International Academy of Family Lawyers

European Chapter

Newsletter, Winter 2023

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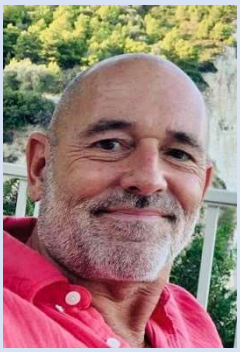

Welcome to the Third Edition of the European Chapter Newsletter

by Alberto Perez Cedillo, Spain & UK

By the time you receive this newsletter, many of you will be packing in readiness for the European Chapter Conference in Venice and I am happy to report that it has all the makings of a legendary IAFL event! More than 200 Fellows will be attending with their spouses and fellow friends so we will be quite a crowd, ready to enjoy an almost deserted off-season Serenissima. The weather forecast is looking relatively mild for this time of year perfect for walking and sailing, but there is still a chance of some sub-zero temperatures in the wee hours so be sure to pack woolly hats scarves and gloves-- just in case! Speakers and chairs are all confirmed, and you have the material ready to download.

This winter edition of the Newsletter is packed with valuable information and I would particularly like to highlight the *EU FamPro MOOC* which is the result of our collaboration with the European Commission Justice Programme. As we have actively contributed to the organisation of the course, I invite you all to participate and recommend it to fellows and colleagues. We can all agree that the successful implementation of effective and inclusive justice aimed at the best protection of cross-border families' interests lies behind solid and multi-perspective training.

I am also happy to report that the European Chapter special interest groups are now taking shape – we have created five steering committees that will be in touch with those who showed interest. By public demand, we have also added a pro-bono special interest group, so anybody interested please get in touch with me or Sandra Verburgt.

I will be leaving my position as European Chapter President at the Venice conference and I would like to thank all those who have worked alongside me over the last two years. It has been a rollercoaster for many reasons some of which will be obvious and others not so obvious.

When I accepted the appointment I had three main ambitions: on the one hand to make sure that the voice of the European Chapter of the Academy of Family Lawyers was heard louder and clearer in the halls of power where laws are discussed formulated and enacted, in particular in European institutions. In that respect, I am especially pleased that we now have the Public Policy Committee and the newly created Relations with EU Institutions and Networks Steering Committee which will coordinate the way forward. The European Public Policy Committee will continue, and the committee will be increased considering the new forthcoming EU regulations

and the EU Institutions and Networks Steering Committee will be lasing with the European Judicial Network in Civil and Commercial matters so that we may become recognised members. We have also participated as stakeholders in the Council of Europe's hearing on the best interests of the child in parental separation and in care proceedings in Dublin (see the report attached)

Secondly, I thought it was really important that we should draw on the strength of our members more directly. This is another reason why I set up the special interest groups and continued with the monthly chats and inaugurated the newsletter. The biggest resource of the IAFL is its fellowship so let's make the most of that.

Thirdly, following my predecessors, we have always emphasised the need to increase membership in under and unrepresented jurisdictions. The EU justice programmes in which we are participating include counties such as Bulgaria, Croatia, Lithuania, and Poland which will hopefully increase our profile and membership. We are also planning our next Young Lawyers Conference in Bucharest with the same aim.

Leaving the European chapter ready for the new structure of the IAFL was an unexpected challenge but I am confident that the new team with the new president and vice presidents will succeed in any challenges they may have to deal with in the future.

My successor Sandra Verburgt and the new team vice-presidents will make sure that the European Chapter leads the way for family law and succession law for professionals in Europe.

I would like to give a big thanks to Judy lane and its excellent team, and particularly to Ele for all her help and support in producing this newsletter.

Alberto Perez Cedillo

Filiation and Parenthood: Proposal for a European Regulation

by Alice Meier Bourdeau

On 7 December 2022 the European Commission presented a proposal for a regulation on parenthood and filiation.

https://commission.europa.eu/document/928ae98d-d85f-4c3d-ac50-ba13ed981897_en

The proposal is part of the key actions mentioned in the EU strategy on the rights of the child and in the EU strategy for equal treatment of LGBTIQ persons.

Two resolutions have been taken to this effect.

European Parliament resolution of 5 April 2022 on the protection of children's rights in civil, administrative, and family law proceedings

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0104&from=EN

European Parliament resolution of 14 September 2021 on the rights of LGBTIQ persons in the European Union

https://www.europarl.europa.eu/doceo/document/TA-9-2021-0366_EN.html

The proposal for a Regulation provides (classically) for rules on jurisdiction, applicable law, the circulation of decisions and authentic instruments and a European certificate of parentage.

Regarding the **exclusions**, it should be noted that parental responsibility is excluded from the scope of the proposed Regulation (Art. 3-b). The legal requirements for the recording of parenthood in a register of a Member State, and the effects of recording or failing to record parenthood in a register of a Member State are also excluded. And the Regulation does not apply to the recognition of court decisions establishing parenthood given in a third State, or to the

recognition or, as the case may be, acceptance of authentic instruments establishing or proving parenthood drawn up or registered in a third State.

The proposal **defines** in its article 4-1 parenthood as the parent-child relationship established by law. It includes the legal status of being the child of a particular parent or parents.

Article 4-2 defines the child as a person of any age whose filiation must be established, recognised or proven.

The child in the context of the proposed Regulation covers both minors and adults. It should be noted that in the Brussels II ter Regulation n°2019/1111, which entered into force on 1 August 2022, the child is defined as any person under the age of 18 (art. 2-6). Thus, depending on the applicable regulations, the child will not have the same definition!

Article 4-3 defines the establishment of parentage as the legal determination of the relationship between a child and each of his or her parents, including the establishment of parentage following a claim contesting a previously established parentage.

As regards **the applicable law**, Article 16 of the European proposal provides for its universal application, i.e., any law designated as applicable applies, whether or not it is the law of a Member State. Thus, an American law could be designated to establish the parentage of a child.

The conflict rule in the proposal provides for:

Article 17
1. The law applicable to the establishment of parentage shall be the law of the State of the habitual residence of the person giving birth at the time of the birth.

If the habitual residence cannot be determined, then the law of the State of birth of the child will apply.

Article 17-2 provides for a qualification in the event that the law of the residence of the person giving birth does not recognise the other parent.

In this case "the law of the State of nationality of that parent or of the second parent, or the law of the State of birth of the child, may apply to the establishment of parentage in respect of the second parent".

The designated law will apply subject to international public policy (22)

Regarding recognition, court decisions on parentage given in one Member State are recognised in all other Member States without any special procedure being required (Article 24). The same applies to authentic instruments (36).

Article 24 specifies that no particular procedure is required for updating the civil status of a Member State on the basis of a court decision on parentage given in another Member State.

Finally, a European certificate of parentage (parenthood) is provided for in Article 47 which is "intended to be used by a child or a legal representative who, in another Member State, has to invoke the parental status of the child".

Regarding the chances of success of the regulation, it is clear that only enhanced cooperation is possible. The 27 Member States have not been able to agree on the law applicable to divorce, matrimonial property regimes or the property effects of registered partnerships. Parentage is even more sensitive as it concerns the vision of the family. And it is not a secret that some EU member states are hostile to homo-parenting. However, in the framework of enhanced cooperation, it is sufficient for 9 Member States to wish to participate for a regulation to be issued which will only be applicable in the Member States participating in the cooperation. Therefore, it is possible that the regulation will be launched during 2024.

Alice Meier Bourdeau

Rights and the Best Interests of the Child in Parental Separation and in Care Proceedings

Introduction

1. On 4 October 2022, the Committee of Experts on the Rights and the Best Interests of the Child in Parental Separation and in Care Proceedings (CJ/ENF-ISE) held a hearing of selected stakeholders on its ongoing work on the draft Recommendation(s) and practitioners' needs with respect to possible implementation tool(s) on the rights and the best interests of the child in parental separation and in care proceedings, as laid down in the Terms of reference of the CJ/ENF-ISE. Invited participants shared their views and experiences on selected topics and provided valuable input to the Committee members for the further elaboration of the draft recommendation and its Explanatory Memorandum. The recommendations made by the experts at the hearing, as summarised in this report, will be reflected in the work that lies ahead of the CJ/ENF-ISE.

2. The hearing, which took place in Dublin as part of an event hosted by the Irish Presidency of the Committee of Ministers of the Council of Europe, was opened by Daniele Cangemi, Head of Department of Human Rights, Justice and Legal Co-operation Standard Setting activities of the Council of Europe, who welcomed the participants and underlined theprecious contribution of civil society and experts in the work of the CJ/ENF-ISE.

3. The event was moderated by Seamus Caroll (Ireland), and by Thomas Knoll-Biermann (Germany), Chair and respectively Vice-chair of CJ/ENF-ISE. It allowed in-depth exchanges with and between representatives of relevant professional groups, including lawyers, mediators, social workers as well as academics, on issues of particular relevance for this work.

