

Family Law and Culture in Europe

Developments, Challenges and Opportunities

5th Conference of the Commission on European Family Law



August 29-31, 2013

Universitätsclub Bonn e.V. · Bonn

Conference Guide



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5th Conference of the Commission on European Family Law

The Scientific Committee

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scientific committee



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Welcome to the CEFL Conference

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It is our great pleasure to welcome you to the 5th Conference of the Commission on European Family Law at the University of Bonn. The paramount goal of our conference is to enhance the exchange of ideas and arguments on comparative and international family law in Europe in their respective cultural contexts.

The focus has been set on three themes featuring the new Principles of European Family Law regarding Property Relations between Spouses and topics which are currently at the forefront of policy debate and academic discussion.

The first topic includes a presentation of the CEFL's current work on Principles of European Family Law regarding Property Relations Between Spouses. This is the CEFL's third working field, following the successful publication of its Principles regarding Divorce and Maintenance Between Former Spouses (2004) and regarding Parental Responsibilities (2007). Our 5th conference thus picks up the thread where the conference in Cambridge three years ago only provided some first impressions. The rights and duties of spouses, marital property agreements and two matrimonial property regimes will be presented: the participation in acquisitions and the community of acquisitions.

Additionally, the impact of the proposed EU private international law regulations for spouses and registered partners for international couples and their property relations will be addressed.

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The second theme deals with the growing number of countries which legislate on non-formalized relationships, concentrating on the situation of partners upon the termination of their relationship either by death or by voluntary dissolution. Here the common law countries – particularly Ireland with the Cohabitation Act 2010 – as well as the Nordic countries with new legislation in Norway (inheritance) and Finland (compensation) are worth a closer look.

Last but not least, the current decisions of the European Court of Human Rights concerning the rights of biological and social fathers will lead to a session on social, biological and legal parentage. It features a panel discussion with the participation of German Constitutional Court Justice Gabriele Britz, former Judge at the French Cour de Cassation Françoise Monéger and Angelika Nussberger, Judge at the European Court of Human Rights.



Contributors

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Masha Antokolskaia is Professor at the Amsterdam Centre for Family and Law at the Free University Amsterdam

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Conference Venue

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The conference is being held at the **Universitätsclub Bonn, Konviktstraße 9**, which is located in the Bonn city center on the west bank of the Rhine near the University of Bonn's main building.

All plenary sessions take place in the main conference room on the ground floor (Wolfgang Paul Room) while additional conference rooms located on the first floor are provided for the workshops (Joseph Schumpeter Room, Ernst Robert Curtius Room and Paul Martini Room).

The reception by the German Women Lawyers Association and the festive dinner will be held on board the "Filia Rheni" which will depart from pier Brassertufer. It is located "Am Alten Zoll", five minutes walking distance from the conference venue. Please note that only delegates who have registered specifically for this event can be admitted.

Free internet access is available for participants during the conference via Wi-Fi connection. You can either use the services provided by "eduroam" or log in by collecting a personal user name and password for the local wireless service from our registration desk.

CERTIFICATES OF PARTICIPATION

Certificates of participation will be provided upon request via e-mail (info@cefl2013.org). In particular, confirmations of participation according to § 15 German FAO may be issued for German specialist lawyers (Fachanwälte) to be mailed after the conference.

TRAVELLING IN BONN

An underground car park (Tiefgarage Markt) is located near the conference venue (Stockenstraße).

Bonn provides a wide variety of public transportation with trams, buses and underground trains. Several stations are in close walking distance to the conference venue (e.g. Universität/Markt and Bertha-von-Suttner-Platz). For information on departure times (in English) please check <http://www.vrsinfo.de/englisch/the-vrs/vrs-about-us.html>.

If you wish to travel via **taxi**, please call **0049 228 555555**.

ANY QUESTIONS?

Please feel free to contact the local conference staff at the information desk which will be open throughout the conference.

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Conference Program

program

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Thursday, 29 August 2013

- 3:00 pm **Registration**
- 4:00 pm **Welcome**
Jürgen Fohrmann
Birgit Grundmann
Nina Dethloff
Katharina Boele-Woelki
Werner Gephart
- 4:30 pm "Family": Fundamental Rights and the Challenge of Change
Susanne Baer
- 5:30 pm to 6:30 pm
Reception by the Rector of the University

Friday, 30 August 2013

- 8:30 am **Registration**
- The CEFL Principles on Property Relations between Spouses**
Chair: Walter Pintens
- 9:00 am Rights and Duties of the Spouses
Katharina Boele-Woelki
- 9:20 am Marital Agreements
Nigel Lowe
- 9:40 am Participation in Acquisitions
Dieter Martiny
- 10:00 am Community of Acquisitions
Frédérique Ferrand
- 10:20 am Panel Discussion: Pros and Cons of the CEFL Principles
Eva Becker, Barbara Dauner-Lieb, Josep Ferrer Riba

11:00 am

Break

International Couples and their Property Relations

Chair: Maarit Jänterä-Jareborg

11:30 am

The proposed EU PIL Regulation for Spouses
Andrea Bonomi

12:00 pm

The proposed EU PIL Regulation for Registered Partners
Miloš Hat'apka

12:30 pm

Discussion

1:00 pm

Reception and Lunch by the Alexander von Humboldt Foundation in Honour of Anneliese Maier Research Award Winner Katharina Boele-Woelki

Non-formalized Relationships (separation/death)

Chair: Masha Antokolskaia

2:00 pm

Statutory Regulation of Cohabiting Relationships in Scandinavia – Recent Developments and Future Challenges
Tone Sverdrup

2:30 pm

Towards Legislation on Cohabitation in Common Law Jurisdictions in Europe
Anne Barlow

3:00 pm

Discussion

3:30 pm

Break

4:00 pm

Family Law and Culture in Four Workshops of Young Researchers

Contents of these workshops no. 1 to 4 see page 15

7:00 pm

Reception by the German Women Lawyers Association and Festive Dinner on a Rhine Ship

Pier Brassertufer "Am Alten Zoll", 53111 Bonn

Schiffahrt Schmitz GmbH Bonn – Bonner Personenschiffahrt

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Conference Program

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Saturday, 31 August 2013

Transnational Families and New Concepts of Parentage

Chair: Katharina Boele-Woelki

9:00 am Transnational Family Situations in Europe seen through
the Lens of the Moroccan Family Law Code
Marie-Claire Foblets

9:30 am The Right of the Child to Parents
Anna Singer

10:00 pm Contracting on Parentage
Christine Budzikiewicz

10:30 am Break

11:00 am Panel Discussion on Biological and Social Parentage:
Where do we go from here?
Chair: Ingeborg Schwenzer

*Gabriele Britz, Angelika Nussberger, Nigel Lowe,
Françoise Monéger*

12:00 pm **Closing Remarks: Family Law as Culture**
Werner Gephart

12:30 pm **Closure of the Conference**
Nina Dethloff · Katharina Boele-Woelki

workshops

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WORKSHOP 1: Cross-border Family Relationships

