran explains that the one-child policy in China introduced in 1980, coupled with the preference for male children, led to many unwanted female children being absorbed through the ICA process.[14] In 2004, China ranked as the highest country of origin sending 13,412 children, but in 2020, it sent just 250 (Figure 3). This decline is partly due to the two-child policy introduced in 2015 and the three-child policy introduced in 2021. In Romania, abortion was outlawed in 1966 for women under 40 with less than four children, resulting in many children being abandoned in orphanages. The

[7] Kelly Weisberg, *Modern Family Law: Cases and Materials* (Wolters Kluwer 2020) 848.
[8] Simon Springer, *Violent Neoliberalism, Development, Discourse, and Dispossession in Cambodia* (Palgrave Macmillan 2015) 50.
[9] Karen Rotabi and Nicole Bromfield, 'The Decline in Intercountry Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns' (2012) 27(2) Journal of Women and Social Work 129.
[10] Kerry O'Halloran, *The Politics of Adoption, International Perspectives on Law, Policy and Practice* (4th edn, Springer 2021) 661.
[11] 'Adoptions: restricted list' (*Department for Education*, March 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965905/Restricted_List_2021.pdf> accessed 24 March 2022.
[12] O'Halloran (n 10) 169.
[13] Interview with Roll Chunhakasikarn, Partner and Family Lawyer, Chun & Chun Law in Thailand, Fellow of the International Academy of Family Lawyers (email, 14 March 2022).
[14] O'Halloran (n 10) 168.

ban was removed in 1989 and by 1991, Romania was a major sending country for ICA. In 2015, Romania changed its adoption laws and now, ICA is only possible for Romanian citizens living outside of Romania and for foreign citizens who are residents in Romania.[15]

The elimination or restriction of private adoption intermediaries has also impacted ICA numbers. Bartholet argues that this has been the '*death knell*' for ICA in many countries, particularly in South and Central America.[16]

It is not just sending countries that have strengthened their domestic policy and legislation making ICA harder, but also receiving countries. In February 2021, ICA was suspended in the Netherlands. The writer interviewed Selman[17] who explained that '*The Dutch government failed to observe its duty of care for many years by looking the other way and failing to take action in cases of malpractice and abuse'*.[18] A similar enquiry has been called in Sweden, while Norway and Denmark are also questioning their ICA programs.

Domestic adoptions

O'Halloran points out that many present-day adopters are interested in babies, preferably healthy and voluntarily relinquished, rather than children simply in need of a home. This has presented countries with difficulties:

> *It removes the most adoptable children from their own country, culture and kin, it pre-empts any possibility of meeting the needs of their own adopters and it leaves behind those children who are statistically less likely to be adopted and who will therefore probably be consigned to institutional care*.[19]

For these reasons and those set out below, there has been a noticeable shift from ICA to domestic adoption.

Countries have introduced legislation or policy requiring them to prioritise domestic adoptions. In South Korea, the Special Adoption Act came into effect in 2012 prioritising domestic adoptions and endeavouring to reduce the number of South Korean children adopted abroad. In 2004, 2,239 children were sent and in 2012, 815 were sent; this dropped sharply in 2013 to 219 (Figure 3). In the UK, O'Halloran notes that domestic adoptions have remained amongst the highest in Europe, '*probably due to local authority policy of looking first to family members in accordance with the Children Act 1989'.*[20] Domestic adoptions have also steadily grown in Canada, largely due to *'more assertive policies to increase adoptions from care'.*[21]

---

[15] O'Halloran (n 10) 661.
[16] Elizabeth Bartholet 'International Adoption: The Human Rights Position' (2010) vol 1 Global Policy 91, 93.
[17] Interview with Dr Peter Selman, Specialist Advisor of statistics to The Hague Conference on Private International Law and Independent Research Professional (Microsoft Teams, 7 March 2022).
[18] 'Minister Dekker suspends intercountry adoption with immediate effect' (*Government of the Netherlands*, 8 February 2021) <https://www.government.nl/latest/news/2021/02/08/minister-dekker-suspends-intercountry-adoption-with-immediate-effect> accessed 23 March 2022.
[19] O'Halloran (n 10) 164.
[20] O'Halloran (n 10) 227.
[21] O'Halloran (n 10) 409.