4. The list of participants to the hearing is attached as an appendix to this report.

SESSION 1 – Protection of the best interests of the child and his/her rights in parental separation proceedings

CONSIDERATION OF THE BEST INTERESTS OF THE CHILD AND HIS OR HER RIGHTS IN CASES OFPARENTAL MEDIATION AND AMICABLE SEPARATION

5. Stakeholders agreed that mediation can play an important role in parental separation

proceedings and that it can act as a capacity-building exercise, placing the child at the centreof the proceeding and empowering parents to make long and short-term decisions in the bestinterests of their child.

6. Before initiating a mediation process, stakeholders pointed to several important factors, to be considered, depending on the situation encountered. Prior to any mediation, it was emphasised that each situation needed to be screened as some cases could be assessed unsuitable for mediation, for example, situations where (one of) the parents may be limited intheir agency to negotiate their position (domestic violence; sexual abuse etc.).

7. Moreover, stakeholders underlined the need to stabilize the level of tension between parents prior to involve the child in the mediation process in order to safeguard the well-beingof the child and reduce the risk of the child of being instrumentalised by his or her parents.

8. Further factors to be considered with respect to professionals involved in this process included the professionals profile involved in mediation, their training and skills needed in the specific situation, including skills in mediating high-conflict situations, the prospects of co- mediation or a cross-disciplinary approach.

9. Stakeholders emphasised the importance of making mediation services accessible to all parties who could benefit from them. In many countries, legal aid schemes did not cover financial aid for mediation proceedings. Another impediment to accessing mediation by parties, even where financial aid was available, was the lack of awareness of the existence ofsuch services. This called for additional measures to be considered to ensure both availabilityof legal aid for mediation and awareness raising.

CONSIDERATION OF THE RIGHT OF THE CHILD TO BE HEARD IN PARENTAL SEPARATION SITUATION

10. Stakeholders considered that children were capable of forming views even though they may not always be able to verbally articulate them, and this should be taken into due consideration when hearing the views of very young children who should not be prevented from being heard due to age requirements set out in domestic legislation.
11. Providing age-appropriate or child-friendly information to the child was deemed essential to empower the child at all stages (before, during and after) parental separation and care proceedings. Empowering the child places emphasis on the fact that it is their right, and not their obligation, to express their views and reinforcing trust.

12. Several stakeholders underlined the importance of maintaining the confidentiality of the information disclosed by a child in the course of the proceedings, unless deemed inappropriate or harmful to the child, for example, in a situation of high conflict involving domestic violence that could trigger criminal proceedings. This was considered a delicate issue, although of paramount importance, since it was directly linked to the child's capacity to be able to trust the process and the professionals involved in their case. On the one hand, the rules of fair trial guaranteed under Article 6 of the European Convention on Human Rights, require that parties are provided with all information on the basis of which a decision would betaken. On the other hand, it was acknowledged that a child should have the possibility to withhold information they did not wish to share. As a consequence, information on their right to disclose, should be provided to them before and during proceeding in a manner that makes them aware about the implications of their statements, so as to be able to choose what information they wish to disclose and which one they do not. In such cases, a child representative or comfort person could support the child and elicit any information they deem relevant (or not), in order to represent their perspectives.

13. When involving the perspective of the child, it is well acknowledged that the role of the professionals involved in the proceedings is vital for ensuring that a child's best interests are brought to focus. There is broad consensus that in order to achieve this, professionals must be duly and adequately trained on how to intervene in cases involving children and the ethics of involving children. In particular, mediators represented at the hearing expressed that they rarely saw and heard children personally in their mediation cases. They called for more trainingon how to find appropriate ways to hear a child, including with respect to identifying the most suitable time and setting. Specifically, they called for the design of special tools to address how to identify the most appropriate situations for meeting and hearing a child, in order to identify the child's needs and ultimately safeguard their best interests. In this context, the importance of adequate tools and guidance, such as protocols and codes of conduct, both at international and national levels, was emphasised.

14. One other mechanism that was suggested during the hearing was promoting the role of a specialised child advocate or *curator ad litem* for safeguarding the rights and conveying the perspective of children in proceedings. A benefit of an advocate for children is that they will know they have, at all times, an adult who represents them, and whom they can trust andturn to and discuss their views in confidence. Currently, access to such child advocates will often bear a high cost.

IMPLEMENTATION AND ENFORCEMENT OF DECISIONS IN HIGH-CONFLICT PARENTAL

SEPARATION

15. Stakeholders noted that, over time, different methods of enforcement had been explored in the situation of an “implacably hostile” or resistant parent who refused to comply with court orders. Measures such as imposing fines on a parent were considered often to be impractical, belittling and/or disproportionate. In this respect, they considered that one should look outside the scope of family law to find inspiration for more adequate solutions for enforcement. It was agreed that, from the very outset, preventative tools should be promoted,that give an understanding of the importance of compliance with decisions issued and place emphasis on their temporary nature, and that these could or should be subject to updates/ reviews.

16. Emphasis was also placed on the need to impose measures with the aim of preventing adverse impact, and for harsher measures to be taken only as a last resort. Measures that could drastically affect the lives of children, such as custodial sentencing, should only be enforced when a parent had implacably refused to comply with a decision, and only after a judge has determined it to be in the child’s best interests.

17. The issue of reviewing a decision in a timely manner was another point for enforcement that was highlighted. When an agreement or decision was not upheld by one of the parties, insome cases, it could take a lengthy time to hear a case in court and to review a decision, which could potentially further escalate a conflict and cause more harm to the child. In this respect, stakeholders expressed that there might be a need to look into the possibility of emergency injunctions and orders.

CONSIDERATION OF THE BEST INTERESTS OF THE CHILD AND HIS OR HER RIGHTS IN CASE OFHIS/HER RELOCATION WITH ONE PARENT, INCLUDING ABROAD

18. Relocation is an increasingly complex issue. A child and a parent may relocate, and a new family may be established, which may involve new parental figures such as partners andstep-parents, as well as new siblings and step-siblings. This complexity of suggests the need for a case-to-case approach that balances the rights of both the original family and the new family through an assessment process. Stakeholders emphasised that all parties involved in relocation cases need to have an understanding of their rights, status and capacity to pursuethose rights after relocation.

19. It was further noted that relocation can become increasingly complex in a transnational family dynamic, which can take on multiple dimensions, for example, sometimes one of the

parents may not join or see the child because he or she does not the required formalities or documentation to travel or the rights of the child to keep contact with his or her parent imprisoned.

20. In relocation cases, stakeholders underlined the need to foster cross-border networks for all actors that may be involved in relocation proceedings, including for child protection, social services, lawyers and mediators.

SESSION 2 – Protection of the best interests of the child and his/her rights in care proceedings

CONSIDERATION TO BE GIVEN WHERE PARENTAL SEPARATION SITUATIONS AND CHILDCARE PROCEEDINGS INTERSECT IN THE CONTEXT OF HIGH CONFLICT PARENTAL SITUATIONS

21. Stakeholders considered that, in practice, parental separation proceedings only very rarely led to situations which called for child protection measures, such as limitations of parental responsibility or even placement in alternative care.

22. When multiple proceedings occurred in parallel to one another, such as a separation, care and maybe even criminal proceedings, there was a need for a multidisciplinary and interagency approach that enabled close collaboration with the involvement of different actorsand professionals.

23. Stakeholders also called for the need to recognise that, in some high-conflict cases such as those involving domestic violence where there are ongoing criminal proceedings, there was a need for professionals to share information, in order to ensure good and informeddecision making.

24. High-conflict cases might signal the need for a child protection assessment. In these instances, it is vital that mediators and judges are trained to identify cases involving a high riskfor the child, to identify and separate cases where there is a real risk for the child, as well as cases where allegations are made by a parent to strengthen their own position. Stakeholders indicated that there is a need to develop codes of conduct and that they receive support to fully comprehend concepts, such as child protection, parental alienation, and potential coercive control by one parental party. Trainings should also cover international conventions in this area, such as the Istanbul Convention on preventing and combating violence against women and domestic violence (CETS No. 210).

25. Stakeholders reflected on the need to empower parental parties in high-conflict cases where a child protection issue may arise and there is a risk of harm to the child. In such cases, mediators indicated that often a parent came to them to seek advice on how to act and signal if they perceived a risk for their child. They emphasised the difficulties faced by a parent in such cases, taking into account the fact that the separation itself was sometimes putting a parent in distress, not to mention the feeling of guilt or blame they may be experiencing. Mediators emphasised the importance of their role in providing guidance to empower parents in such situations, by informing them of the services they can reach out to and the alternatives they can seek when acting responsibly and taking a decision in a given circumstance, without feeling guilty or be blamed.