Chair: Cristina González-Beilfuss

“Habitual residence” in European Family Law: Diversity, coherence and transparency
of a challenging notion · *Katharina Hilbig-Lugani*

Protection orders provided for by articles 342 bis-ter, Italian Civil Code: Are they still
valid when victims move across Europe? · *Eva de Götzen*

Notion of “marriage” under European and National Regulations – Polish approach
Anna Sapota

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WORKSHOP 2: Transnational Families: Across Nations and Cultures

Chair: Jane Mair

Family Life and EU Citizenship: The discovery of the substance of the EU citizen's
rights and their genuine enjoyment · *Katharina Kaesling*

Private and Family Life vs. Morals and Tradition in the Case-law of the ECHR
Geoffrey Willems

Real-life International Family Law – Belgian empirical research on
cross-border family law · *Jinske Verhellen*

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WORKSHOP 3: The (Un-)Wanted Child

Chair: Velina Todorova

Anonymous Relinquishment and Baby-Boxes – Life-saving mechanisms or
a violation of human rights? · *Claire Fenton-Glynn*

Cross-border Recognition of Surrogacy · *Martin Engel*

Re-thinking Family Law: A new legal paradigm for stepfamilies? · *Angela D'Angelo*

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WORKSHOP 4: Relationship Breakup: Winners and Losers?

Chair: Ingrid Lund-Andersen

Maintenance between Former Spouses and Gender Equality · *Marketa Rihova*

The Swedish Cohabitees Act in the Society of Today · *Kajsa Walleng*

Collaborative Practice: An interdisciplinary approach to the resolution of conflict
in family law matters · *Connie Healy*

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Keynote Lecture

“Family”: Fundamental Rights and the Challenge of Change

Susanne Baer

People live what we call family at times in very different ways, which creates an ever-changing landscape of intergenerational relations. However, fundamental rights in constitutional law as well as human rights in international law promise stability und unchanging notions of what we agree on as basics for our societies. Thus, the dynamic field of family life is in tension with the stable foundations of family law. The keynote discusses, in light of case-law from the German Federal Constitutional Court and other sources of comparative constitutionalism, how we need to understand constitutional and human rights in order to be able to deal with such a situation.

THE CEFL PRINCIPLES ON PROPERTY RELATIONS BETWEEN SPOUSES

Chair: Walter Pintens

General Rights and Duties of the Spouses in the CEFL Principles

Katharina Boele-Woelki

The general rights and duties of the spouses constitute the first chapter of the new set of principles of European family law regarding property relations between Spouses. This chapter consists of nine principles, which apply irrespective of the matrimonial property regime. They are intended to be mandatory. As a result the spouses may not set them aside by an agreement. In addition to stating fundamental and established principles on the equality of the spouses and their autonomy, the Principles' régime primaire concerns the spouses' contributions and liability for family expenses, protection of the family home, mutual

authority of representation and mutual duty of information, as well as the freedom to enter into matrimonial property agreements. The General Rights and Duties of the Spouses should – like the two following chapters – be read in conjunction with the preamble which contains specific considerations and objectives as regards the property relations between spouses. One of the objectives expressed in the preamble, for example, concerns the protection of the family home. Two principles, contained in the first chapter specify how the family home is to be protected (Principles 4:6 and 4:7). In addition, two principles contained in the respective matrimonial property regimes determine that the competent authority may allocate the family home to one of the spouses upon dissolution of the marriage by taking into account the interests of both spouses paying particular consideration to the needs of the children of the family (Principles 4:30 and 4:56).

Marital Property Agreements

Nigel Lowe

Building on the general principle, 4:9, that spouses should be free to enter into agreements determining their marital property relationship, itself based on party autonomy to which the CEFL is generally committed, Chapter II of the CEFL's Principles of European Law Regarding Property Relations Between Spouses provides the framework principles governing marital property agreements. The object of this paper is to present the six principles contained in Chapter II, namely:

- Principle 4:10 Concept – i.e. that future spouses may choose before their marriage their marital property regime and/or change or modify it during their marriage.
- Principle 4:11 The form requirements for such agreements.
- Principle 4:12 Disclosure

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Principle 4:13 Obligations of a notary or another legal professional with comparable functions.

Principle 4:14 Effects as against third parties.

Principle 4:15 Exceptional hardship justifying a competent authority setting aside or adjusting a marital property agreement.

Participation in Acquisitions

Dieter Martiny

Participation in acquisitions is one of the two matrimonial property regimes found in the CEFL Principles (4:16 – 4:32). It may act as a bridge between civil law and common law systems. This matrimonial property regime promotes the autonomy of the spouses and is relatively simple. The participation in the acquisitions regime aims to promote gender equality both during the regime and upon its dissolution by giving the spouses a claim to take part in the acquisitions of the other spouse made during the regime.

In this matrimonial property regime, assets are owned and administered separately by the spouses. There is also no joint liability for debts. The starting point is therefore independence of the property of the spouses. However, at the dissolution of the marriage a participation may take place in accordance with the participation regimes in existing national legislations (see the participation systems in Catalonia, Greece and Switzerland, the German “community of accrued” gains and the French-German Agreement instituting an optional regime of participation in accrued gains). The Nordic systems of deferred community and the redistribution of property in common law jurisdictions have also been taken into account.

Each spouse’s property comprises acquisitions and a separate category of personal or individual property (called reserved property). It is therefore necessary to

determine what kind of assets fall under the two categories. The acquisitions comprise the assets acquired during the regime, in particular each spouse’s income and gains whether derived from earnings or property and also assets acquired by means of either spouse’s income or gains (Principle 4:18). Reserved property comprises, inter alia, assets acquired before the commencement of the regime, gifts, inheritances and bequests acquired during the regime as well as assets that are personal in nature (Principle 4:19). There is also a presumption of joint ownership (Principle 4:20).

After dissolution of the regime by death, dissolution by divorce or a change of the matrimonial property regime, a liquidation takes place. Each spouse participates in the acquisitions made by the other during the regime. The basic principle is equal sharing of the net acquisitions after a determination and valuation of acquisitions (Principle 4:31). Special provisions deal with the detrimental transactions of a spouse and exceptional compensation claims between the spouses. An agreement on participation is possible. There is also a special rule for the allocation of the family home and household goods. In exceptional cases an adjustment by the competent authority may take place. Reserved property as such is not affected by participation.

It should not be forgotten that the rules on the participation in acquisitions regime are interconnected with the equally applicable mandatory rules of Chapter I on the general rights and duties of the spouses, the restraints on disposal for the family home and household goods and with the Chapter II rules on matrimonial property agreements.

Community of Acquisitions

Frédérique Ferrand

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INTERNATIONAL COUPLES AND THEIR PROPERTY RELATIONS

Chair: Maarit Jänterä-Jareborg

The Proposal for a Regulation on Matrimonial Property

Andrea Bonomi

The Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter, the Matrimonial Property Proposal), presented in March 2011, is a very important building block of a harmonized system of private international law rules in the area of financial relationships between spouses.