It is arguable that as a country becomes more prosperous, ICA declines; countries want to hold on to their children, particularly the 'healthy' ones. The writer interviewed Stephen Page who explained that '*the side effect of countries becoming more prosperous is that children are not being exported for ICA anymore. Instead, people within those countries who cannot have children have become more inclined to adopt domestically*.[22] Page gave the example of India, a country with one of the fastest-growing economies in the world; ICA fell from 1,067 in 2004 to 262 in 2020 (Figure 3). Similarly, Page explained that '*China is hanging on to the children who are fit'*; China tends to send disabled children to Australia aged 2-5. China is not alone in this regard, with several countries almost exclusively sending children with '*special needs'*, or older children, including Brazil, Latvia, Lithuania and Poland.[23] Selman explains that these children are '*expensive'* to look after domestically.[24] That said, prosperous countries such as South Korea are still sending children for ICA. Selman believes that this is due to the concept of diaspora; South Korea favours the idea of sending children around the world to '*spread the message of the goodness of* Korea'.[25]

Linked to prosperity is national pride. Bartholet argues that national pride has led to calls to stop selling, or giving away, '*our most precious resource [children]*', and for countries to '*take care of our own*'.[26] This concept is particularly prevalent in Asian countries, where domestic adoptions by relatives are seen as a '*means of strengthening bloodlines'*; in China, this is called 'qinqi'.[27]

Genetically related child

The desire to have a genetically related child, and the greater ability to achieve this through assisted reproduction, has led to a decline in prospective adopters and therefore contributed to the decline of ICA. Indeed, O'Halloran suggests that where prospective adopters have a choice between having a genetically related child versus adopting a child in need of a family, they are likely to choose the former.[28]

In 2004, when ICA began its steep decline, surrogacy began to take off. Gestational surrogacy rates stood at 738 in 2004; by 2013, the number of children born by surrogacy was higher than the number of ICAs.[29] O'Halloran describes how as ICA becomes a much slower, more complicated and uncertain process, which tends to deliver older children or those with physical or mental health issues, many would-be parents are instead considering commercial surrogacy.[30] O'Halloran puts it bluntly, stating *'where choice rather than altruism is in play, some prospective adopters may simply decide that surrogacy offers better value'.*[31]

[22] Interview with Stephen Page, Family Lawyer and Director at Page Provan, Fellow of the International Academy of Family Lawyers and a Fellow of the Academy of Adoption and Assisted Reproduction Attorneys (Microsoft Teams, 3 March 2022).
[23] Peter Selman, 'The Global Decline of Intercountry Adoption: What Lies Ahead?' (2012) vol 11 Social Policy and Society 381, 386.
[24] Interview with Dr Peter Selman (n 17).
[25] Interview with Dr Peter Selman (n 17).
[26] Bartholet (n 16) 92.
[27] O'Halloran (n 10) 821.
[28] O'Halloran (n 10) 997.
[29] Kim Armour, 'An Overview of Surrogacy Around the World' (*Growing Families*, 2012) <https://www.growingfamilies.org/wp-content/uploads/2015/12/Overview-of-Surogacy-Around-The-World.pdf> accessed 10 March 2022.
[30] O'Halloran (n 10) 997.
[31] O'Halloran (n 10) 358.

Surrogacy has become increasingly popular with the LGBT+ community, due to prospective parents facing '*numerous attitudinal and institutional obstacles in the adoption process'*.[32] Whilst the Convention neither prohibits nor requires nations to place children for adoption with LGBT+ individual(s), it leaves the matter open for each country to decide. This has led to many sending countries prohibiting LGBT+ individuals from adopting, including countries that recognise same-sex marriage.

The writer interviewed Janaína Albuquerque.[33] Albuquerque considers that '*It is not possible to talk about ICA without talking about surrogacy. ICA has definitely gone down. Surrogacy is going up'*. When asked why, Albuquerque explained that surrogacy is viewed as a quicker and sometimes cheaper process, with adoptions potentially taking 3 to 4 years. In addition, people want to have a baby of their own; *'a baby comes without baggage and offers a clean slate, unlike adoption'*.[34] Chunhakasikarn explained '*The development and success rate of IVF and surrogacy processes have increased, while the cost has decreased*', and this has had a direct impact on the trajectory of ICA.[35]

