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Family Law Update

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Legal Practice Division

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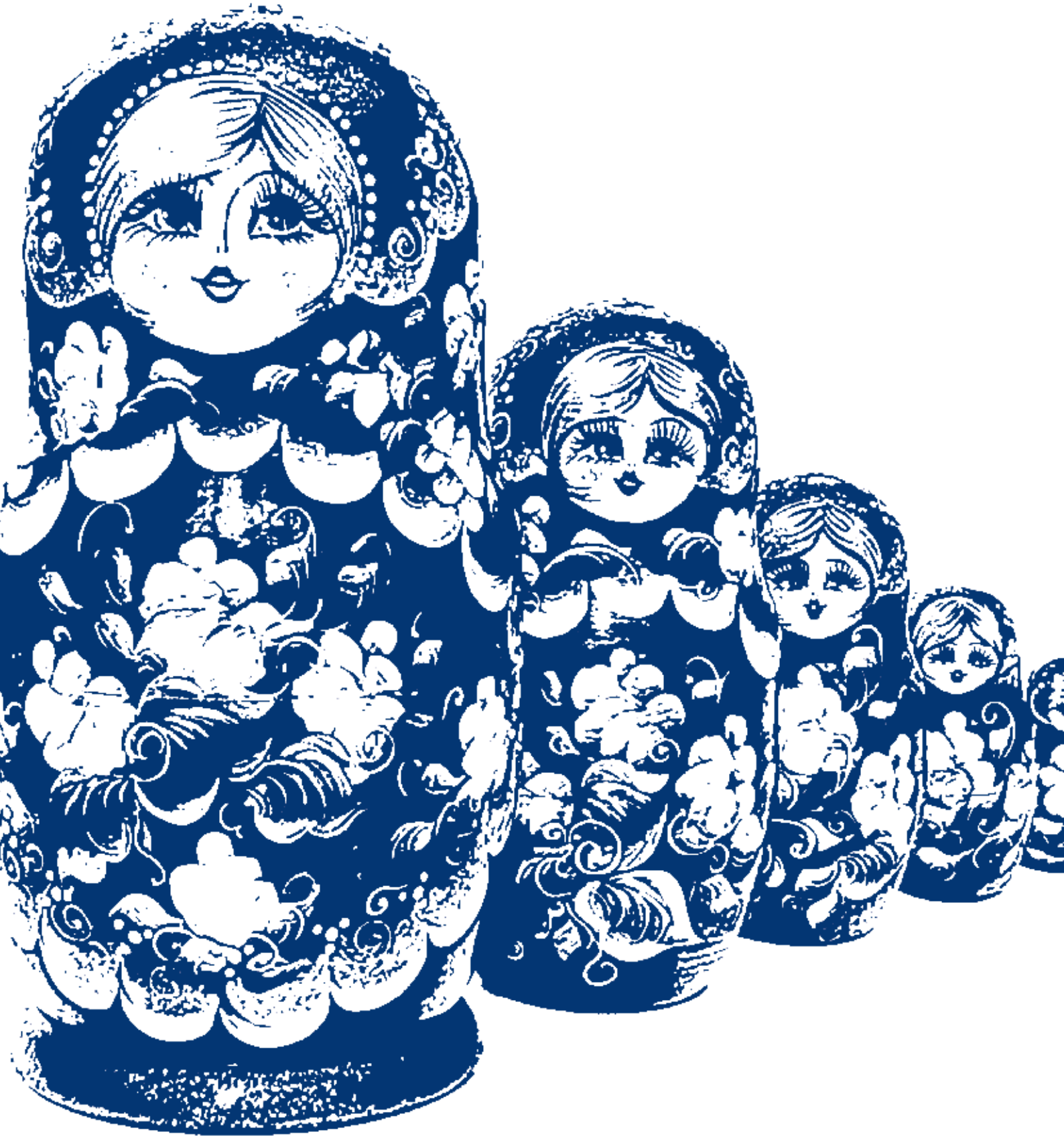

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This update is intended to provide general information regarding recent developments in family law. The views expressed are not necessarily those of the International Bar Association.

From the Chair

Zenobia du Toit
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We are delighted to present our Family Law Commitee Update on topics of developing family law to all our members.

Please be aware that, through our Website Officer Ruwani Dantanarayana (see contact details on p 6), we are compiling a history of interesting international case law in family law matters. Therefore, if there is a case in your division that you think would be of interest to family law practitioners, we would be delighted if you would pass it on to Ruwani, who will be posting a selection of these cases.