With respect to divorce and other matrimonial causes, the rules on international jurisdiction and those on recognition and enforcement of foreign decisions are, to a large extent, unified by virtue of the Brussels I-bis Regulation and the Maintenance Regulation. The Succession Regulation also includes a comprehensive set of uniform rules on jurisdiction and recognition. In the same areas, the unification of conflict-of-law rules has also made significant progress, although it is still restricted to a more or less conspicuous group of Member States: only 15 Member States have participated in the adoption of the Rome III Regulation, whereas 25 Member States are bound by the 2007 Hague Protocol and 24 by the Succession Regulation.

However, all of these instruments exclude matrimonial property issues from their material scope of application. In this area, the national private international law rules are still applicable. The coexistence between these two sets of rules is not always easy, especially when they diverge (for instance, when national rules are still based on the principle of nationality).

In this context, the introduction of uniform European rules would obviously represent an important step forward in terms of legal certainty, predictability and

consistency of results. Coordination with national private international law rules is unlikely to remain problematic since the proposed rules regarding both jurisdiction and applicable law are designed to entirely replace the national rules in the Member States. However, new coordination problems might arise.

On the one hand, coordination between the proposed regulation and the other EU regulations relating to matrimonial causes and succession will become crucial because of the constant interplay among these instruments. It is obviously desirable that the courts of one Member State have jurisdiction and that one law governs all the disputed issues. This concern has played an important role in the elaboration of the jurisdictional scheme of the Matrimonial Property Proposal. By contrast, the importance of coordination with other EU instruments has been underestimated in the drafting of the choice-of-law rules included in the proposal.

On the other hand, rules on jurisdiction and choice-of-law should also be coordinated. As a matter of fact, the well-known difficulties related to the proper access to and application of, foreign law could significantly be reduced if jurisdiction and choice-of-law rules were conceived in a consistent way, thereby favouring, where possible, the application of the law of the forum. However, this aspect of coordination seems to play only a secondary role in the choice-of-law rules included in the proposal.

It is submitted that an additional effort to take these considerations into account should be made during the final revisions of the regulation.

The proposed EU PIL Regulation for Registered Partnerships

Miloš Hat'apka

The European Commission presented its proposal on property consequences of registered partnerships in March 2011 together with the proposal of a similar regulation on matrimonial property regimes.

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Both proposals share a similar structure and areas covered and the aspect that the recognition and enforcement of decisions resulting in the application of the regulations would be submitted to the current Brussels I regime of recognition and enforcement.

The proposal deals with the three important areas of PIL relating to this subject matter: international jurisdiction, applicable law and recognition and enforcement. Unlike the recent Maintenance Regulation, it does not contain any provisions on administrative cooperation.

The structure of the proposal reflects these three areas, as the provisions on these areas populate Chapters II to IV of the proposal. Additional chapters deal with the scope and definitions (Chapter I), effects in respect of third parties (Chapter V) and final provisions (Chapter VI).

Scope and definitions (Chapter I)

According to Article 1, the Regulation is intended to apply to matters of the property consequences of registered partnerships.

The personal effects of registered partnerships are excluded (para. 3(a)).

Most definitions included are familiar from other EU instruments (court, decision, authentic instrument, etc.), but the proposal introduces two definitions which are specific to this instrument, namely the definition of property consequences and, most notably, the definition of the registered partnership.

Jurisdiction (Chapter II)

International Jurisdiction is divided into several categories:

- a) Ancillary jurisdiction in favour of courts dealing with the succession or with the dissolution or annulment of the partnership (Art. 3 and 4)
- b) Regular jurisdiction for situations of daily management of the property (Art. 5)
- c) Subsidiary jurisdiction for situations not covered by Articles 3 to 5 (Art. 6), and
- d) Forum necessitatis (Art. 7)

The courts under Article 3 and Article 5 may decline jurisdiction if its law does not recognise the institution of registered partnership.

The remaining provisions of the Chapter (counterclaim, lis pendens and related actions, admissibility etc.) are familiar from the existing instruments, in particular Brussels I.

Applicable Law (Chapter III)

There is only one connecting factor for applicable law under the proposal. The law applicable to the property consequences of registered partnerships is the law of the State in which the partnership was registered (Art. 15). It applies universally to all forms of registered partnership, in whatever State they are registered, not merely to partnerships registered in a Member State.

The chapter on applicable law includes provisions familiar from other instruments, mainly Rome I and Rome II (overriding mandatory rules, exclusion of renvoi), but also a specific provision on public policy (Art. 18). Its second paragraph determines that the application of a rule of the law determined by this Regulation may not be regarded as contrary to the public policy of the forum merely on the grounds that the law of the forum does not recognise registered partnerships.

Recognition, Enforceability and Enforcement (Chapter IV)

This Chapter includes provisions familiar from Brussels I and the Succession Regulations. It is based on the principle of automatic recognition with the possibility to apply for recognition. Enforcement of a decision from another MS requires declaration of enforceability.

Recognition and enforceability of authentic instruments and court settlements is covered as well.

Effects in Respect of Third Parties (Chapter V)

Chapter V contains specific conflict of law rules related to the relationship with third parties. The main rule is the application of the law of registration (Art. 15), but there are some exceptions when such law may not be relied upon.

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NON-FORMALIZED RELATIONSHIPS (SEPARATION/DEATH)

Chair: Masha Antokolskaia

Statutory regulation of Cohabiting Relationships in Scandinavia – Recent developments and future challenges

Tone Sverdrup

The Nordic countries have undergone the same demographic trend as many other European countries after the Second World War, with a significant rise of cohabitation at the expense of marriage. There is reason to believe that cohabiting relationships are more accepted socially than in many other Western countries. Today, cohabitation is the model chosen by about one in four of all couples. The proportion of births outside marriage is about 50 percent. However, this social development has not been reflected in family law to any appreciable extent. Most striking is the fact that the financial consequences upon termination of cohabitation have remained mostly unregulated in the Nordic countries. Sweden is the only country where assets can be divided equally upon dissolution of the relationship. In the other Nordic countries each cohabitant retains his or her property and debt upon relationship breakdown, but compensation to avert unjust enrichment may be granted. Finland is, so far, the only Nordic country to codify such compensation rules (in 2011). Norway is the only country where cohabitants may inherit each other; the inheritance rules were enacted in 2008.

This presentation will give an overview of these two recent legal reforms, as well as offer short remarks on the legal situation in the other countries. The prevailing political attitudes regarding statutory regulation of cohabiting relationships in the Scandinavian countries will also be discussed. Keywords include increased individualization and a predominant self-sufficiency principle on the one hand, and the logic of intimate relationships and the growing opportunities to veto marriage due to increasing social acceptability of cohabitation, on the other hand.

With these considerations as a starting point, the main challenges in this field of law will be presented. Finally, the question is raised as to which of the Nordic countries has chosen the best way of regulating unmarried cohabitation.

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Legislating for Cohabitation in Common Law jurisdictions in Europe: Two steps forward and one step back?