In summary, and as O'Halloran points out, the '*correlation between falling rates of domestic adoption and ICA and rising rates of surrogacy tourism and successful IVF is unmistakable'.*[36]

The Hague Convention

The Convention came into force in 1995. By 2022, 104 states had contracted to the Convention.[37] Whilst the objects of the Convention include establishing safeguards to ensure that ICA takes place in the best interests of the child, and to prevent the abduction, sale of or traffic in children,[38] arguably, the Convention is '*actually depressing intercountry adoption due to resulting increased bureaucracy, delays, and costs'*.[39]

Article 4 of the Convention requires Members to give '*due consideration*' to placing the child within the country of origin; this is the principle of subsidiarity.[40] O'Halloran states that the '*requirements to give first preference to domestic adoption and to confirm orphan status before releasing children'* led to the radical decline of ICA in China.[41] Albuquerque worked with the team responsible for the Convention. She explained that when discussing the Convention, the experts considered that '*the more the child stays within their cultural context or routes, the better it would be for them'.*[42]

[32] Gretchen Wrobel, Emily Helder and Elisha Marr (eds), *The Routledge Handbook of Adoption* (Routledge 2020) 167.
[33] Interview with Janaína Albuquerque, international Family Lawyer registered in the Brazilian and Portuguese Bar Associations (Microsoft Teams, 1 March 2022).
[34] ibid.
[35] Interview with Roll Chunhakasikarn (n 13).
[36] O'Halloran (n 10) 213.
[37] 'HCCH MEMBERS' (*Hague Conference on Private International Law*), https://www.hcch.net/en/states/hcch-members> accessed 21 February 2022.
[38] The Hague Convention (n 6), Article 1.
[39] Robert Ballard and others, The intercountry adoption debate: Dialogues across disciplines (Cambridge Scholars Publishing 2015) 200.
[40] The Hague Convention (n 6), Article 4
[41] O'Halloran (n 10) 826.
[42] Interview with Janaína Albuquerque (n 33).

The costs and delays from ratification of the Convention have further contributed to the decline of ICA. The safeguards put in place by the Convention can be '*crippling'* to a sending country that will bear the cost of implementing them.[43] The writer interviewed Victoria Nabas.[44] Referring to the Convention, Nabas explained '*it is so complicated to adopt that individuals or couples who would like to adopt have no choice but to give up'*. Nabas spoke of adoption costs as high as £50,000. Indeed, a recent study by the European Commission on Adoption found that '*the cost of adoption is an important issue and sometimes forces the prospective adoptive parents to give up the procedure'*.[45]

After joining the Convention, some countries have seen a sharp decrease in ICA, whilst others have seen a sharp increase. Selman points out that amongst others, Italy, Belgium, the U.S and Ireland (receiving countries) all experienced a decrease after joining, as did Sri Lanka, Brazil, Madagascar, China and Chile (sending countries).[46] That said, Selman believes that ICA '*has not declined in Hague countries particularly faster than non-Hague countries'*.[47] He points out that '*The ten years after the Convention came into force saw the largest rise in ICA in the 70 years since WW2'***.** For example, Spain, Sweden and Switzerland (receiving countries) saw an increase after joining, as did Romania, South Africa, Mali and Guatemala (sending countries)**.** Instead, Selman argues that the Convention has '*exposed more and more where ICA has gone wrong'*. [48]

Scandals, bad press and politics

ICA scandals, bad press and politics have helped contribute to the decline of ICA and as discussed above, the shift in focus towards domestic adoptions.

There have been many high-profile cases involving children being hurt or killed by their foreign adoptive parents*.* Albuquerque informed the writer that '*one of the biggest problems with adoption is that parents give the child back. It happens a lot'*.[49] This is what happened to Artyom Savelyev, who was rejected by his American mother and sent back to Russia alone. On 1 January 2013, Vladimir Putin banned the adoption of Russian children by U.S. citizens; perhaps he was embarrassed, or perhaps this was retaliation for the Magnitsky Act[50] that sanctioned Russian officials and nationals for human rights abuses.[51] In Romania, it was deemed politically expedient to cease ICA in 2005, as a result of ongoing allegations of malpractice that threatened to compromise accession to EU treaties.[52]

As Bartholet puts it,

[43] Ballard (n 39) 221.
[44] Interview with Victoria Nabas, Partner and Head of Immigration, qualified in Brazil, Portugal and England & Wales, Gunnercooke, (Microsoft Teams, 24 February 2022).
[45] Ballard (n 39) 289.
[46] Interview with Dr Peter Selman (n 17).
[47] ibid
[48] Ibid.
[49] Interview with Janaína Albuquerque (n 33).
[50] Global Magnitsky Human Rights Accountability Act 2012.
[51] Weisberg (n 7) 848.
[52] O'Halloran (n 10) 994.