26. High-conflict cases can trigger multiple proceedings and decisions which require exchange and cooperation between all actors involved (civil, administrative and criminal proceedings).

BEST INTEREST DETERMINATION IN CARE PROCEEDINGS

27. Several stakeholders indicated that placement in care should be a measure of last resort and that the objective pursued should be to avoid placing the child in care. When a child is placed in alternative care, there is a need to strike a balance between the temporary care placement, the child's right to maintain contact with their family, family reunification and the child's need for stability.

28. Stakeholders stressed that the best interest determination in care proceedings was also an ongoing process and was not limited merely to binding court decisions. The best interest of the child is related to several decisions that are to be taken, including, but not limited to, placement, access, and the consideration of the needs of the child, which are evolving and/or changing over time.

29. The best interest of the child assessment should determine the upbringing for the child, which includes, where possible, prospects for family reunification and the right to maintain a good relationship with the family, balanced against considerations to ensure the child's safety.To make contact and visitation rights effective, children and parents should be able to fully exercise their rights. This includes ensuring that parents have adequate means for travelling and making use of (public) transport to the childcare location and receive the necessary support to do so. It was stressed that the further away the location from the parent's domicile,the higher the responsibility for the State to give practical support for

access and transport. Where appropriate, the notion of "contact" should be interpreted to not only be limited to physical contact but could also include opportunities for non-physical contact such as throughdigital platforms for messaging.

30. In case of safety concerns, a number of stakeholders indicated their preference for supervised contact, which takes into account considerations such as the cultural dynamics between a child and their parent, including their native language. The child and their parent should be able to communicate in their mother or native tongue, and States should ensure that the burden to speak in a language that is understood by a supervisor should not be placedon the child and parents, but on the authority that must ensure that the supervisor is able to understand the spoken language.

31. Where in the child's best interest, the end goal of placement is to place a child as close as possible to the child's family and network. Stakeholders suggested that kinship care shouldbe preferred. However, stakeholders stressed the importance that services for the support of kinship care are provided in the same way as in other forms of alternative care such as fostercare. Moreover, when considering kinship care, stakeholders stressed the importance of taking into account informal kinship care models; arrangements made between family members, with some authority supervision. Stakeholders also emphasised that kinship carersshould receive the same kind of support as other foster carers.

Conclusions and final remarks

32. The Chairs warmly thanked the stakeholders for their excellent contributions. The Rapporteur highlighted that interveners confirmed the importance of a number of issues and measures under discussion by the CJ/ENF-ISE. In addition, they also brought to light a number of very enriching new perspectives, and among them the following:

PROTECTION OF THE BEST INTERESTS OF THE CHILD AND HIS/HER RIGHTS IN PARENTALSEPARATION PROCEEDINGS

33. **Mediation** can be a strong and helpful tool in safeguarding children's best interests in parental separation proceedings. Three requirements where particularly highlighted: firstly, the importance to adequately screen cases for their suitability for mediation, secondly, the importance of appropriate training of all professionals involved, including training on identifying situations where the child's welfare may be in danger, and, thirdly and equally importantly, the importance of making mediation services accessible, where appropriate, through providing financial aid schemes, and adequate information.

34. **Informing** the child throughout the process is key. This should include providing a child with full information, in an age appropriate and child friendly language, on how their statements would be communicated to the court, and notably to the parents, in order to allow them to discern which facts they wish to disclose, and to foster trust. **A child-advocate** (*curator ad litem*) can be a powerful support for the child throughout the proceedings, particularly in difficult conflictual cases between the parents.

35. There is a need to **promoting compliance with decisions**, for example by providing appropriate information about the benefits of compliance and consequences of parental actions in cases of non-compliance, and by promoting preventive tools. Inspiration for innovative solutions may also be found outside the scope of family law.

PROTECTION OF THE BEST INTERESTS OF THE CHILD AND HIS/HER RIGHTS IN CAREPROCEEDINGS

36. Wherever possible, placement in care should be temporary and adequate measures to prepare for family reunification should be taken early in the process. To allow for meaningful contact, **contact and visitation rights have to be practically accessible**. Depending on the situation, this may include the need to support the parent in accessing public transport and providing for a suitable venue. Supervision of contacts should be culturally sensitive, this includes providing the possibility for parents and children to speak their native language.

37. **Kinship care** can be a very valuable option, provided that services for the support of kinship care are offered in the same way as in other forms of alternative care, such as foster care.

News on Illegal Displacement

by Alex Boiché

The first half of 2022 has been quite rich in decisions relating to child abduction at the level of the Court of Cassation (French Supreme Court two judgments), the European Court of Human Rights (three judgments), not to mention a judgment of the Supreme Court of the United States which will need also to be addressed.

A plurality of decisions on the exception to return to be studied Most of the decisions deal with the now classic issue of the exception to the return of the child in Art. 13 (b) of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction, i.e. the risk to which the child would be exposed in case of return. On this point, it should be noted that the Court of Cassation maintains a firm position in line with the spirit of the Convention by not hesitating to quash trial judges who did not sufficiently characterize the existence of a serious risk (Civ. 1re, 16 Feb. 2022, n° 21-19.061), or by rejecting the appeal against a judgment which had rejected the exception to return taking into account, in particular, the protective measures taken by the courts of the child's habitual residence (Civ. 1re 16 Feb 2022, n° 21-21.079). Conversely, on this question of taking into account protective measures by the authorities of the child's habitual residence upon his or her return, one can only regret the position adopted by the Supreme Court of the United States in *Golan v. Saada* (15 June 2022[1]). The Court considers that judges should limit themselves to a literal reading of the Hague Convention and refuse the return of the child when a serious risk is established without having to consider the protective measures that can be taken in the child's state of habitual residence. For its part, the European Court of Human Rights, stressing the non-existence of protective measures, refused to condemn Russia in a case where Russian judges have always rejected requests for the return of a child to Switzerland which would expose him to a serious risk (ECHR, 3 May 2022 n° 30560/19).

Two parallel decisions on the enforcement of return orders - On 16 May 2022, the ECHR found Romania in violation of Art. 8 of the ECHR in a case of non-enforcement of a return order by the Romanian authorities (ECHR, 17 May 2022, No 20425/20). Five days earlier, it

[1] bit.ly/CS_EtatsUnis_15062022.

had found a non-violation of that Article by the Czech Republic for enforcing a return order of a child to the USA (ECHR 12 May 2022, No 64886/19).

Announcement of plan - We will therefore consider these decisions through the two main issues they deal with, namely the implementation of the exception under Art. 13, b, of the Hague Convention and the enforcement of return orders.

1. Applications of Art. 13, b, of the Hague Convention

Under Art. 13(b) of the Hague Convention, the return of the child may not be ordered if "there is a serious risk" that "exposes the child to physical or psychological danger, or otherwise places the child in an intolerable situation". This provision is the classic defense of the abductor parent and has been the subject of much literature. The Hague Conference has even produced a guide to the interpretation of this text[2] .

A strict reading of the Court of Cassation - In France, the Court of Cassation, after some hesitation, has adopted a strict reading of this exception, perfectly in line with the spirit of the Hague Convention. This is illustrated by the two rulings of 16 Feb. 2022.

First case. In Case No. 21-19.061, the Court of Cassation censured, on the basis of Art. 13(b) of the Convention, the Court of Appeal of Basse-Terre considered that the return could not be ordered because of the serious risk to which it would have exposed the child on the grounds that :

"In order to rule that there was no need to return the child to Canada, the judgment noted that [Z], now aged 8, was perfectly integrated in Guadeloupe where she had been living with her mother for more than four years and where she benefited from a family, friendly and school environment favorable to her intellectual, social and emotional development, and that no evidence was provided on the conditions of the child's return to her father, whom she did not know and with whom she had not been living at the time of her departure, as was the case with the child, She has been living with her mother for more than four years and benefits from a family, friendly and school environment that is conducive to her intellectual, social and emotional development, and that no information is provided on the conditions of the child's return to her father, whom she does not know and with whom she was not living at the time of her departure, as revealed by the decision of the Superior Court of Canada of 26 January 2015 granting custody of the child to her mother. 2015 awarding custody of the child to the mother and access and accommodation to the father.

In so ruling, on grounds that were not sufficient to characterize, in the light of the child's best interests, the serious danger to the child in the event of an immediate return or the

[2] Available at the following link on the website of the Hague Conference on Private International Law: bit.ly/ConvLaHaye_Enlevement_1980_Guide. It should be noted that the Hague Conference has also developed a number of documents to assist professionals in the operation of the Convention available at: bit.ly/ConvLaHaye_Enlevement_1980_DocPratique.

intolerable situation that such a return would create for him or her, the Court of Appeal violated the above-mentioned texts.