We look forward to seeing you in Rome for the 2018 IBA Annual Conference. We will be presenting on, *inter alia*, the effect of the electronic era and IT on family law, and the pursuit of proprietary claims internationally.

Please let us know whether there are topics of special interest you would like us to address in future.

We are envisaging a special programme during the course of the next year to promote the Hague Conventions as it applies to family law and also doing a special session on the development internationally of Muslim law.

Best wishes for the new year.

Regards,

Zenobia du Toit

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From the Editor

It gives me immense pleasure yet again to pen down this message for the IBA Family Law Committee Update as part of my duty as Newsletter Editor, a responsibility I enjoy immensely. One of the prime reasons I enjoy the role so much is on account of the connections it opens up with the global legal fraternity, leaving me intimately connected with the advancement and promotion of cross-border international family law jurisprudence.

The Family Law Committee very generously acknowledges the highly analytical updates and contributions from our loyal contributors from major jurisdictions across the globe. This makes the publication a very powerful medium and a snapshot of developments in the arena of international family law: a very authentic source primarily comprising leading international family law lawyers and renowned academics.

Some important developments have attracted a huge amount of attention in international family law issues as this year comes to a close. The international events in this area of law have been primarily devoted to child abduction/child removal *qua* the 1980 Hague Convention on Child Abduction and, of course, surrogacy.

The Hague Experts meeting on 12 June 2017 at the University of Westminster, London, focused intently on the interplay and interaction of domestic violence *qua* the provisions of the 1980 Hague Convention. The brilliant efforts of Professor Marilyn Freeman of the University of Westminster and the Hague Conference on Private International Law (HCCH) on the topic of domestic/family violence and the 1980 Child Abduction Convention resulted in the culmination of a day-long, intense deliberation with 57 experts from all over the world. The Honourable Mr Justice AK Sikri, a Senior Judge of the Supreme Court of India, and Salla Saastamoinen, Director for Civil and Commercial Justice from the Office of the Directorate-General for Justice and Consumers, European Commission, opened the meeting with remarks.

The highlight of the deliberations was Lord Justice Thorpe's tribute to Chief Justice Diana Bryant at the magnificent evening reception hosted at the University. It was such a powerful speech and beautifully woven. Each word was carefully chosen and loaded with meaning and emotion. It was a very moving tribute. Lord Justice Thorpe, on my asking, very kindly furnished his speech for our Family Law Committee Update (see p 7) and we are very grateful to him for doing so.

The second leading international event in the arena of international family law was the 2017 Annual Meeting of the International Academy of Family Lawyers held in Reykjavik, Iceland, from 15–19 September. The cornerstone of international child protection law dominated the bulk of the educational programme. It emanated from the multi-jurisdictional deliberations that the needs of children are the axis of family law. The unique country hosting the conference immensely added to the charm of the event.

Finally, there were thought-provoking and meaningful family law sessions on contemporaneous live wire issues at the IBA Annual Conference held in Sydney, Australia, from 8–13 October under the guidance of our hugely respected Chair, Zenobia du Toit. I would be failing in my duty if I did not acknowledge all the constant hard work Zenobia performed with so much passion and commitment, which hugely motivates the Officers of the Family Law Committee, all of whom have very busy schedules. This backend think tank is constantly busy crystal gazing into the future and planning wonderful events for IBA conferences and collaborative work with the IBA, which take shape as platforms of exchange of ideas, thoughts and perspectives looking at the larger canvas of family law issues with significant cross-border ramifications.

I must now stop with best wishes for the much-awaited festive season, also in the fond hope that our valued contributors and any first-time writers will revert to us with a contribution in the coming year.

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Tribute to Chief Justice Diana Bryant

Lord Justice Thorpe's Tribute to Chief Justice Diana Bryant on the occasion of the 2017 International Lecture arranged by Professor Freeman at Westminster University on 12 June 2017.

Diana was appointed Chief Justice of the Family Court of Australia in 2004. Shortly after, I was appointed Head of International Family Justice for England and Wales. I had the pleasure of working with her in that field for almost a decade.

The community of judges representing their respective jurisdictions is close-knit. We frequently need to communicate and, the more we communicate, the more inter-reliant we become. Thus, we were all impressed by Diana's style of leadership. There was no bombast, no self-importance, no vanity, none of the tricks of advocacy. Her interventions were always quiet but firm. She was always heard with interest and respect.

This style of leadership, in turn, reflects her personality. She is elegant, feminine, authoritative but always open to debate and ready to hear another point of view. She is a shrewd judge of what is achievable and of the surest path to the achievable goal.