> *The media reflect and exacerbate the hostility to international adoption, featuring stories of baby buying and kid-napping, fueling the idea that ICA is an inherent violation of human rights, depriving children of their heritage birthright.*[53]

Celebrity adoptions have not helped this hostility; 67 organizations filed amicus briefs in court opposing Madonna's first adoption of a child from Malawi, with The Human Rights Consultative Committee, representing 85 such organisations, opposing the second adoption.[54]

An interesting case study is that of Australia. As a result of historic failings, Australia is sometimes described as 'anti-adoption'. Page explained that Australia's height of adoption was in the 1960s, when forced adoptions by churches and adoption agencies were widespread and when thousands of Aboriginal Australians were forcibly separated from their families.[55] This ultimately led to a formal apology from the Government. Page explained that '*as a result of this guilt, the adoption authorities in Australia are very rigid'*.[56] Other countries with similar tainted histories may feel the same way. Selman considers that the British ''Home Children'' migrant program '*may explain why ICA is so low in the UK'*.[57]

Miscellaneous

Perhaps parenting has become more feasible in sending countries? Perhaps this has led to fewer children being given up for adoption, thereby contributing to the decline of ICA. War and natural disasters are also factors to be considered.

We cannot ignore the worldwide decline in mortality rates, rising standard of living, wider availability of effective birth control, the emergence of family planning centres, weakening of stigma around abortions and increased support for single parents. Pösö and Skivenes argue that one reason for the decline of ICA is '*fewer unwanted pregnancies*' and '*social measures supporting parents*'.[58] The writer interviewed Doreen Brown; Doreen explained that '*Parents are allowing their daughters to be on the pill much younger than in the past. Abortions have become easier … life, in general, is evolving and we see many single-parent families today'*. [59] In Selman's view, these factors may also explain the decline in domestic adoptions. Selman points to the impact of The Abortion Act 1967[60] in the UK which legalized abortions on certain grounds, along with increased support for single parents in the 1990s.[61]

O'Halloran states that war and natural disasters have '*impacted upon established flow patterns'* of ICA.[62] For example, by 2008 and following several tropical storms and hurricanes, Haiti had

[53] Bartholet (n 16) 92.
[54] Bartholet (n 16) 92.
[55] 'Forced Adoption Practices' (*Australian Government Department of Social Services*, 8 October 2021) <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/forced-adoption-practices> accessed 9 March 2022.
[56] Interview with Stephen Page (n 22).
[57] Interview with Dr Peter Selman (n 17).
[58] Tarja Pösö and Marit Skivenes, *Adoption from care: international perspectives on children's rights, family preservation and state intervention* (Policy Press 2021) 4.
[59] Interview with Doreen Brown, Family Attorney, Green Glazer in Canada, Member of Academy of Adoption and Assisted Reproduction Attorneys, (email, 10 March 2022).
[60] Abortion Act 1967.
[61] Interview with Dr Peter Selman (n 17).
[62] O'Halloran (n 10) 412.

become a major source of children for France, Canada, the Netherlands and the USA. This peaked in 2010 after the earthquake.[63] ICA also increased after WW2, the war in Korea and the war in Vietnam. The impact of the armed conflict in Ukraine is yet to be seen. On 16 March 2022, The Permanent Bureau published an Information Note in light of the Ukraine conflict, stating:

> *The conflict should not be used as a justification for expediting intercountry adoptions, or for circumventing or disregarding international standards and essential safeguards for safe adoption … Adoption procedures should be prohibited from taking place*.[64]