Anne Barlow

Within Europe, the common law jurisdictions of England and Wales, Scotland and the Republic of Ireland have not taken a unified approach in their legal response to the increasingly common social phenomenon of unmarried cohabitation. Whereas both Scotland and Ireland have recently legislated to provide financial provision remedies as between cohabiting partners on relationship breakdown, in England and Wales (and in Northern Ireland), there are still no family law remedies for financial provision when such relationships break down. This is despite the Law Commission for England and Wales recommending reform in 2007 (see *Cohabitation: the financial consequences of relationship breakdown*, Law Com No 307, CM 7182, (2007) London: TSO). Interestingly, in the recent Supreme Court decision of the Scottish case of *Gow v Grant* (Scotland) [2012] UKSC 29, the Supreme Court Justices expressed their frustration at this state of affairs, calling loudly for English law to be changed in line with that of Scotland. Yet so far these calls have fallen on deaf ears. Thus whilst England and Wales have now seemingly embraced legal recognition of same-sex marriage, heterosexual cohabitation continues to be regarded by government as a social problem and a threat to formal marriage, with both the Scottish approach to compensating economic disadvantage within cohabitation relationships and an extension of civil partnerships to different-sex couples having been recently rejected once again by government.

Drawing on socio-legal research evidence and discussion (including the continued existence of the “common law marriage myth”), this paper will explore these legal

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and policy developments in all three jurisdictions against the background of the changing socio-demographic nature of family structures within these societies. It will consider whether the piecemeal legal response to cohabitation in England and Wales provides adequate remedies, given policy objectives, or alternatively whether the Irish and/or Scottish solutions could be appropriately adopted within England and Wales (and Northern Ireland) or indeed, whether a different approach is called for.

Family law and culture in four workshops of young researchers

WORKSHOP 1:

CROSS-BORDER FAMILY RELATIONSHIPS

Chair: Cristina González-Beilfuss

“Habitual residence” in European Family Law:

Diversity, coherence and transparency of a challenging notion

Katharina Hilbig-Lugani

Based on a synoptic overview of relevant provisions (I.), the paper intends to address the question of the possibility and desirability of common or at least transparent standards for the interpretation of habitual residence provisions (III.) given their extreme diversity across the different legislative acts (II.).

I. Ubiquity of the concept in modern European family law acts

The habitual residence notion in European legislative acts in the field of family law has multiplied enormously in recent years. It serves as the primary or as an important criterion to establish jurisdiction and to determine the applicable law in the Maintenance Regulation 4/2009, in the Divorce Regulation 1259/2010, in the Draft Property of Spouses Regulation 2011, and – although not a European Act by origin – in the Hague Protocol of 2007. It thus dominates jurisdiction and

applicable law in divorce and similar proceedings, in the field of maintenance and in the prospective law of the property of spouses.

II. Great Diversity under the Roof of the Habitual Residence Principle

The habitual residence may be that of children, spouses or of other family members. The results of assuming or denying habitual residence differ depending on whether the provision opens a concurrent jurisdiction, broadens the range of laws capable of being chosen or whether it determines the applicable law in the absence of a choice of law. Specific problems are raised by the diverging interpretation standards for the Hague Protocol 2007 and European Union law. In detail, the habitual residence provisions are drafted with large differences.

III. Transparent Standards for Interpretation

It is debated to what extent common standards of the notion of habitual residence are feasible and/or desirable. There are many good arguments in favour of an approach that pays tribute to the provision's specific context. Recent ECJ case law may open the floor to numerous individual concepts of habitual residence. Certain factors are universally agreed upon and will apply in all contexts: The notion is subject to an autonomous interpretation on a case by case basis. Habitual residence can be understood as the actual centre of one's life composed of physical presence of a certain duration, integration into the social environment and the intention to reside.

But the details of those factors vary according to the specific context. Where recognising the existence of a habitual residence is in the interest of both parties, the notion can be handled more generously than elsewhere. The question of multiple habitual residences may be answered differently, as well as the question of alternating habitual residence. Where habitual residence has to be established for a fixed period of time or for a point in time in the far past, objective aspects might reasonably take the lead over subjective aspects. One might even consider whether a person can have differing habitual residences for different aspects of life.

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Protection Orders provided for by Articles 342 bis-ter, Italian Civil Code: Are they still valid when victims move across Europe?

Eva de Götzen

Measures to protect victims from violence already exist under the Italian national legal system.

According to Articles 342 bis-ter, Italian Civil Code, in case of violence, particularly domestic violence, stalking or violence against children, the victim can invoke a temporary and preventative protection order when their physical and/or psychological integrity or liberty is at serious risk. This measure is issued by a judicial authority, upon request of the person at risk, and it could be ordered on an ex parte basis without the person causing the risk being summoned to appear, particularly in case of urgency (“inaudita altera parte” procedures). In general, it consists of, for example, the obligation not to approach the protected person closer than a prescribed distance, or the obligation not to enter certain localities where the protected person resides or which they visit.

But what happens when the protected person travels or moves to another Member State?

Is the protection gained through a national protection order irremediably lost or is it still valid? Nowadays, these orders cease to apply when the victim moves to another country.

Thus, in order to ensure that victims of violence continue to benefit from protection measures against their offender even if they move across Europe, the EU Commission has proposed a Regulation to establish the arrangements for the mutual recognition of protection measures in civil matters (COM(2011)276). This proposal was aimed at completing another legal instrument on the mutual recognition of protection measures taken in criminal matters (EU Directive no.

2011/99 – EPO Directive). The Regulation was finally adopted on 6 June 2013. Consequently, the combination of the two abovementioned instruments is expected to cover the broadest possible range of protection measures for victims taken in any Member State.

All the aforementioned aspects serve to tackle a few themes concerning the Italian protection orders and their cross-border implications.

In the first place, due to the fact that the adopted EU Regulation does not deal with conflict of laws rules, an overview of the existing national connecting factors (provided for by Italian law no. 218/95), that could be devoted to establish the competent authority for dealing with such matters and the law applicable to a cross-border violence case of a civil nature, will be given and their current application, if available, will be analyzed.

Furthermore, the issue concerning the scope of the adopted EU Regulation will be addressed. In this regard, since the Regulation at issue does not cover protection measures taken in matrimonial matters and matters of parental responsibility, its applicability to the Italian protection orders could be disputed. Hence, the crucial question I will refer to is to assess whether the order provided by Articles 342 bis-ter, Italian Civil Code, due to its nature and to the competent authority to take the protection measures, could benefit from the mutual recognition between Member States. It is also important for the purpose of this paper to investigate whether the duration of the measure could affect the victim’s cross-border protection.

Finally, in the light of the above it shall be assessed whether the application of the adopted Regulation, aimed at protecting the weaker party, restricts the free movement of persons provided by the EU Treaty.

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Notion of “Marriage” under European and National Regulations – Polish approach

Anna Sapota

By adopting the Brussels II (and then Brussels II bis) regulation, the European Union has started to regulate family matters in private international law and international civil procedure. This step has been followed by implementing the Rome III regulation and now preparing the project of a matrimonial property regulation. This project has been prepared as a package with (i) the project of regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships and (ii) the explanatory note. All these documents use a notion of “marriage” but none of them defines this institution. The problem of definition was left to the Member States.