I have worked with her on innumerable occasions and in many different situations. I have seen her sitting in her own courts in Melbourne and Sydney. I have seen her in The Hague at Special Commissions and at meetings of Expert Advisory Groups. I have seen her at lectures and conferences. I have seen her at the many hospitality gatherings fringing these events when her ease of manner and interest in others has won her so many friends.

During her years as Chief Justice, the Anglo-Australian alliance in international family justice has never been stronger or more productive. She has steadfastly maintained the importance of judicial activism and the expansion of the role of The Hague International Judicial Network. She has supported the standing of international family judges, particularly in smaller jurisdictions, through the Association of International Family Judges, which she co-chairs. The creation of the Commonwealth Judicial Conference would not have been possible without her support, a creation that assumes added importance as the United Kingdom loosens its ties with Europe.

I am grateful to Marilyn Freeman for giving me this opportunity to say thank you to Diana for all the kindness that she has shown me over the years and to express our appreciation and admiration for all that she has done for international family justice. She might have chosen Australia but she has always given high priority to the needs of families and children caught up in transnational proceedings.

Compulsory mediation in the civil and family courts: opportunity or threat?

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The Academic Committee of the Civil Mediation Council (CMC)[1] chose the topic 'Compulsory mediation in the civil and family courts: opportunity or threat?' for its first thematic conference, which was shared jointly with the Family Mediation Council (FMC).[2] At first sight, the topic is a curious choice. There has been so much background 'noise' about legal aid cuts[3] and emphasis on their impact on those who cannot afford access to the courts that seemingly there has been no time or opportunity for serious consideration of whether this is the right question.

MIAMs and compulsion to mediate

It would appear that the CMC/FMC conference was intended to explore mediation information and assessment meetings (MIAMs)[4] within the process of family mediation. These meetings seem to be understood – or, in fact, misunderstood – as making mediation 'compulsory' in most family cases. In reality, there is no compulsion at all to participate, let alone to achieve settlement, in such family cases. Indeed, the concept of 'compulsory mediation', even in existing family MIAMs, is a complete misnomer. Attendance of potential litigants in the Family Court at a MIAM, which also assesses whether a case could be settled out of court, is pursuant to a rule of the FPR 2010,[5] which merely regulates procedure in family cases that are started in that court. There is no question that there should be any compulsion to settle the dispute through mediation, or indeed by any other dispute resolution method. A party may even decline to attend a MIAM, in which case there is no obligation on the other party to do so since, as in the case of any essentially interactive two-handed activity, it obviously takes two to mediate. In the case of an aborted meeting, the mediator then signs a form to indicate that mediation is not suitable for the particular dispute, which permits the potential claimant to initiate proceedings.

Clearly, 'compulsory mediation' is an oxymoron. Compulsory settlement, were it to be introduced, would be completely contrary to the entire ethos of mediation, since mediation is a voluntary and consensual activity. This we expressly tell parties who come to us for mediation – at the point where we formally 'set the table' for their initial plenary meeting – emphasising that, even having commenced the process, they can still leave at any time if (sadly) they prefer the court route. However, in 17 years of a variety of successfully mediated cases, I have only ever had a party leaving on one occasion, though some might occasionally want to have a chat about whether they want to participate. Thus, family MIAMs are neither a denial of access to justice nor any form of compulsion, but rather an automatic referral to a non-court dispute resolution method that is part of the overall framework for appropriate family dispute resolution provided by the Family Court. Similar systems are successful in the European Union (Italy) and North America (Canada), where local clients have simply been attracted by potential for facilitated settlements.

Therefore, it seems that, in debating whether there could be compulsory mediation, we are agonising over a myth because, so far, no one has suggested that settlement is compulsory. Even in MIAMs, family litigants cannot be compelled to attend against their will. Recognition that there are disputes where mere attendance would be inappropriate has led to exemptions, for example, in a public law child protection case or where there has been evidence of domestic violence.

However, there is now both a potential threat and an interesting opportunity in the latest plans for the radical reform of civil and family justice, as set out in the recent Briggs reports.[6] The plans now indicate a severe reduction in the role of both the judiciary and the volume of court hearings currently taking place. This is set to occur within the relatively short period of the next three to five years, to 2020 and up to 2022.