Conclusion

Once a rapid growth phenomenon, ICA is now in steep decline. There is no single cause for this, but rather an amalgamation of legal, social, political, cultural, economic and scientific changes. It is arguable that over the years, ICA has become somewhat lost, that it can no longer be seen solely in terms of an altruistic child rescue response but is more often a consequence of the '*demand-led pressure to satisfy the parenting needs of infertile couples in modern western societies'*.[65] Those that agree with this statement hope that as the world recovers from Covid-19, '*reformation of the ICA system will increase its focus on the best interest of the child'* and continue to look towards the preservation of natural families or domestic adoptions.[66] Whilst this is likely to further accelerate the decline of ICA, it will '*shift the transactional focus to a humanitarian effort to assist children more at risk'*.[67] However, where the preservation or domestic adoption is unavailable, the decline of ICA may mean that too many of these children will never realise their intrinsic right to a family.[68]

Word count excluding title, references and tables: 2,992

Special thanks

With special thanks to Professor Werner Menski MA (Kiel), PhD (London) for gifting the writer Kerry O'Halloran's book, The Politics of Adoption, International Perspectives on Law, Policy and Practice.

With further special thanks to Dr Peter Selman, Janaína Albuquerque, Stephen Page, Roll Chunhakasikarn, Victoria Nabas and Doreen Brown who agreed to be interviewed by the writer.

[63] Karen Rotabi, *Intercountry Adoption: Policies, Practices, and Outcomes* (Taylor & Francis 2016) 74.
[64] 'Children deprived of their family environment due to the armed conflict in Ukraine: Cross-border protection and intercountry adoption' (*HCCH*, 16 March 2022) <https://assets.hcch.net/docs/0f9c08e9-75d0-4497-8ca0-12c595aa6845.pdf> accessed 30 March 2022.
[65] O'Halloran (n 10) 157.
[66] Ambrosia Wilkerson, 'The Fate of intercountry Adoptions following COVID-19' (2021) vol 54 no. 3 The International lawyer 457, 482.
[67] ibid.
[68] Ballard (n 39) 301.

Capacity (I)

Starting the conversation about capacity in family law matters

JENNA LUCAS

Barrister
Pump Court Chambers
London, England

Web: pumpcourtchambers.com

Jenna Lucas is a barrister at Pump Court Chambers in London. She specialises in private law children and matrimonial finance cases, which often include international elements. Prior to joining chambers, Jenna was a Partner at Irwin Mitchell LLP in London where she was involved in a number of high profile closes including Re. H-N, heard by the Court of Appeal in 2020 and Sharland and Gohil, heard by the Supreme Court in 2015. She has been described in Legal 500 as being “tactically excellent, justifiably confident in her own abilities and extremely hardworking”.

SAMANTHA HILLAS KC

St John's Building

Web: stjohnsbuildings.com
IAFL Fellow Profile: view here

Sam Hillas KC is a senior member of the matrimonial finance team at St John's Buildings based in the North West of England, dealing exclusively with financial remedy work. Commended by Chambers and Partners and Legal 500 as a "*charismatic and client-friendly advocate*", Sam routinely acts in complex cases, especially those involving marital agreements, trusts and corporate structures, cases involving non-disclosure and Schedule 1 Children Act claims.

She is a IFLA qualified arbitrator and acts as an evaluator for private FDRs. Sam played prop for a number of years (Saracens, New Brighton, Birkenhead Park, Cheshire) and now sits as a judicial chair for the RFU, Six Nations and World Rugby.

DR SIAN TUCKER

Edinburgh, Scotland

Sian is Deputy Medical Director of National Services Scotland which is part of the NHS in Scotland. She has been a primary care out of hour's advisor to the Scottish Government for the last 5 years and is Chair of the National Out of Hours Group in Scotland. Sian continues to see patients as an Out of Hours GP in Edinburgh evenings and weekends. Her voluntary commitments include being a representative of the Royal College of GPs on both UK and Scottish RCGP Council and a trustee of the Queens Nursing Institute Scotland.

In her spare time Sian enjoys sleeping.

Capacity (II)

Capacity in international family law matters- the International Protection of Adults Convention 2000 and its relationship with European Regulations and domestic law

MAGDA FERNANDES

Partner
Morais Leitão, Galvão Teles,
Soares da Silva & Associados
Lisbon, Portugal

Web: mlgts.pt

Magda Fernandes joined the firm in 2007 and became a non-equity partner in 2016. She is a member of the litigation and arbitration team.

Her practice mainly focuses on the areas of civil and commercial litigation and arbitration.