Fifty years ago, no-one would have asked about the notion of “marriage”, but nowadays this question has to be answered. This would be not so much a question about the formalities or age of spouses as about the fundamental question of their sex. This presentation seeks to discuss this question because even though Member States share the same values and traditions, the notion of “marriage” is not the same in all of them.

The question is how should a Polish court deal with the case of a Spanish same-sex marriage. Especially considering that the definition of “marriage” in Poland is grounded in constitutional provisions and does not allow same sex marriages. Should it treat the couple as married and apply the conflict-of-laws rules applicable for matrimonial property regimes or as a registered partnership and seek for some proper conflict-of-law rules because the Polish Act on Private International Law does not contain any regulation in this scope. Or, finally, should it invoke the public policy clause and refuse to apply foreign law. In all cases the Polish court may be surprised by the problem of qualifying the same-sex relationship and deciding on its property consequences.

Seeing the newly proposed regulations of the EU in wider perspective, it is necessary to ask if it is wise to regulate such a sensitive field as family law either on a private international law or material law level when the basic notions remain undefined. As we can see, common history and similar Christian origins are not a firm enough basis for the introduction of common regulation in all matters.

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WORKSHOP 2:

TRANSNATIONAL FAMILIES: ACROSS NATIONS AND CULTURES

Chair: Jane Mair

Family Life and EU Citizenship: The discovery of the substance of the EU citizen's rights and its genuine enjoyment

Katharina Kaesling

European Union law increasingly influences family life in Europe. Particularly with regard to third country nationals and their family life with EU citizens, a remarkable body of case-law has emerged.

It will be argued that the CJEU's “genuine enjoyment”-test for the compatibility of national measures with Art. 20 TFEU has to be interpreted with particular regard to the right to family life, thus creating a sensible demarcation line between EU and Member States' competence in the area of family reunification.

In 2011, the Grand Chamber found that Mr. Ruiz Zambrano, the Colombian father of Belgian children, who had never left their home state, had a right to reside and work in Belgium on the basis of Art. 20 TFEU, as the EU citizenship “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”. It thus isolated the application of EU law from

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the presence of a cross-border element and focussed on the severity of the Member State's interference instead. Yet, the Court's third chamber denied the Jamaican husband of British and Irish national Mrs. McCarthy and the third-country nationals, in *Dereci et al.*, such rights. What do these judgements imply about the validity of the new formula and the definition of its key terms?

So far, the paramount criterion for the deprivation of the genuine enjoyment of the substance of the EU citizen's rights appears to be whether the Union citizen has to, in fact, leave EU territory as a consequence of the Member State's measure. The CJEU thus adopts a functional approach, focussing on the effectiveness of Union citizenship. However, it did not find constraints susceptible to drive EU citizens outside the territory in cases where their close relatives are denied the right to live with them.

It will be suggested that Member States' measures, which eliminate all prospects of family life for their nationals, should be qualified as denial of the genuine enjoyment of the substance of the EU citizen's rights, as they effectively render the right to family life an empty shell. Notwithstanding the limitation of the fundamental rights' impact to matters within the scope of EU law, the substance of the rights flowing from the EU citizen status established in Art. 20 TFEU has to be defined in consideration of the right to family life as set out in Art. 7 CFREU and Art. 8 ECHR. By consistently employing the Ruiz Zambrano-formula in this light, the effects of reverse discrimination to the detriment of static EU citizens would be significantly mitigated in the area of family reunification.

National courts are best situated to assess whether the national measure amounts to the denial of the genuine enjoyment of the EU citizenship rights' substance in the particular circumstances, but a defragmentation of the rights derived from EU citizenship has to be avoided by developing clear guidelines at EU level.

Private and Family life vs. Morals and Tradition in the Case-law of the ECHR

Geoffrey Willems

For approximately thirty years now, the ECHR has constantly been reshaping the relations between individuals, family and the State. On the one hand, the autonomous concepts of private life and family life have been given a totally unexpected width. On the other hand, the obligations imposed on States in this ever-enlarging field have also become heavier.

Birth, death, procreation, origins, sexuality, disability, conjugal and parental relationships, inheritance, sexual identity, name, marriage and parenthood are all included in the scope of Article 8, which requires States not only to abstain from undue interferences, but also to protect individuals from each other and to adopt positive measures designed to ensure the effectivity of rights.

Simultaneously, the pattern of justifications imposed on States regarding actions and abstentions in the ambit of personal and family life also seems to evolve. At first sight, subjective justifications based on morals (see e.g. *K.A. and A.D. v. Belgium* and *B. and L. v. United-Kingdom*) or tradition (see *Konstantin Markin v. Russia*) may seem much less efficient today than they used to be in the early jurisprudence of the Court.

Accordingly, States should rely on value-free justifications to account for limitations to private and family life. They may for instance put forward objective public interests, like the protection of economic well-being, health or security (see e.g. *Andrle v. Czech Republic*). But the most efficient way for a State to repeal an individual claim is to argue that the litigious restriction to individual rights is aimed at the protection of the rights and freedoms of others (*K.A. and A.D. v. Belgium*).

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As a matter of principle, morals and tradition, which are intrinsically bound to personal and family law in many European States, could thus *prima facie* appear to be quite weak justifications before the Court. But the careful examination of the case law suggests that things are a lot more complex.

First, three recent Strasbourg rulings show that morals can have significant weight in the proportionality balance, not only when the beginning of life is at stake (A., B. and C. v. Ireland and S.H. and others v. Austria), but also when sexual relationships are concerned (Stübing v. Germany). Second, while the judgment delivered in February 2013 by the Court in the X. and others v. Austria case can be seen as a refusal by the Court to take into account the traditional understanding of parenthood prevailing in Austria, the Gas and Dubois and Schalk and Kopf judgments, delivered a few months earlier ascribe considerable weight to the specificity of traditional marriage.

The paper focuses on these elliptic apparitions of subjective values like morals and traditions in the European Court's case-law in personal and family law. It attempts to connect this issue with the principle of subsidiarity and to enunciate some explanatory elements to the considered hesitations connected to the respect for life and the protection of vulnerable people.

Real-life International Family Law – Belgian empirical research on cross-border family law

Jinske Verhellen

This paper will present recent empirical research carried out in Belgium in matters concerning cross-border family law. The main research question was whether the Belgian Code of Private International Law of 2004 (PIL Code) is a sufficiently adequate instrument to deal with “real-life” international family law matters. I examined whether or not the objectives set out by the Belgian legislator have been achieved in practice. For this study I relied on three empirical sources:

- 1) The database of the Centre for Private International Law (a PIL helpdesk embedded in the non-profit organisation Kruispunt Migratie en Integratie), which contains 3369 files (2006-2010) with questions from judges, social workers, local authorities, individuals and their lawyers and the advice given by the Centre's lawyers;
- 2) In-depth interviews with judges specialized in cross-border family cases;
- 3) 656 published and unpublished court decisions.