In this case, it is clear that the Court of Appeal used the serious risk exception to reject the request for return, even though the unlawful removal was established, and the mother intended to perpetuate the situation created by the de facto action, given the time that had elapsed since the abduction and the child's integration into her new environment, where she had been living for more than four years. None of the criteria used characterized the danger that the child would have faced if returned to Canada. It should be remembered that the return decision is not a decision on the merits of parental authority; it does not mean that the child will live with a father whom she no longer knows, as the trial judges had argued. If it turns out that the child is entrusted to his father on his return to Canada, it is because the mother has decided not to return with him. But this cannot constitute a serious risk.

Second case. In case no. 21-21.079, on the other hand, the trial judges applied these provisions correctly by rejecting the mother's objection. In this case, the mother had unlawfully moved her son from England to France. The Versailles Court of Appeal had ordered the return of the child to England and the mother's appeal was logically rejected: "It follows from Art. 13, b, of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction that an exception to the immediate return of the child can only be made if there is a risk of serious danger or of creating an intolerable situation.

The Court of Appeal found that the draft child protection plan prepared by the UK authorities, alerted by problems of domestic violence, had indicated that, while [H] was exposed to parental conflict, there were no significant concerns about his health and development, as he appeared to be a happy child whose basic needs were being met.

It considered that as the parents' divorce was about to be finalized, the child was no longer at risk of witnessing parental conflicts.

It noted that on several occasions during their life together, Mrs [B] had entrusted [H] to her father when travelling abroad, reflecting her confidence in his parenting skills, and that the monitoring and supervision put in place by the UK authorities provided safeguards.

It found that there was no serious risk that the child would be separated from the mother, who was responsible for the situation, and that she could assert her rights in relation to the child before the UK courts.

The Court of Appeal, which was not obliged to follow the parties in the detail of their arguments, deduced from this that the return of the child did not expose him to a risk of serious danger or place him in an intolerable situation.

In this case, the mother also argued that if the child was returned to England, this would lead to a breakdown in the mother/son relationship. However, the Court rightly emphasized her responsibility for the situation, which had nothing to do with the return

order. Moreover, the mother is perfectly capable of asserting her rights in the context of the proceedings on parental authority which will be held before the English courts.
The judgment is also interesting in that the return is ordered in particular with regard to the monitoring and supervision put in place by the English authorities which constituted positive guarantees for the return of the child. This point is reminiscent of the provisions of the Brussels II *bis* (Art. 11, § 4) and Brussels II *ter* (Art. 27, § 3) Regulations. However, this taking into account of protective measures adopted by the authorities of the child's habitual residence to secure his or her return is not strictly speaking included in the text of the Hague Convention. Originally, when the text was ratified, international cooperation between judges or central authorities was not as developed as it is today. However, it is strongly encouraged, as shown in particular by the practical guide (see above) on the implementation of Article 13(b), both at the level of the central authorities and at the level of judges through the Hague Judges' Network. As this consideration of protection measures is promoted by the Hague Conference and the various reports adopted by the Special Commissions on its operation, the question may arise as to whether it is binding on the judge seized of the application for return in the context of the implementation of Art. 13(b). This was the question put to the US Supreme Court in *Golan v. Saada*, which resulted in a judgment of 15 June 2022.

A strict reading does not mean a literal reading: criticism of *Golan v. Saada*[3] in the United States - In *Golan v. Saada*, a US woman had unlawfully removed her son from Italy to the US. The child's Italian father sought the child's return to Italy before the US courts. The mother objected on the grounds that she had been abused by her husband and that the child had witnessed it.
The trial court, while agreeing that there was a serious risk if the child was returned to Italy, ordered the return based on the case law of the Second Circuit Court of Appeals, which requires consideration of all measures that could be taken to ensure the safety of the child upon return. However, the Second Circuit Court, on appeal by the mother, overturned the first judge's decision on the grounds that further investigation was needed to show what protective measures could be taken in Italy. It, therefore, remitted the case back to the first judge to determine what measures should be taken. After 9 months of investigation, the first judges considered that measures had indeed been taken and that they were adequate to ensure the child's safety. Return was therefore ordered. On a further appeal by the mother, the Second Circuit Court upheld the return order. The mother then appealed to the Supreme Court, criticizing the Second Circuit Court's jurisprudence which required judges to *"independently consider 'the full range of options that might make possible the safe return of a child' before denying return on the basis of serious risk, even if the party seeking the child's return has not identified or argued for*

[3] See above web link.

such measures". The argument hits home. The Supreme Court censured the decision referred to it. It held that a court is not categorically required to consider all possible ameliorative measures before rejecting an application for the return of a child to a foreign country under the Hague Convention, once the court has concluded that the return would expose the child to serious risk. The Supreme Court's analysis is based on several arguments. The first concerns a literal interpretation of treaties as a matter of principle. In this case, the Hague Convention gives the judge the discretion to refuse the return if he or she considers that it would expose the child to a serious risk; nothing in the Convention requires or prohibits the judge in exercising this power to take into account protective measures taken in the State of the child's habitual residence. The Court considers that the examination of the serious risk does not necessarily involve the examination of the protective measures and that these are two separate issues. The judge may assess them together, but the Convention does not oblige him or her to do so. The judge, therefore, has discretionary power in this respect, which the Second Circuit Court disregarded. Secondly, it is criticized for placing the return of the child above all the other objectives of the Convention, whereas the Convention's objectives of speed and non-interference in the merits of parental responsibility must also be met. The Second Circuit Court's case law contributes to slowing down return proceedings and leads the judge to focus on the merits of parental responsibility.

While the Second Circuit Court was undoubtedly excessive in its demands, the Supreme Court's solution of sticking to a literal interpretation of the Convention and giving full power to the judge to assess the serious risk and - possibly - to take protective measures into account, is quite a step backward. To revert to the Supreme Court's literal interpretation of the Hague Convention on Wrongful Removal is to ignore both the considerable work of the Hague Conference and the Member States over the past 40 years and the progress made in international cooperation and communication. It would be absurd to ignore this and focus on an exegetical interpretation of the text.

ECHR control - To conclude with the question of grave risk, we will refer to the judgment delivered by the European Court of Human Rights on 3 May 2022 (no. 30560/19) in the case of *P.D. v. Russia*. In this case, a woman of Russian nationality, who also had a child from a previous union, had a child with a man of Belgian and Russian nationality in June 2014. The family lives in Geneva. The couple separated in 2015. The father moved to France and was granted access to his daughter and her half-brother. While the children were with him in December 2016, the half-brother was sexually abused by one of his friends, who was arrested but released in 2017 with a duty of care. At the mother's request, the Swiss authorities will initially suspend the father's rights, but he will obtain a ban on the common child leaving Swiss territory. However, a few hours before the decision was handed down, the mother left Switzerland with her daughter for Russia. Considering that he was not responsible for the aggression suffered by his daughter, the

Swiss authorities reinstated the father's rights, and he initiated a procedure for return in Russia. But without success. In the first instance, the Russian court ruled that there had been no unlawful removal because, at the time of departure, the father's rights had been suspended and the ban on leaving the country had not yet been issued. Furthermore, the court considered that the child's return could expose her to being assaulted herself. The decision was upheld on appeal and in cassation, and the father brought an action before the ECHR against Russia based on Article 8 of the ECHR, considering that by failing to apply the Convention correctly, Russia had infringed his right to respect for his family life. Again, in vain. The Court considered that, while the Russian courts had not found the removal unlawful - which would normally have precluded application of the Hague Convention - they had also considered that the child would run a serious risk if returned to Switzerland, and it was on this latter point that it focused its review. In so doing, the Court considers that the court's analysis of the situation and of the serious risk is sufficiently justified, in particular, because, since the aggressor had been released with a duty of care, it was to be feared that he would seek revenge when no protective measures had been taken. In the Court's view, the provisions of Art. 8 ECHR were fully respected. After much criticism of the ECHR for rereading the provisions of Art. 13 (b) of the Hague Convention, we will not reproach it today for deferring to the analysis of the judges whose decision is being challenged and for merely verifying whether the existence of the serious risk has been sufficiently characterized...