She represents domestic and foreign clients in construction businesses, technology, infrastructure, consumer law, media and advertising, distribution, agency and international franchises.

Magda also has significant experience in family law, corporate law and maritime law as well as in restructuring and insolvency law.

From 2004 to 2007, Magda was at Macedo Vitorino e Associados Sociedade de Advogados and from 1998 to 2004 at Sousa Machado, Ferreira da Costa e Associados Sociedade de Advogados, both Portuguese law firms.

Education
Law Degree (Católica Lisbon School of Law, 1998)
LL.M in International Commercial Law (University of Nottingham, 2002)
Master's Degree in Legal Sciences (University of Lisbon School of Law, 2009)

Languages
Portuguese, English and Spanish

Memberships
Portuguese Bar Association (admitted in 2000)
Co-founder of the Association *Advogados de Família e das Crianças*

PIERRE-GUILLAUME DUCLUZEAU

CBBC
Paris, France

Web: cbbc-avocats.com/

A lawyer since 2017 and a counsel since 2021, Pierre-Guillaume Ducluzeau mainly deals with litigious and complex patrimonial cases such as divorces or successions as well as guardianships, in both national and international law.

His experience within CBBC Law Firm has led him to develop a specific expertise in cases involving England and Switzerland.

He is certified in international wealth management.

JOSEF ALKATOUT

Head of Family Law
Borel & Barbey
Geneva, Switzerland

Web: borel-barbey.com

Josef is Head of Family Law at Borel & Barbey in Geneva, Switzerland. He holds an LL.M from Columbia University and a Doctorate in Law from Göttingen University. Josef is admitted to the Bars of Geneva and New York.

Josef Alkatout, BOREL & BARBEY, Geneva, Switzerland

1

Contents

2

I. The Hague Convention of 13 January 2000 on the International Protection of Adults

- 19 contracting parties (14 ratifications)
- Amongst them: 3 non-EU
- No contracting party outside the European continent

3

BOREL & BARBEY AVOCATS 1907
IAFL Introduction to European Family Law Conference
Ibiza, Spain – 14 October 2022
International Academy of Family Lawyers IAFL

I. The Hague Convention of 13 January 2000 on the International Protection of Adults

"Adults who, by reason of an impairment or insufficiency of their personal faculties, are not in the position to protect their interests."

A. Competency:

- Habitual residence (No *perpetuatio fori*)
- Otherwise: presence (especially if emergency)
- Potentially: nationality
- Also: location of the adult's property

B. Applicable law:

- Own law
- Otherwise: law with "substantial connection"
- Law of habitual residence concerning powers of representation (or: designated law)

4

I. The Hague Convention of 13 January 2000 on the International Protection of Adults

C. Recognition and enforcement unless:

- measure not taken in accordance with Convention
- adult did not have opportunity to be heard
- measure contrary to public policy

D. International cooperation

5

II. First meeting of the Special Commission on the practical operation of the 2000 Protection of Adults Convention (2022)

France:

- 127 cases treated by Central Authority since 2009
- 0.15 FTE in Central Authority

Switzerland:

- "Not much activity"
- No other convention needs less resources from Central Authority
- Activity mainly with surrounding countries
- One Supreme Court case (other family law: about one case per day)