This material offered a clear picture of how courts and (local) authorities apply the PIL rules. My field-test research revealed several discrepancies between the legislative ambitions and the practice of courts and administrations, some of which can be attributed to the context within which PIL functions. At the national level for instance, migration policy exerts considerable pressure on international family law.

The research revealed the nexus between private international law and migration law. Some migration procedures have a far-reaching impact on family relations, as they serve restrictive migration policies rather than the ambition of achieving cross-border harmony in family matters. Granting the foreign spouse of a Belgian man a visa that permits a family reunification for example, implies a stance on the marriage this couple concluded abroad. Nowadays, private international law and migration law take a different, even opposing stand I would describe as “cross-border openness” v. “border-check reticence”. The research demonstrates a true instrumentalisation of private international law by migration (law) policies, leading, amongst other things, to all kinds of limping family law relationships (limping names, limping marriages and divorces, limping fatherhoods, etc.). The presentation will elaborate on these limping legal relationships, also in the light of the EU evolutions on the free movement of public documents.

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Abstracts of Conference Papers

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Furthermore, my research showed how little use has been made of the possibility the PIL Code offers to spouses to choose the applicable law in divorce cases even though a well-considered choice can help avoid recognition problems in their country of origin. The research revealed that spouses often have other concerns than to choose the applicable law. This paper will investigate some of those “other” recurring concerns and will treat the research results in the light of the application of the Rome III Regulation for which party autonomy is the starting point.

I will discuss these and other research findings using several specific cases from courts and administrations.

WORKSHOP 3:

THE (UN-)WANTED CHILD

Chair: Velina Todorova

Anonymous Relinquishment and Baby-Boxes – Life-saving mechanisms or a violation of human rights?

Claire Fenton-Glynn

In the last 15 years, there has been an increasing trend towards the creation of “baby boxes” throughout Europe, which allow parents to relinquish their child to the care of the state anonymously. Boxes have now been established in Austria, Belgium, Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia and Switzerland, with more countries set to join this list in 2013.

This paper will argue that such mechanisms for anonymous relinquishment violate the right of the child to know and be cared for by his or her parents where possible, and undermines the proper functioning of the child welfare system. As has been seen in several jurisdictions, it can act as a fast-track into adoption, without

undertaking the proper examination necessary to make a fully informed decision concerning the best available alternative care for the child. In addition, it prevents any opportunity for the child to later gain access to information on his or her origins, which is in violation of the UN Convention on the Rights of the Child.

The paper will further contend that anonymous relinquishment violates the rights of fathers, allowing the mother to unilaterally prevent a man from establishing paternity or caring for the child. The contrasting approaches of France and Spain will be examined in this context: while the former considers such deprivation of rights as legitimate to protect the rights of mothers, the latter has deemed the practice unconstitutional.

Finally, this paper will suggest that rather than promoting the rights of the birth mother, as has been extensively argued, the practice of anonymous relinquishment in fact puts vulnerable women in an even more precarious position. As will be shown by various examples from European jurisdictions, it fails to address the root causes of child abandonment, and does not provide the mother with appropriate support and assistance to make an informed choice. As such, the paper will argue that anonymous relinquishment should not be seen as a balancing process between the rights of the mother, father and child, but as a practice that jeopardises the rights of all parties involved.

Cross-border Recognition of Surrogacy

Martin Engel

The proposed paper deals with cross-border recognition of surrogate parenting. The current legal situation as regards surrogacy is quite diverse – throughout the world but also within the European Union. Countries like India, Ukraine, the United Kingdom, and Greece have legalized surrogate motherhood under certain conditions, whereas other legislators, like in Spain or Germany, have taken a tough stance on this issue and widely forbidden surrogate parenting.

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This kind of legal diversity has recently made a lot of people engage in so-called “procreative tourism”: They commission women in one of the more liberal countries to carry a child for them, and once the baby is born, they try to take it to their home country, thereby evading the surrogacy ban that prevents them from entrusting a surrogate mother at home. The authorities in their home country then struggle with a coherent approach on how to treat those citizens who went abroad to have a baby.

Often, the intended parents’ home countries attempt to factually disincentivize surrogacies abroad by refusing to issue a passport for the newborn child, thus preventing the child from entering its territory. The calculus behind this policy is not meant to disadvantage the child – however, in fact it does so. At the same time, authorities in those countries and their embassies abroad perceive this legal situation as being highly dissatisfying because they are advised to prevent similar cases in the future by denying the child and – indirectly – the intended parents the right to enter the country.

A number of cases during the past years – inter alia from France, Spain, and Belgium – show that, confronted with this matter, courts are afraid to set precedents and at the same time tend to choose non-bureaucratic solutions. Eventually, child and intended parents usually end up in the parents’ home country. However, the baby’s citizenship and the intended parents’ acknowledgment as being its legal parents remains under dispute.

The paper proposed here deals with the question which consequences the missing recognition of (intended) parenthood bears for a young family with a child born by a surrogate mother. It furthermore covers the problem of such a couple splitting up and arguing over parental custody of the child. The paper eventually aims at developing a meaningful approach on how the law might handle surrogacy cases involving children born abroad without disadvantaging the child.

Re-thinking Family Law: A new legal paradigm for stepfamilies?

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Angela D'Angelo

The escalating number of separations and divorces in modern societies, generates a growing number of stepfamilies, where children can develop a substantial relationship with the stepparent who may play the role of a “parental figure”, in addition to biological/legal parents. This form of social parenting is rising in significance. However, traditional family law has continued to privilege the link between blood tie and the legal status of parents, which solely entitles an adult to enjoy all the related rights and benefits, while requiring them to carry out all duties and responsibilities towards the child.

The existing dichotomy between the stepparent’s “social role” and their “legal status” contributes to complicating the life of these new families in different ways. For instance, due to the absence of formally recognized relationships between minors and their parent’s partner/spouse, stepparents may encounter many obstacles in assisting stepchildren in many daily tasks, especially when they have to deal with public authorities. Moreover, although stepbrothers and/or stepsisters live together in the same household, they may be discriminated by statutory provisions that recognize, for instance, some family benefits in connection with the “parent” they do not have in common.

The matter becomes more complex in case of stepfamily’s breakdown, when the legal irrelevance of the “social link” between some family members makes very difficult to protect their interests before a court.

A number of European national legislators and courts have elaborated innovative legal solutions aimed to balance the role of the biological/legal parents with the role of the stepparent actually involved in childcare.

Our comparative analysis identifies three different legal approaches to the issues arising from stepfamilies:

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- 1) An “exclusionary-model approach”, where there is no way to recognise the legal relevance of the stepparents as “additional parents”. In these countries, the new relationship may acquire a legal status only in case of full exclusion of one legal parent from parental authority.
- 2) A “replacment-model approach”, where informal agreements between legal parents may – totally or partially – delegate parental rights and responsibilities to a third person (in particular to the stepparent) and, in some circumstances, be upheld by courts.
- 3) An “inclusive-model approach”, where a statutory provision can entrust parental responsibility to a third person (in particular the stepparent), without depriving legal parents of their own responsibility. Here, more than two adults legally share parental rights, duties and responsibilities.