These proposals certainly leave room for

debate since it seems that, while dramatic in potential impact, they have neither been thoroughly thought through in practical terms nor sufficiently detailed or analysed. Thus, at present, they offer both threats and opportunity. They are naturally influenced by, and depend heavily on, Richard Susskind's digital development theory, set out in his groundbreaking publications, *Tomorrow's Lawyers: An Introduction to Your Future*[7] and *The End of Lawyers: Rethinking the Future of Legal Services.*[8]

The principal opportunity – one of many apparent for professional mediators in these modernisation plans – is the proposed digital court. Most potential participants have nothing against the online court as such, or online mediation for that matter, which many creative mediators make their specialism. Much work on digital courts already exists, for example, Roger Smith OBE's report, *Digital Delivery of Legal Services to People on Low Incomes.*[9] However, there is concern about addressing both IT access and IT proficiency in this constituency, including some problems associated with both elderly age groups and people poorer than those recently identified as 'just about managing'.

The principal threat is the potential Briggs' implementation. Some of the most creative ideas were honed in the 2016 Final Report, which omitted the wilder ones in the Interim Report of December 2015, written when Briggs LJ was deputy head of civil justice. There is, however, still apparently a plan to reduce all hearings to ten per cent of existing levels and introduce a wholly new class of civil servant: the 'delegated judicial officers' (DJOs), who are neither judges nor mediators, but are to be charged with the task of achieving settlements. Nevertheless, the Final Report, perhaps wisely, does not say how – especially as Sir Ernest Ryder, President of Tribunals at Her Majesty's Courts and Tribunals Service (HMCTS), who delivered the keynote address at the CMC/FMC conference, is known to favour a system of triage in tribunals that could potentially transplant successfully to civil and family justice, particularly if the concept of 'compulsory mediation' were given speedy burial in a new scheme for 'automatic referral' of some kind that enlarged the existing limited use of court-based mediation.

A distinct concern for mediators, protective of their ethics in preserving mediation in its famously voluntary character, must be the idea of the proposed DJOs not being instantly associated with appropriate mediation (or at least conciliation) training.

The mediators' perspective

Clearly, as mediators, we agree with more out of court settlement and fewer court hearings – as does Sir James Munby, President of the Family Division, who calls this 'non-court dispute resolution', coining his own acronym, 'N-CDR'. Also, as both family lawyers and civil and commercial lawyers, we agree with Resolution, formerly known as the Solicitors Family Law Association, that court litigation is no place for settling family disputes. Litigation is rarely worth it in civil and commercial disputes either, since it is not attractive to commercial enterprises of any size because litigation takes up time, cost and energy that could otherwise be devoted to business that aims to make a profit. So much do commercial enterprises dislike litigation that the origins of modern arbitration are found way back in history as a means of achieving business people's own determination of their disputes in a fair and timely manner, a concept that still exists in the contemporary Arbitration Act 1996.

However, despite these strong indications that neither family nor civil and commercial mediation should always be pressed upon disputants for their own good, from a dispute resolution ethics perspective, we certainly cannot support compulsory settlement and by the proposed DJOs' strong arm.

Questions remain, for example, regarding how the ten per cent of cases to receive hearings in the new regime will be allocated. It must be impossible to allow a situation in which the ten per cent allocation has been fully used and yet many cases remain to be 'settled' by the DJOs. If the Briggs reforms are to be implemented largely as proposed, the DJOs must clearly train as mediators since they surely cannot impose settlements by force if no court hearings remain of the small ten per cent allocation proposed. This would be 'compulsory settlement' and clearly breach Article 6 of the Convention on Human Rights, also incorporated into English law in the Human Rights Act 1998.

So what is the way forward?

How can we take advantage of the reforms to increase the reach of mediation without breaching our ethos of facilitating, but not imposing, settlements?

Clearly there is no reason not to have MIAMs before access to civil and commercial litigation just as in family cases. Perhaps the family mediation movement (headed by the FMC) should take the lead here: they already have MIAM experience and it has not been all negative, despite some criticisms.

The initial research by Resolution (4 April 2012) and later Resolution commentary has thrown up some useful insights, including that the MIAM stage is often too late to stop the court momentum. This may also not have been adequately thought through yet: an interesting 2015 *Solicitors' Journal*[10] article by Jo Edwards, then-Chair of Resolution, indicates that further creative development is clearly needed to get the best out of MIAMs, which have been disliked by the general public since they were first suggested in 1996.[11] It may be suspected that they are no more welcome now than in their earliest form, when the feedback seemed to be expressing a desire to continue to receive assessment of cases by a solicitor – the client's own – and preferably under legal aid, as had always been the previous system. This indicates that Sir Ernest Ryder's suggestion of the use of triage – possibly through early neutral evaluation (ENE), itself a species of dispute resolution – might be a highly productive innovation.