2. Enforcement of return orders

On the issue of enforcement of return orders, we note two further decisions of the ECHR. In the first case, which gave rise to a decision on 12 May 2022 (no. 64886/19, X v. Czech Republic), the applicant, a Czech national, married an American man in 2007 and had a child with him in 2014. The couple, who were living in the United States, separated and a US decision in 2015 fixed the child's residence with the mother while granting access rights to the father. The couple reconciled and in June 2016 the family traveled to the Czech Republic, returning in September 2016. But the father returned to the US alone. In August 2017, he filed a lawsuit in the Czech courts to obtain the return of his daughter, claiming that she had been wrongfully removed. His application was rejected at first instance but he won his appeal, with the Czech Constitutional Court rejecting the mother's appeal. The enforcement of the decision was in dispute between the parents. The father had previously given a number of undertakings to facilitate the return of the child and the mother to the USA. On 1er July 2019, the return order was enforced: the child returned to the US with his father. The mother also returned to the US and sued the father there for failure to comply with his obligations. In the end, the American proceedings were not favorable to the mother, who lost custody of her daughter and was only granted mediated access. The mother then brought an action against the Czech Republic before the ECHR,

claiming that the Czech Republic had violated her and her daughter's right to family life under Article 8 of the ECHR by ordering the return of her daughter to the United States and by enforcing the decision. This was unsuccessful. The Court rejects the application, considering in particular that the mother is mainly responsible for the majority of the complaints she makes to the Czech authorities. One can also only note this paragraph of the decision which illustrates the matter under consideration here:
"The Court agrees with the applicant that the concept of the best interests of the child must be paramount in the procedures established by the Hague Convention. However, it should be borne in mind that the constituent elements of this concept also include the fact that the child is not removed from one of his or her parents and retained by the other, who considers, rightly or wrongly, that his or her right to the person of the child is equally or even more important (see *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII (extracts))*".*

***Loiry v Romania*: speed of execution** - The second case gave rise to a judgment of 17 May 2022 in *Loiry v Romania* (20425/20). A man, of French nationality, was living in France with a Romanian woman. Two children were born in 2012 and 2015. In the summer of 2017, the mother left for Romania with the children without the agreement of the father, who then applied for their return under the Hague Convention. This he obtained from the Romanian courts both at first instance and on appeal on 9 August 2018. Unable to obtain voluntary compliance with the decision, the father sought the services of a bailiff and the assistance of the Romanian social services and the Romanian central authority. In Feb. 2019, the bailiff demanded the mother pay the enforcement costs and seized her bank account. Two months later, in April 2019, the Romanian court ordered the psychological support of the children for two months under the direction of the Romanian child protection services. After a few meetings in May, the mother refused to let the children meet the psychologist, in part because the enforcement proceedings had been suspended. Indeed, in January 2019, the mother applied to the court to have the enforcement decision suspended and annulled. The enforcement procedure was indeed temporarily suspended, but the enforcement of the decision was confirmed in October 2019. Attempts at enforcement continued in 2020 but to no avail. In the French proceedings, the Paris Court of Appeal awarded the residence of the children to the father in 2019. The mother's appeal was rejected in January 2021 (No. 20-13.628). In Romania, the mother multiplied the appeals to try to obtain the residence of the children. All were rejected.
Having never been able to obtain the return of the children, the father applied to the ECHR to have Romania condemned based on Art. 8 of the ECHR for failure to respect his right

and that of his children to a normal family life due to the non-execution of the return order. Not surprisingly, the Court found against Romania:
"It took almost eleven months for the courts to decide on Ms. V.'s opposition to enforcement (see §§ 9 and 11 above), which resulted in a stay of enforcement for almost five months (see § 10). Following the rejection of this objection, no steps were taken by the authorities to secure the delivery to the court and other competent authorities of a report by an appointed psychologist, thereby finalizing the counseling program (see § 8 above, *in fine*). No justification was provided for this inaction, which ran counter to the authorities' obligation to take, without delay, appropriate measures to establish effective contact between the applicant and his separated children. Equally important, the non-completion of the counseling program was subsequently used by the bailiff to refuse to resume the enforcement proceedings, thus causing additional difficulties for the applicant in his efforts to obtain the return of his children to France.
As can be seen, it is the Romanian authorities' shortcomings in the enforcement of the return order that are thus criticized by the ECHR. On this point, the case law of the Court since the *Washington* case (No. 39388/05) remains constant: once a return order has been made, the local authorities must proceed with its enforcement and no new disputes must arise concerning the implementation of the return order. One can only recall in this respect the condemnation of France in the *Raw* case (No 10131/11) where, despite the children's opposition to the enforcement of the return order, the Court considered that the French authorities had not done their utmost to enforce the orders for the return of the children to England.
This case law is fully in line with the spirit of the Hague Convention. If the return procedure must be conducted expeditiously to put an end to the de facto situation, the first victim of which is the child, the enforcement of this decision must also be promptly effective. If the parent who has removed the child opposes this enforcement, the public authorities must intervene firmly. These are never pleasant situations, but they are made necessary by the lack of cooperation of the "abducting parent". At the heart of the conflict, the children are necessarily torn apart, which reinforces the need to act firmly to avoid the harmful in-between situation in which a non-enforcement of the return order places them.

Alex Boiché

Parental Responsibilities in Portugal

by Magda Fernandes

PARENTAL RESPONSIBILITIES IN PORTUGAL

The present memo addresses:

1. What is parental responsibility?
2. Rights of the children living in Portugal, born from parents or one parent living outside Portugal.
3. Rights of other persons to have contact with the child.

1. What is parental responsibility?

Under Portuguese law, parental responsibility represents a collection of rights and duties that the legal system confers to or imposes upon both parents.
Parents should, in the interests of their child, look after all aspects of the child, particularly the child's maintenance, health, safety, education, legal representation and administration of property (Art. 1878, No. 1, of the Portuguese Civil Code, hereinafter "CC").
Parental responsibility may not be renounced (Art. 1882 of the CC), is non-transferable (inter vivos and mortis causa), and the exercise of it can be objectively controlled.
The first general dimension is that of care and protection, which encompasses the parents' right and duty to keep their children close to them, and also the maintenance of a close personal relationship with their child.
Both parents are obliged to ensure that their children receive an education proper to their superior interest.

According to Art. 1878, No. 1, of the CC, "it is the responsibility of the parents, in the interests of their children, to look after their health and safety, provide for them, oversee their education, legally represent them, even while still unborn, and administer their property".
The main powers and duties include: the power and duty of custody of children, the power and duty to protect the child's health, the power and duty to provide for them, the power and duty to oversee their education, the power and duty to represent them legally and the power and duty to administer their property.

2. What happens in a divorce or separation, nullity or annulment of marriage?

In situations of divorce, legal separation or the declaration of nullity or annulment of marriage, the exercise of parental responsibility may result from a system established by the parents through an agreement, subject to ratification by the judge (Art. 1905, No. 1, of the CC and Art. 174 of the Portuguese Child Protection Law), or from court intervention in those cases where there is no agreement between the parents, or when the agreement presented by them is not in the interests of the children.
The exercise of parental responsibility is always subordinate to the interests of the child (Art. 1878, No. 1, of the CC).
Law does not define what should be considered the superior interest of the child, nor does it offer criteria for defining it.
The child's interests is a cultural concept, related to the person of the child, his or her material and emotional needs, and the conditions necessary for his or her healthy development.
With regards to any child with both parents, parental responsibility belongs equally to the father and mother and is exercised by both (Art. 1901, No. 1 and 2, of the CC). The principle of equality between spouses imposes this solution (Art. 1671 of the CC). Art. 36, No. 3, of the Portuguese Constitution establishes that parents have equal rights and duties regarding to the maintenance and education of their children.
If the parents cannot agree on issues of particular importance, the court will settle the matter (Art. 1901, No. 2, of the CC). The court will first try to persuade the parents to resolve their differences by an agreement between them. If this proves impossible, the court will decide. Before doing so, however, the judge shall hear any child – normally if it is more than 12 years old –, unless there are circumstances that militate against this (Art. 1901, No. 2, in fine, of the CC).

The parent that does not exercise parental responsibility – namely because it lives abroad – has the right to oversee the education and living conditions of the child
(Art. 1906, No. 7, of the CC). The custodial parent does not have full freedom of action. Parental responsibility is subject to the control of the non-custodial parent.

3. Rights of contact with the non- custodian parent and his family

Today, the right of contact in the context of a divorce or legal separation is understood very broadly. It consists of the right of the non-custodial parent to relate to and spend time with the child, not only through occasional contacts but also by providing accommodation for the child for short periods of time (such as weekends, holidays) and by corresponding with the child (by letter, e-mail, telephone, videoconference, or through an intermediary).
The institution of visiting rights is not only a right, but it also contains an element of duty that corresponds to the rights of the child.
Thus, in a situation in which parental responsibility is exercised jointly but the child resides with only one parent, the other parent and correspondingly, the child, enjoy free right of contact with each other.
Portuguese courts have established strong rights of visitations, of spending holidays and of a close relationship between the non-custodian parent and the child, in an attempt of equality between parents.
Therefore, in a situation of sole custody, the law refers to the child's interest in maintaining a close relationship with the non-custodial parent (Art. 1905, No. 1, of the CC).
In these cases, the non-custodial parent's right of contact is restricted to the terms of a system established by agreement, ratified by the judge, appreciated by the Public Prosecutor's Office and deemed to be in the interests of the child, or else it is decreed by the court.
In the event of failure to comply with the system of contacts established through the creation of obstacles by the custodial parent, the other may apply to the court, invoking non-compliance with the system of exercise of parental responsibility, for coercive measures to be taken and for the punishment of the parent that is at fault, by means of a fine and compensation to the child.
If it is the non-custodial parent who has failed to comply, then the custodial parent may raise the matter of non-compliance.