In spite of the relevance of the ad hoc solutions adopted so far, the legal tools able to bridge current family law with the social reality of stepfamilies are still far from perfect.

Building on the analysis of the various approaches that have been experimented with, this paper argues for the need of a conceptual reform of family law and illustrates its constitutive characteristics as an entirely new paradigm where stepfamilies are considered equal to a “regular” family unit in all the phases and transitions that may occur in life.

WORKSHOP 4:

RELATIONSHIP BREAKUP: WINNERS AND LOSERS?

Chair: Ingrid Lund-Andersen

Maintenance between Former Spouses and Gender Equality

Marketa Rihova

The laws of most European Union states and the CEFL Principles contain regulations regarding maintenance between former spouses.

In my research, based especially on German and Czech law, I seek to show that the background of many maintenance regulations is incompatible with gender equality and I will draft some principles that would make maintenance more equitable.

First, the legal justification of the currently applicable regulations on maintenance in Czech and German law or in the CEFL Principles is questionable. A divorce terminates all legal bindings between the former spouses. A justification for the right of maintenance is, therefore, necessary. In Germany, the theory of “post-marital solidarity” between former spouses was developed to justify maintenance payments. However, maintenance payments under this theory reflect traditional gender role divisions. The theory supposes a dependant wife who is taking care of children and the household and, in the case of a divorce, counting on financial support for her lifetime, except in the situation when she maintains a (sexual) relationship with another man; in that case, she is, in fact, not worthy of receiving support and, in many cases, loses the claim.

Second, maintenance between former spouses has been received only by a minority of those entitled, mostly women. In most cases, it is not even claimed and, if claimed, actual payments are rather rare. The acceptance of this claim by the (mostly male) debtors is very low. That the (mostly female) creditors do not

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raise the issue of the claim much also demonstrates that acceptance in this group is also not high.

Third, by the terms of current German and Czech law, and even of the CEFL Principles, such maintenance leads to the reproduction of traditional gender roles because it gives the woman the impression that, in the case of a divorce, she will have a claim and receive maintenance. However, this situation is, in fact, largely imaginary and supports, indirectly, the woman's decision to depend on the man during marriage.

Such maintenance payments need to be ended. Instead of this claim, there should be a claim for a divorced or unmarried person who is taking care of minor children. This maintenance should be limited by the age of the child(ren) to about 3 years. Furthermore, it should be clearly stated, by law, that the duties of married men and women within a marriage, such as taking care of the household and children and earning the family maintenance, are generally equal. Finally, the law should deal with cases where only one of the partners suffered some disadvantage in his/her professional career in favor of the family and the other partner's career. The advantages and disadvantages of the spouses should be compared and compensated with a lump sum, as a special claim or within the claim for division of the marriage property. These provisions would encourage women to care for their own financial independence and better meet the principles of gender equality.

The Swedish Cohabitees Act in the Society of Today

Kajsa Walleng

Unmarried cohabitation has increased considerably in Sweden during the last decades, as in many other European countries. The question how the increasing number of cohabiting couples should be dealt with from a legal point of view has been up for discussion in several European countries, resulting in a variety

of legal solutions. Sweden is the country in Europe with the longest experience with a specific act on unmarried cohabitation. Cohabitation without marriage was first regulated in Swedish statutory law in 1973. Division of property rules were introduced in 1987. However, this does not mean that the Swedish act functions optimally today. The topic of this paper is the Swedish Cohabitees Act (2003:376) and the aim is to discuss how it functions – and how it does not function – in the Swedish society of today.

The legal effects of unmarried cohabitation are the same as 25 years ago when property rules were first introduced. The law provides a minimum level of protection for a financially vulnerable cohabitee upon dissolution of a relationship. Cohabitees in need of more financial protection are encouraged, in the preparatory works to the Cohabitees Act, to protect each other by drawing up contracts, wills or life insurance.

In my research I have carried out an empirical study to investigate how the view of cohabitees and the purpose with the Cohabitees Act correspond with today's reality. The study shows i.a. that unmarried cohabitation is no longer just a preliminary stage to marriage, but a fully accepted cohabitation form. Many cohabitee relationships are long-lasting and the economic intertwinement between cohabitees is significant. Half of all cohabitees live with minors, whereof more than 80 % have common children. Even though cohabitees want more legal protection – both in case of separation and death – contracts and wills seldom exist. This depends mainly on poor knowledge of the law, that cohabitees do not discuss this type of issue with each other and that they simply are bad at drawing up contracts.

On the whole, my research shows that unmarried cohabitation is a complex legal area, mainly because of the diversity of couples as cohabitees – ranging from young people that just moved together to cohabitees with common children to people who move in together in older age. On the one hand, the majority of

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cohabiting couples are not satisfied with the legal effects that the Cohabitees Act provides; on the other hand, couples trying to give each other more legal protection – tailored to their specific needs in the event of dissolution of the cohabitation – are few. During my presentation, I intend to raise questions such as: How should unmarried cohabitation be dealt with legally? How can we take into account the diversity of cohabiting couples that exists? Who is responsible for the financial protection for unmarried cohabitees – the society or the individual?

Even though I deal mainly with Sweden, the topic how to legally regulate unmarried cohabitation concerns most European countries.

Collaborative Practice: An interdisciplinary approach to the resolution of conflict in family law matters

Connie Healy

Divorce has been described as encompassing

“...dreams unfilled, or dreams that have run their course. It may be profound grief and it may be bittersweet freedom. It is about families restructuring: financially, emotionally and practically. It is both conflict and resolution. It is pain and it is relief.”

With such a diverse description, capturing some of the many emotions experienced by parties when going through a relationship breakdown, it is clear that a traditional adversarial, one model fits all approach to the resolution of conflict in family law matters may not be sufficient to meet the needs of all separating couples.

Collaborative law/collaborative practice is an alternative method of dispute resolution used mainly in family law matters. Originating in the US in the early 1990s, this innovative process has now spread worldwide and provides separating parties with a more “family friendly” and holistic means of resolving conflict.

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The parties, rather than taking the matter before the court, agree that they will negotiate settlement through a series of four-way meetings, each party with their own lawyer present at all times. Hand in hand with this focus on an amicable settlement is a recognition that separation does not just involve the legal, property or financial issues but that it is also an emotional period of transition for the separating couple and their children. The interdisciplinary nature of the process provides a framework for the separating couple to engage counsellors to assist with this transition. In addition, a child specialist may also be engaged to speak to the children of the relationship in a non-threatening way, thus addressing the needs of the children and ensuring that their voices are heard in accordance with their rights under Article 12 of the United Nations Convention on the Rights of the Child.