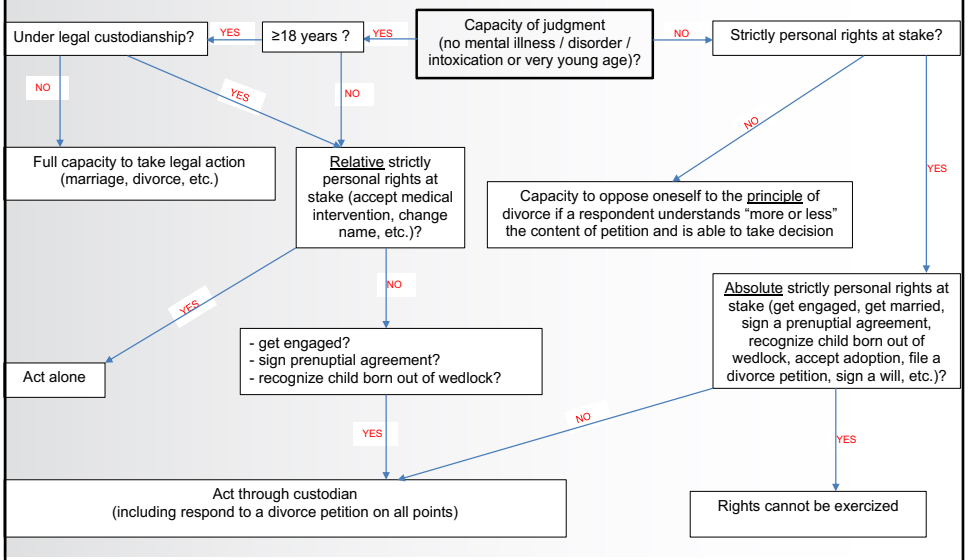
6

III. Other instruments

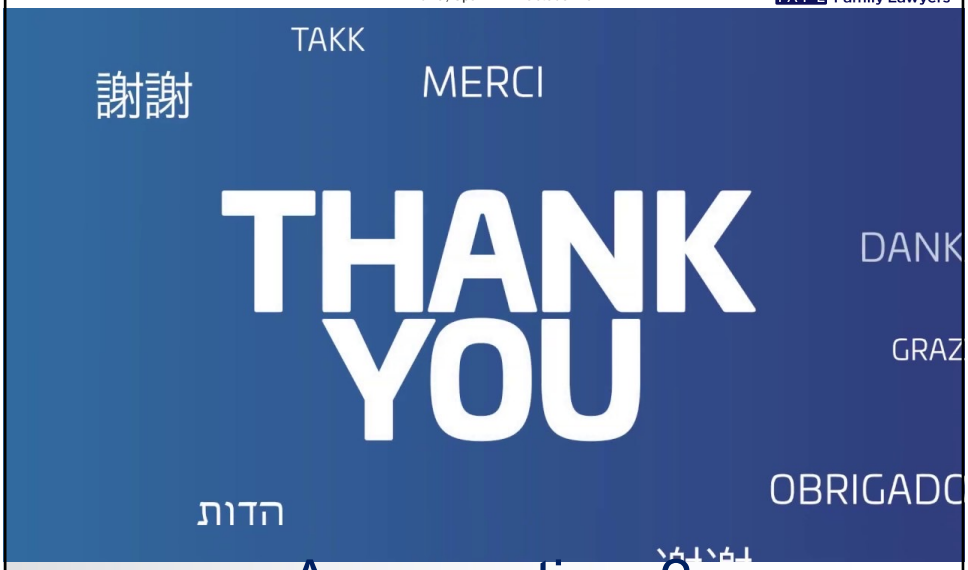
- EU regulation?
- UN Convention on the Rights of Persons with Disabilities (CRPD)

7

V. Capacity under Swiss law



8



Any questions?

9

Law 49/2018 Portuguese Legal Framework for "accompanied persons"

Magda Fernandes

Ibiza 2022

1

Two topics regarding capacity issues

- 1. Requests for legal representation when minors with psychiatric problems reach adulthood;
- 2. Requests for legal representation of adults facing problems with the capacity to manage their affairs and property.

2

Portuguese Legal Framework

- Law 49/2018 – establishes the legal framework of the "accompanied person" (*maior acompanhado*);
- Article 138 of the Portuguese Ciivl Code defines accompanied person as "*Adults who are unable, for reasons of health, disability or due to their behaviour, to fully, personally and conscientiously exercise their rights or, under the same terms, fulfil their duties, shall benefit from the accompanying measures provided for in this Code.*";
- Main goals: ensure the well-being, recovery, full exercise of rights and fulfilment of duties by people with disabilities;
- Key words: **autonomy** and **subsidiarity**.

3

The measures

- Flexible, proportional and appropriate to the specific case;
- Limit exercise capacity to a minimum;
- May be modified or terminated at any time at the request of the accompanied person or any of the persons who may request to be accompanied;
- Should be reviewed every 5 years.

4

Who can apply the measures? Article 141 of the Civil Code

- The person with a disability;
- Their spouse or unmarried partner;
- Any relative entitled to succession;
- Public Prosecutor's Office.