Further, Art. 1887-A of the CC establishes that parents may not unreasonably deprive their children of contact with their siblings or ascendants. This rule appears to give rise to a right of contact with siblings, grandparents, and other ascendants and consequently, a right of the child to relate to those relatives.

4. Alimony to the child

The law defines the general criterion for awarding maintenance in Article 2004. of the Civil Code when it refers that it depends on the possibilities of the parents and the needs of the person being fed.
As regards the parent's means, it will have to the income of work and capital that he has, his savings and the value of his goods, without reaching the so-called subsistence reserve.
At the other extreme, we have the needs of the person receiving maintenance, social situation, his age, his health, or the possibility of the minor provide for his subsistence.
Therefore, according to Portuguese law, there is no table for calculating maintenance. The criterion should be the proportion between each of the parents' patrimony and the needs of the child, taking into account his/her level of life, age and special conditions.
As alimony is of public order, it is not possible for one of the parents to renounce the alimony owed by the other, since the child is the creditor.
As for extraordinary educational and health expenses, such as private schools, surgical operations, etc., the respective costs are usually excluded from the fixed amount of maintenance, and they should be borne either in equal shares, or according to another criterion agreed by the parents or, in the absence of agreement, set by the court according to the income of each parent.

Intimate Partner Violence in Conflict and Post Conflict Societies – Insights and Lessons from Northern Ireland

By Emma Jamison

Intimate partner violence in conflict and post conflict societies – insights and lessons from Northern Ireland – Emma Jamison (Young Lawyer)

Conflict and post-conflict communities consistently experience high rates of intimate partner violence (IPV) perpetrated against women and children. Northern Ireland (NI) is an example of this, where 'peace' was achieved by the 1998 Good Friday Agreement having endured decades of conflict, and now has high rates of IPV, which are increasing. In NI, police respond to a domestic abuse incident every 16 minutes, and it accounts for 20% of all recorded crime.[1] NI has also become a resource of research into 'generational trauma.'

What is IPV?

The World Health Organisation describes IPV as one of the most common forms of violence against women and incudes physical, sexual and emotional abuse and controlling behaviours by an intimate partner. There are different causes and risk factors for IPV, the widely used model of the ecological model which proposes that violence is a result of individual, relationship, community and societal factors.[2] IPV takes on specific modalities in each cultural and geo-political setting. However, many risk factors are consistently identified across studies from different countries.[3] Therefore, what has played out in NI may have similar patterns in other conflict and post conflict countries, which may be helpful for family law practitioners to be aware of.

What were 'The Troubles?'

[1] Northern Ireland Statistics and Research Agency, Police Service of Northern Ireland 'Domestic abuse incidents and Crimes Recorded by the Police in Northern Ireland' 30 June 2022, available at: https://www.psni.police.uk/sites/default/files/2022-09/domestic-abuse-bulletin-jun_-22_0.pdf

[2] World Health Organisation, 'Understanding and addressing violence against women – Intimate partner violence' (2012) available at: https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf

[3] DoyleJ., & McWilliamsM. (2019). Transforming Responses to Domestic Violence in a Politically Contested Environment: The Case of Northern Ireland. *feminists@law*, *9*(1). https://doi.org/10.22024/UniKent/03/fal.744

From 1960 – 1998, approximately 3600 people were killed and over 30,000 injured as a result of the "Troubles", some of whom are thought to have been kidnapped, murdered and buried in undisclosed locations. The conflict was underpinned by complex historical, religious, economic and psychosocial factors[4]. It was between the overwhelmingly Protestant unionists who desired to remain part of the United Kingdom, and the overwhelmingly Catholic nationalists who wanted the separation of the North and South of Ireland to end. No Irish citizens, North or South of Ireland, were ever afforded a vote on the matter.[5] Young males were the primary 'combatants' and victims of sectarian violence, community violence and paramilitary (i.e. non state armed groups) punishment beatings,[6] although statistics indicate that the violence was not confined to this group.

The effects of conflict can be seen throughout NI and has impacted its rates of IPV. The religious element of the conflict made victims reluctant to leave abusive relationships (the Roman Catholic Church still does not recognise divorce) as well as the social attitudes underpinned by religion which can exert a strong influence on certain decision making.[7] The police were seen by many Catholics as an extension of the Protestant oppressors from whom they would not seek help from. Notably, all the main paramilitary groups operating during the period of the Troubles remain in existence and have a relatively high public profile in spite of being illegal organisations.[8] This conflicted with the level of police responsiveness since during the conflict, the police at times would not respond to calls from victims of IPV for fear that they may have been hoax calls and they were being led into a perilous trap by a paramilitary group. During and post conflict, women have reported that their partner claimed (sometimes factitiously, bringing the coercive control element to IPV) to be associated with paramilitary organisations which made them too frightened to report IPV to the police, and that if they did, they or their families may become targets of paramilitary violence themselves

IPV in conflict and post-conflict societies

[4] E.Fitzgerald, M.Given, M. Goug, L.Kelso, V.Mcilwaine and C.Miskely, School of Psychology, Queens University Belfast, 'The Transgenerational Impact of 'The Troubles; in Northern Ireland.,' 2016-2017 Available at: https://www.qub.ac.uk/schools/psy/files/Filetoupload,784073,en.pdf

[5] Wallenfeldt, Jeff. "the Troubles". Encyclopedia Britannica, 24 Aug. 2022, https://www.britannica.com/event/The-Troubles-Northern-Ireland-history. Accessed 1 January 2023.

[6] Reilly, J., Muldoon, O.T. and Byrne, C. (2004), Young Men as Victims and Perpetrators of Violence in Northern Ireland: A Qualitative Analysis. Journal of Social Issues, 60: 469-484. https://doi.org/10.1111/j.0022-4537.2004.00367.x

[7] Doyle, J., & McWilliams, M. (2018). Intimate Partner Violence in Conflict and Post-Conflict Societies: Insights and Lessons from Northern Ireland. Political Settlements Research Programme.

[8] An assessment commissioned by the Secretary of State for Northern Ireland, 'Paramilitary Groups in Northern Ireland' 19 Oct 2015 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/469548/Paramilitary_Groups_in_Northern_Ireland_-_20_Oct_2015.pdf

Community and societal factors from the ecological model of risk factors state that armed conflict and high levels of violence in society are risk factors, as well as a broad social acceptance of violence as an acceptable method of conflict resolution.[9] In conflict societies, there is generally an increased ability to access firearms, which can be used as part of the IPV or a threat to commit IPV as a means to control the victim.[10] Post conflict, levels of firearms are generally reduced but when hyper-masculinised male combatants leave the battlefield, their homes become the new stage for violence. Compounding this experience is the fact that post-conflict communities are predominantly poorly equipped to combat IPV.[11]

Generational trauma

Another element is the so called, 'transgenerational trauma' or 'intergenerational trauma' whereby the trauma from conflict is being passed onto the next generations, resulting is the poor psychological health of children that appears to result (partially) from the consequences of the trauma experienced by the parents.[12] Trauma can be described as exposure to actual or threatened death or serious injury or violence through direct or indirect exposure.[13]'

The transgenerational impact of the Troubles indicates that trauma in parents can compromise their ability to facilitate synchronous interactions with their children. This impacts the ability of the parent to assist the child with self-regulation and may increase the propensity of the child to develop emotional and behavioural problems.[14] The children become more vulnerable to stress and increasing likelihood of developing DSM- related symptoms. When the child moves into adulthood, the emotional imbalance may self- regulate by abuse of alcohol and substance misuse, leaving those concerned, more vulnerable to an IPV relationship, or risk factor to perpetuate IPV. Furthermore, parental mental health concerns such as PTSD can interfere with a parent's ability to care for and bond

[9] Ibid at 2.

[10] Doyle, J., & McWilliams, M. (2018). Intimate Partner Violence in Conflict and Post-Conflict Societies: Insights and Lessons from Northern Ireland. Political Settlements Research Programme.

[11] Aoláin F. N., Haynes D. F., Cahn N. R. On the frontlines: Gender, war, and the post-conflict process. Oxford: Oxford University Press; 2011. p. 47.

[12] Hanna, D., Dempster, M., Dyer, K., Lyons, E., & Devaney, L. (2012). Young people's transgenerational issues in Northern Ireland. (A Report for the CVSNI) Belfast: QUB, School of Psychology page 20 [cited at Ibid 4).