While research has been carried out into the process in the US, Canada and England/ Wales, this paper will present the preliminary findings of the first known empirical research into collaborative practice in Ireland, contextualising the Irish position within the international framework. Specifically, the paper, which is based on part of a wider research project undertaken for my Ph.D. research, presents the views of clients who used the collaborative process to resolve the conflict arising out of their relationship breakdown and also the views of collaborative lawyers, both ascertained through in depth semi-structured interviews.

In addition, the paper will address the criticisms of the process raised by the mainstream legal profession. It will conclude with an assessment of the cultural issues and nuances that arise when such a process is adopted from another jurisdiction and the changes that need to be made to ensure that it meets the needs of those who choose to use it.

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TRANSNATIONAL FAMILIES AND NEW CONCEPTS OF PARENTAGE

Chair: Katharina Boele-Woelki

Transnational Family Situations in Europe seen through the Lens of the Moroccan Family Law Code

Marie-Claire Foblets

The Right of the Child to Parents

Anna Singer

Parenthood is no longer what it once was. The view on parenthood has changed during the last decades. Initially being considered as a position given by nature, it is in our time more often seen as a role that can be created, varied and negotiated. The definition of a parent has changed. Several factors lie behind this development.

The family as a societal phenomenon transforms over the years. Today, the nuclear family based on the married heterosexual couple is no longer the sole model. We have seen an increase in the number of reconstituted, single parent and rainbow families. Children can have many parents during childhood.

Different techniques for assisted reproduction have also been developed, helping many who in the past could not become genetic and biological parents. Sperm- and egg donation, embryo adoption and surrogate motherhood are just a few examples of methods currently used to create parents.

It has to a large extent been the right to become a parent that has been in the focus of the general discussion, legislation and practise. Many want to become parents and be recognized as parents. Children in our time are seen as valuable and many are seeking legal recognition as a parent, not just those who cannot have children of their own, but also those who have biological children that they

are not living with and those who are not biological parents but social parents. The right to become and to be recognized as a parent is increasingly defined as a human right.

The child's right to parents on the other hand has not received the same attention. This right of the child is fundamental but as such very seldom explicitly stated in law. Considering the developments, there might be reason to reconsider this.

To meet the child's needs and interests – the interests of the child – has long been the loadstar of lawmaking and law enforcement in matters concerning children. It is in most situations the child's parents who in the first place make decisions that affect children and who are obliged to ensure that the child's different needs and interests are protected and met. From a child's point of view, it is therefore crucial that legal parenthood is established in order to make it possible to give someone the responsibility to meet the child's interests. The child has an unconditional right to parents. But who are they, why and how?

In this paper the different ways to protect the child's right to parents in different situation are explored. Several European legislations are used as examples. How are the interests of the child defined and how are they protected by law when it comes to the establishment of legal parenthood.

Contracting on Parentage

Christine Budzikiewicz

As a consequence of medical progress and social changes, ever more frequently legal, genetic, and social parentage do no longer coincide. The discrepancy of genetic and legal paternity is a notorious phenomenon ("pater semper incertus"). However, modern reproductive medicine increases the number of children genetically not related to one or even to both legal parents. Also to be considered are new forms of family life where responsibility for a child is assumed by persons not (legally) related to it.

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This development contradicts the traditional understanding of parentage as a status relationship dependent on descent. The law of parentage still focuses mainly on the genetic relationship. Accordingly, every child can have only one legal mother and one legal father. The law provides a determined and limited number of elements to be considered for the assignment of parentage. The intent of the involved persons is of importance only insofar as the constitution of parentage requires specific declarations. A free disposition of the status by agreement is at least excluded by German law; a comparative survey in Europe repeats this result.

However, the needs of the involved persons are not always fulfilled by the traditional understanding of parentage. In practice, people increasingly attempt to regulate parentage – or at least specific aspects of it – by contractual arrangements. Such agreements flank especially medically assisted forms of reproduction. Thus, there exist heterologous insemination agreements according to which the genetically not related would-be father is to take over the legal paternity. In surrogacy agreements a commitment of the surrogate mother to surrender the child is regularly stipulated, as well as a commitment of the commissioning parents to accept it. However, even beyond the realm of modern reproductive medicine, the legality and desirability of agreements on central aspects of parentage is discussed. In this context, not only maintenance agreements may be considered, but also the derivative acquisition of parental responsibility.

Except for maintenance agreements, the law does not favour such agreements. This is not only true for status dispositions as such, but also for contractual obligations incurred with the intent to establish facts that are destined by law to institute or deprive of parentage. However, a change of mind can be progressively observed. In a reaction to social developments, family law legislation increasingly recognises contractual assumptions of responsibility. For example, the recent Family Law Act of British Columbia provides the possibility to establish

legal parentage of more than two persons on the basis of a written agreement in cases where assisted reproduction has been used. In English law, a step parent can acquire parental responsibility on the basis of a Parental Responsibility Agreement.

These recent developments show that traditional forms of establishing parentage do no longer adequately reflect the present day diversity of family life. The extension of the contractual freedom of the parties is increasingly seen as a means to meet the requirements of the different forms of modern parentage. However, this development is not without risks: the intentions of the contracting parties and the interests of the child do not necessarily coincide. The law is challenged to reconcile the desire for freedom of contract with the best interest of the child.

CLOSING REMARKS

Family Law as Culture

Werner Gephart

This contribution is inspired by Emile Durkheim's methodological insight of searching for an access to the forms of familial social life in family law (cf. the visualization of Emile Durkheim's family on the invitation flyer). According to the "Introduction à la sociologie de la famille", the object is: "En résumé ce que nous devons chercher à reconstituer c'est la structure interne de la famille qui seule présente un intérêt scientifique". Durkheim only acknowledges one methodological way of conducting such an internal structural analysis: "Dans ces manières d'agir consolidées par l'usage qu'on appelle les coutumes, le droit, les mœurs". The secret to the structure of families is thus to be found wherever the normative aspects of family life are consolidated – a perspective that therefore goes beyond the law. But wherein lies the role of the cultural embedment of normativity surrounding family?

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From the perspective of cultural sociology, we can observe two intersecting orders: On the one hand, there are the forms of familial life that carry symbolic meaning and possess ritual traits in daily life, exhibit a plurality of multiple forms of organization and are subject to a plural normative order. Legal validity, on the other hand, is derived from the diversity of European legal cultures. While carrying a strong national imprint, these legal cultures nonetheless build on transnational experiences and are normatively geared towards Europeanness. Due to the fundamental importance of family for the shaping of societies, the interpretation of what constitutes the “Kulturbedeutung” (“cultural meaning”) of family and which form it should take gives rise to conflicts of validity cultures, e.g. with conceptions of family informed by Islam.

How family law mediates between these conceptions of validity speaks volumes about how the familial cycle of property and persons is designed in a Europe that not only considers itself an economic, cultural and value community and a political construct, but also a historically constituted “Rechtsgemeinschaft” (legal community).

Family Law and Culture in Europe

Developments, Challenges and Opportunities



5th Conference

of the Commission on

European Family Law

rumberggrafikbonn

Images: Werner Gephart

**The Conference will
take place at the
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