5

Who can accompany? Article 143 of the Portuguese Civil Code

- It must be the person who safeguards the beneficiary's interests;
- The spouse or unmarried partner;
- Either parent;
- Person designated by the parents or by the person exercising parental responsibilities, in a will or in an authentic or certified document;
- Adult children;
- Any of the grandparents;
- Person indicated by the institution of which the accompanied person is a member;
- The representative to whom the accompanied person has conferred powers of representation;
- Any other suitable person.

6

How to know when someone has been deemed vulnerable or incapacitated?

- Article 153 of the Portuguese Civil Code: in Portugal, the decision and measures applied are public (limited to the necessary to safeguard the interests of the beneficiary or third parties);
- Article 893 paragraph 1 and 2 of the Portuguese Civil Procedure Code: judge decides on how public the measure will be in the different stages of the process; the decision can be publicized in an official site, to be regulated by an ordinance of the member of Government responsible for the area of justice;
- Ordinance has not yet been issued: publication of the decision must be done as previous legislation (law 41/2013): "*(…) the judge shall order that notices be posted at the court and at the seat of the parish council where the concerned resides, stating the his/her name and the subject matter of the action, and shall publish, with the same indications, a notice in one of the newspapers most widely read in the respective judicial district*"

7

Enforcement of foreign judicial decisions regarding capacity issues – **EU Regulation 2201/2003**

- Concerns jurisdiction and the recognition and enforcement of judgements in matrimonial matters of parental responsibility;
- Applicable in civil matters relating to "*the attribution, exercise, delegation, restriction or termination of parental responsibility*", which include "*guardianship, curatorship and similar institutions*" (article 1 paragprah 1 *(b)*);
- Article 21 paragprah 1: "*A judgement given in a Member State shall be recognised in the other Member State without any special procedure being required*" - if a person is declared incapacitated through a judicial decision issued by Member State Court, that decision is immediately recognised in any other Member State (without prejudice to Article 23);

8

Portuguese case law

- Porto's Court of Second Instance (29.05.2012): Regulation 2201/2003 also applies in situations where the parents are forced to exercise parental responsibilities as if their adult child was a minor;
- Supreme Court of Justice issued an opposite decision on the exact same case (18.12.2012): measures applied to adults do not fall within the scope of Regulation 2201/2003, and therefore are not automatically recognised. As such, these measures must be revised and confirmed by the Court of Second Instance, in order to be effective in Portugal;

9

Enforcement of foreign judicial decisions regarding capacity issues – **Hague Convention 2000**

- Article 22 paragraph 1: "*The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States*." Without prejudice to paragraph 2, which determines the situations in which recognition may be refused;
- Article 25 paragraph 1: "*If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter state.*"

10

Hague Convention 2000 Cont.

- European Law Institute defends that articles 22 paragraph 2 (a) and 25 paragraph 1 should be altered;
- In their report on the protection of vulnerable adults in international situations, the ELI defend that:

1. Regarding article 22 (2)(a): the ELI suggests that an article be added, establishing that "*Article 22(2)(a) of the Hague Convention shall not apply to the recognition of measures directed at the protection of an adult's person or property taken in a Member State*". With this, their aim is to enhance the cross-border continuity of the relevant measures of protection and simplify the legal landscape

2. Regarding article 25: the ELI suggests that the wording of article 25 be altered to "*Measures given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in this Regulation*." This would introduce a uniform procedure applicable throughout the European Union.

11

Hague Convention 2000 Cont.

- March 30th, 2021: a conference on the protection of vulnerable adults was held virtually. It resulted from the conference that it is crucial that we move forward and further in seeking the approximation of private international law rules to ensure the effective protection of vulnerable adults on the basis of the principle of mutual recognition;
- Came up with Council Conclusions on the Protection of Vulnerable Adults across the European Union and invited Member States to adopt various measures;

12

Hague Convention 2000 Cont.

- Several EU Member States have yet to ratify the Hague Convention. Perhaps an initiative by the EU would be crucial to ensuring that all Member States become parties to the Convention and do so within a reasonable time frame;
- The ratification of the Convention would advance some of the objectives of the EU:

1. It would make the protection of the fundamental rights of those concerned more effective, in line with article 6 TFEU;

2. It would foster the free movement of citizens, in line with article 3(2) TEU;

3. It would help combat social exclusion and discrimination, as well as promoting solidarity between generation, in line with article 3(3) TEU.

13

The End

- Thank you for your attention!

14