[13] American Psychiatric Association . *Diagnostic and Statistical Manual of Mental Disorders*. 5th ed. American Psychiatric Association; Arlington, VA, USA: 2013

[14] O'Neill, S., Armour, C., Bolton, D., Bunting, B., Corry, C., Devine, B., Ennis, E., Ferry, E., McKenna, A., McLafferty., & Murphy, S. (2015). Towards A Better Future: The Trans-generational Impact of the Troubles on Mental Health. Commission for Victims and Survivors: Belfast. [cited at Ibid 4).

with their children, due to symptoms of trauma. This pattern is likely to repeat down through the generations[15]

The global phenomenon of IPV is multi-dimensional. Reviews suggest a need for comprehensive, multi-sectoral, long-term collaboration between governments and civil society at all levels of the ecological framework. A family lawyer can assist on an individual level and are relatively easy to access. It is important to note that strengthening women's civil rights related to divorce, property, child support and custody have demonstrated effectiveness in preventing and responding to IPV. Furthermore, disseminating existing and new information between countries will lead to a better understanding and raise awareness to IPV. However, wide reforms are more challenging, including reforming civil and criminal legal frameworks, media and transforming whole institutions at every section and engage men and boys, and on occasions, women who are not immune to the trauma of civil violence to promote nonviolence and gender equality[16]. Prevention and treatment is likely to be the best method for minimising IPV and stopping the trauma of it going through the generations.

Emma Jamison

[15] Ruscio, A. M., Weathers, F. W., King, L. A., & King, D. W. (2002). Male war-zone veterans' perceived relationships with their children: The importance of emotional numbing. Journal of Traumatic Stress, 15, 351–7. Cited in [cited at Ibid 4).

[16] Ibid at 2.

.Out of Court Divorce and the Main International Issues

by Simona Ambroziūnaitė

OUT OF COURT DIVORCE AND THE MAIN INTERNATIONAL ISSUES

By advocate Simona Ambroziūnaitė from Lithuania, ILAW LEXTAL

In Europe, it has long been customary that only a court could dissolve a marriage, both in the event of a dispute between the spouses and when they reached a mutual agreement regarding all the legal consequences of the divorce. However, in order to reduce the workload of the courts, to reduce the duration and costs of divorce, in Europe, out of court divorce have been gaining ground recently. The Republic of Lithuania is not an exception either, where from 2023 January 1 spouses can dissolve the marriage at a notary public, avoiding the court proceedings. This new function of the notary will give individuals the opportunity to divorce faster, without going to court, with dignity, and of course - more confidentially. Currently, it is possible to divorce out of court in Spain, Greece, Latvia, Estonia, Slovenia and some other countries of the European Union.

If all the parties are from one country and are living in that country then generally the divorce is heard by the courts of that country, and a decision is made and implemented in accordance with the laws of that country. Problems arise when the parties are not living in the same country or are not nationals of the same country. It may not be clear which country's courts should make the decisions, which country's laws should be applied and how the decisions made in one country can be implemented in another.

It is clear that, due to lower time and financial costs, out of court divorce will establish itself in the majority of European Union countries in the future. Since out of court divorce is quite new and still is just making its way in the Europe, reasonable questions arise, when we are speaking about international out of court divorce too:

(1) do the jurisdictional rules provided for in the Brussels IIb Regulation apply to out of court divorce?
(2) what law is applicable in international out of court divorce? Could we apply the regulation of Rome III?
(3) can a out of court divorce be recognized and enforced in other European Union states?

The main problem comes from the different models (public and private) of out of court divorce in different countries. The above-mentioned problem is best reflected in the recent cases examined by the ECJ.

For example, the Sahyouni case dealt with a private (out of court) divorce registered by a religious institution in a third country. The main question for ECJ was to answer if the regulation of Roma III recognizes a divorce issued by a third country religious authority?

In this case ECJ stated that private divorces are not explicitly excluded from the scope of Roma III. EU legislature had in mind only situations in which divorce is pronounced by a national court or by, or under the supervision of, another public authority, and that, accordingly, **it was not the intention of the EU legislature that that regulation should be applicable to other types of divorce, such as those which, as in the present case, are based on a 'private unilateral declaration of intent' pronounced before a religious court.**

The other example, is Senatsverwaltung case, dealt with a public out of court divorce where the request for preliminary ruling has been made to answer whether Article 2(4) of the Brussels IIa Regulation must be interpreted as meaning that a divorce decree drawn up by a civil registrar of a Member State, containing a divorce agreement concluded by the spouses and confirmed by them before that registrar in accordance with the conditions laid down by the legislation of that Member State, constitutes a 'judgment' within the meaning of Article 2(4) of that regulation.

In this case ECJ stated that the Brussels IIa Regulation covers only a divorce which is pronounced either by a national court or by, or under the supervision of, a public authority, thereby excluding mere private divorces, such as a divorce resulting from a unilateral declaration of one of the spouses before a religious court.

Therefore, where a competent extrajudicial authority approves, after an examination as to the substance of the matter, a divorce agreement, it is recognised as a 'judgment', in accordance with Article 21 of the Brussels II a. Whereas other divorce agreements which have binding legal effects in the Member State of origin are recognised, as the case may be, as authentic instruments or agreements, in accordance with Article 46 of the Brussels IIa Regulation.

It is important to mention that Brussels IIb Regulation, which recast the Brussels IIa, has special recognition rules, Art. 64 et seq, it is lex specialis for all new out-of-court divorces.

So, in conclusion, we could see the EU legislator's intentions to include out of court divorce as a “real alternative” to the court ones. But still we require a coherent, complete concept, especially when we are speaking about private out of court divorce. It will create further issues in the future and require modifications of Brussels/Rome rules.

Simona Ambroziūnaitė

Lugano News

by Rachael Kelsey

Many, if not all, of you will remember our- post Brexit- paper, Lugano 2007- a Family Law Perspective from IAFL, from June 2021. Practitioners from 22 different European jurisdictions unanimously agreed that allowing the UK to re-join Lugano would be a good thing for the individuals and families we work with- and that that would ameliorate some of the challenges that Brexit has brought about.

The UK's potential accession to Lugano has stalled and we are now two years on from the end of the transition period with no sign of the UK being able to re-join any time soon. We want to prepare an update to the paper from 2021 and I hope some of you might be able to help with that.

I would love to hear from you with examples of any matters that you have run into which have had Brexit related difficulties, and, in particular, any which would have been improved by the UK having been within the Lugano framework. If you can email me, that would be wonderful! Rachael.Kelsey@sko-family.co.uk

Rachael Kelsey

Brussels II Regulation

by Joaquim Bayo

CHOICE OF COURTS AND APPLICABLE LAW IN THE EU REGULATIONS ON FAMILY MATTERS

The possibility of agreements on jurisdiction and applicable law is not rare in EU regulations and it has to be considered in prenuptial and postnuptial agreements, as well as in divorce agreements (both judicial and non-judicial).

As to jurisdiction agreements, the chosen courts must be those of an EU Member Estate (ME) which applies the regulation. This means that, in enhanced cooperation regulations (such as 2016/1103 or 2016/1104, matrimonial regimes or patrimonial effects of registered partnerships), applied only in ME which have participated in their approval, other ME and third countries will ignore the agreement.

Formal validity of the agreement requires written form, date and signature of the parties; it can be also done pursuant to the procedural rules of the forum, if the agreement is concluded within the proceedings.

The courts must be connected to the case and this connection varies in the different family matters.

The new Brussels II b (2019/1111), surprisingly, does not include any choice of courts for divorce, legal separation and marriage annulment, but it does for parental responsibility (following EUCJ judgment C-656/13, 12 Nov. 2017): Article 10 requires connection (habitual residence of one parent, former habitual residence or nationality of the child), best interest of the child and agreement previous to or in the course of the proceedings. The last gives exclusive jurisdiction.

The Maintenance Regulation (4/2009) excludes choice for child support (Art. 4.3), but allows agreement on exclusive jurisdiction in the case of maintenance obligations between spouses or former spouses[1]. The connection must be habitual residence or nationality of

[1] Agreement on jurisdiction must always be checked with future enforceability in other States. For example, the USA has made reservation in respect of Article 20.1(e) of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, which sets up

one of the parties, last common habitual residence for at least one year or the court dealing with the matrimonial dispute. Although no agreement is possible for child support, indirect agreement is possible: jurisdiction for parental responsibility gives jurisdiction for child support pursuant to Article 3(d) of Regulation 4/2009.

Unless matters of matrimonial property regimes come under the jurisdiction of a court of a ME seized in matters of the succession or on the application for divorce, legal separation or marriage annulment (Arts. 4 and 5.1 of the Matrimonial Regime Regulation, 2016/1103), or, in the last case, in cases the respondent may exclude the jurisdiction (Art. 5.2), choice of exclusive jurisdiction of courts is possible (Art. 7) among the courts of the ME whose law they have also chosen as applicable, or of the first common habitual residence after marriage, or of common nationality at the time of marriage, or of the conclusion of the marriage.

Unless property consequences of registered partnerships (Regulation 2016/1104) come under the jurisdiction of the court of a ME seized in matters of the succession (Art. 4), partners may agree on the court of the ME seized to rule on the dissolution or annulment of the registered partnership (Art. 5), or they may also agree on the exclusive jurisdiction of the courts of the ME whose law they have also chosen as applicable, or under whose law the registered partnership was created (Art. 7).

When the agreement concerns applicable law, its effect may be broader than the choice of court. Some non-participating ME and third countries may accept choice of applicable law in their own international private law. Besides, applicable law agreements may choose any law of any country, provided it has a connection with the case. It is the so-called universal application; the chosen law is not limited to that of a ME. Of course it may be banned by incompatibility with public policy of the forum (sexual discrimination, best interests of the child, etc.), but a professional wise advice will avoid to choose a law which does not comply with the international standards.

The existence and validity of an agreement on choice of law is determined by the law which has been chosen, if the agreement were valid. Formal validity usually requires written form, date and signature of the parties, but it has to be carefully analysed if the law of the ME of residence of both or one of the parties lays down additional formal requirements, or the chosen law does; in that case those additional requirements have to be fulfilled.

Article 5 of Regulation 1259/2010 allows agreement on applicable law for divorce and legal separation; annulment (not within its scope) is normally ruled by the law of the State of marriage. The choice may be the law of the State where the spouses are habitually

acceptable jurisdiction criteria in the State of origin for future enforcement of foreign decisions. This means that the USA will not accept decisions of a foreign court whose jurisdiction is based on choice of court.

resident, or of the State where the spouses were last habitually resident and one still resides there, or of the nationality of one of them; all conditions must be fulfilled at the time the agreement is concluded.

There is no EU regulation on applicable law for parental responsibility. In all ME, applicable law is ruled by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. No agreement is possible, but, as it is possible on choice of court pursuant to Regulation 2019/1111, Article 15 of the Convention would apply: *In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.* And Recital 92 of Regulation 2019/1111 says: *the reference in Article 15(1) of that Convention to 'the provisions of Chapter II' of that Convention should be understood as referring to 'the provisions of this Regulation'.*

Article 15 of Regulation 4/2009, on maintenance, refers to the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations for applicable law (except in Denmark). Article 7 of the Protocol allows designation of the law applicable for the purpose of a particular proceeding, with no exclusion of child support. On the contrary, Article 8 only permits designation for maintenance of adults; it may be the law of any State of which either party is a national or habitual resident at the time of designation; or the law designated by the parties as applicable, or the law in fact applied, to their property regime or to their divorce or legal separation.

Spouses or future spouses may agree on the law applicable to their matrimonial property regime (Art. 22 Regulation 2016/1103); it may be the law of the State where the spouses or future spouses, or one of them, is habitually resident, or of the State of nationality of either one, at the time the agreement is concluded.

Partners or future partners may agree on the law applicable to the consequences of their registered partnership (Art. 22 Regulation 2016/1104); it may be the law of the State where the partners or future partners, or one of them, is habitually resident, or of the State of nationality of either one, at the time the agreement is concluded, or of the State under whose law the registered partnership was created.

In conclusion, good professional advice must take into account those possibilities of choice of court and applicable law in family matters, so future disputes are avoided and the interests of their clients are better served.

Joaquim Bayo

Massive Online Open Course

by Lucia Ruggeri

Lucia Ruggeri – Massive Online Open Course (MOOC) – add flyer.

IAFL has actively contributed to the realisation of such an important European initiative born within EU-FamPro Project – E-training on EU Family Property Regimes funded by the European Union's Justice Programme (2014-2020). It is a Supporting Organization who dynamically collaborates with the five States part of the European Consortium on the achievement and dissemination of project results such as the MOOC course. The course is totally free and open to all IAFL members.

Massive Online Open Course (MOOC) is a first self-placed e-training course which draws attention on issues of cross-border couples from the legal professionals' perspective. It represents a unique opportunity made possible by the European Commission Justice Programme to increase competence and understanding in the field of EU private international family law as well as to foster their interaction and cooperation. Investing in the training of legal professionals means laying the foundations for a more inclusive and closer to the needs of citizens' society. Investing in e-learning methodologies such as video-simulation of cases or specifically dedicated discussion spaces contributes to create professional networks without borders ready to respond to the needs of those who live and work in different countries. The successful implementation of an effective and inclusive justice aimed at the best protection of cross-border families' interests lies behind a solid and multiperspective training.

For more information see the flyer attached.

For the enrolment click on the following link:

https://learn.eduopen.org/eduopenv2/course_details.php?courseid=511&lang=en

Lucia Ruggeri

Ukraine Blog

by Natalia Olowska-Czajka

18 December, 2022

Blog: Natalia Olowska-Czajka, IAFL Fellow

UKRAINE: A cold war

As the year's end is approaching and everyone is focusing on their preparations for the holiday season, some thoughts about this year's events come to our minds. And inevitably, there is the thought that this year saw a war happening in Europe, which none of us would have thought was possible in the 21st century.

But there it is – the war in Ukraine.

And it is worth providing an update on what is happening there in terms of the regular people's lives, the lives of the brave Ukrainian people, including families with children and the elderly.

So many of us thought that the COLD WAR is OVER – yet the European perspective now is that THE COLD can be an enemy's weapon in this war. This war is also the war with THE COLD and the COLD can be a means to try to break people and even physically threaten them, not to say anything worse.

The temperatures in Kyiv are now far below zero degrees centigrade (-7C or 21F). It is clear that in such cold temperatures, and with the daylight available for a shorter period at this time of the year, people need electricity: to have their households being operational, to maintain their businesses, to stay warm, to stay connected with the world.

Recent Russian missile attacks on the strategic energy infrastructure are having a devastating effect on civilians' lives and the news broadcast is that:

1. there is no place, city or region in Ukraine that is not affected by shortages of electricity;
2. there are repetitive breaks in the electricity supplies causing blackouts;
3. in many places this affects not just the electrical power but also the heating system and temperatures in people's homes.

It may help to reflect on what we need and rely on electricity for in our lives – to understand and feel what the Ukrainians are really going through:

1. we need power to have access to the Internet. We rely on the Internet to stay connected with our families. With the lack of Internet there comes the fear of not knowing what the situation of our loved ones, what is happening to them which is a huge worry to those abroad, including 2 million people who emigrated to Poland after the war started.
2. we need power for schooling - most of the Ukrainian pupils are still on distance learning, and when there is no power and no internet, the children cannot attend their classes for days.
3. the elevators in the multi-story buildings do not work and a lot of people live in blocks of flats in big cities, including buildings 15 or 20 stories high. For them to get home means climbing all these floors on foot.
4. with no electricity a lot of supermarkets and shops offering other goods remain closed, so the supply of goods shrinks – because there is no light to illuminate the interior and no power to operate the cash tills and the electronic payment systems.
5. the judicial system operating online is threatened; hearings are revoked or adjourned due to the lack of electricity.
6. no electricity means no water - like in Mikolayiv and consequently might cause a permanent stop of the heating system.
7. The skyscraper office buildings cannot welcome their tenants – workers, administration, contractors.

The longest blackout in the Kyiv region happened after the 15 November bombings and lasted 50 hours. Last week a new wave of bombings were close to this sad record.

The new heros within the society are not just the soldiers fighting in the battle fields – they are the electricians and all other workers in the power plants – because soon after the missile strikes, it falls to them to immediately start rescuing the damaged systems and returning the electricity supply risking their lives and working non-stop.

Poland was expecting more refugees (we call them – "the newcomers", we do not want to stigmatize them) coming in due to these extremely difficult conditions. But for the Ukrainians staying in Ukraine despite the cold and the dark became a new form of a resistance movement – they are going to stay there and show everyone that they will survive, and they will protect their homeland and their homes.

As a result,

1. power banks are in great demand and are difficult to obtain
2. those who can afford it, buy generators, and produce their own electricity
3. people try to think out of the box, using other electricity supplies, like gas – if they have it
4. people show solidarity – they are sharing resources, making sure power gets to all those in need
5. Everyone is trying to maintain their lives as normal as possible – so generator supplied cafes and restaurants or card payments systems are present wherever possible.

Everyone is trying to live their "life as usual" as much as they can: the public transport is operating, despite the threat of bombing. People work, visit others, prepare for their holidays (which for most Ukrainian will fall on 6 January according to the orthodox calendar).

A part of the new normality is working remotely from generator-supplied restaurants and staying there the entire working day, sipping coffee or tea and staying connected with the world via the internet.

When we sit at our dinner tables for Christmas this year, enjoying our favorite traditional meals and looking at each other's faces lit with beautiful lights please, let us think that it is a blessing that most Ukrainian people will be deprived of this year.

Natalia Olowska-Czajka