Consequently, it seems that what is needed is for the CMC and FMC to work together with HMCTS and the respective civil and family justice councils on this. In short, we need to improve on past history. It is no good asking why mediation does not grow faster as the evidence is in front of us. The evidence is explicitly there on this occasion, in the government and judicial footprints through several reports. The Woolf reports, released in 1995 and 1996, Civil Procedure Act 1997 and Civil Procedure Rules (CPR) 1998 introduced judicial case management, which was certainly a useful innovation but, not being more robustly supported in the CPR, has proved to be a secondary support tool, not a magic bullet. The Jackson Report 2009 and Jackson ADR Handbook[12] were intended to raise comprehensive awareness, but did not apparently do so, possibly much hindered by the cuts to legal aid in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Act also cut out solicitors from their previous gateway tasks that included information about dispute resolution, including mediation.

It seems that a holistic professional approach, rather than more reports, is needed. Those who would be involved would include: judges at all levels and the Judicial College; the entire legal profession, bar, solicitors, the Chartered Institute of Legal Executives; government organisations, Civil Justice Council, Family Justice Council, HMCTS and the Ministry of Justice; the mediation umbrella organisations – CMC, FMC and Globis, which leads the workplace mediators; and a few organisations that have remained in business trying to stem the tide of litigants in person (LIPs), without legal aid who are complained of by Black LJ in her *Lindner v Rawlins*[13] judgment. A paper presented at the CMC/FMC conference actually proposed a tailor-made plan for assisting LIPs with a specific mediation scheme to address their particular problems.[14]

These are the individuals and entities now making litigation work, which is itself only a form of dispute resolution with mediation still bolted on, despite much academic and practitioner criticism highlighting this 'bolt on' deficiency throughout the initial period of the CPR's implementation from 1999 to 2004.

The Centre for Child and Family Law Reform, a research committee sponsored by City University, is currently examining whether the proposed further automation changes in the Family Court are fit for purpose – since certainly the trend towards such widespread IT, albeit supported by Susskind, an online court and self-diagnosis by litigants (with orders processed not judicially but administratively) are steps beyond encouraging as much N-CDR as possible.

These concepts also shift the current debate. Should the first question not now be reframed? In other words, no longer to read 'Should there be compulsory mediation?' but 'How can there be reform of the Civil and Family Courts without embedding mediation?'

Towards 2022

Would cutting court hearings so severely be doing the right thing? Hearings also have a role in dispute resolution. A powerful model of a 'dispute resolving' court is the Family Drug and Alcohol Court (FDAC)[15] where Brunel's research endorses the value of hearings, just as Barlow et al's research – into the relative values of solicitor negotiation, mediation and litigation[16] – endorses the role of lawyers.

Is there another way for the LIPs, particularly if no legal aid is available? Much

work has been done on this.[17] But, as only half this likely constituency has regular access to IT and their IT expertise is unmapped, it might be better to involve the student law clinics, run by many university law schools, especially as students love them and most report that a substantial part of their workload is family law, with the second-most substantial being small civil and consumer disputes.

Conclusion

I have a strong suspicion that this is only the start, not the end, of the debate.

Notes

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1 The umbrella organisation for UK civil and commercial mediators was set up by a group of mediation providers in 2003 and is now a charity. The CMC holds an annual conference each May, usually alternatively in London and the Midlands or North of England, where academics have normally presented a session. The initiative with the FMC was for the first time a separate conference held in London on 13 October 2017.

2 The umbrella organisation for English and Welsh family mediators, which has a longer and more complex history, and now controls legally aided family mediation and mediators who currently deliver the MIAMs made compulsory by the Children and Families Act 2014, s 10 and the FPR 2010, r3A and associated Practice Direction.

3 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made severe cuts to legal aid, largely abolishing it in private family law cases. The Act was brought mostly into force in 2013, although some of its more stringent cuts were delayed for a few months because of protests from those seeking to protect poorer potential litigants and a number of jurists who considered the cuts a threat to access to justice for those who needed legal aid most.

4 With minor exceptions, MIAMs must be undertaken before issuing most private law proceedings in the Family Court.

5 New Family Procedure Rules 2010, 512010/2955, later amended for use in the Family Court after its inauguration in April 2014.

6 These reports by Lord Justice Briggs, Deputy Head of Civil Justice, consist of two instalments of his Civil Courts Structure Review: first, his Interim Report, December 2015; and second, the Final Report, 27 July 2016, both available online at https://judiciary.gov.uk.

7 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press 2013).

8 Richard Susskind, *The End of Lawyers: Rethinking the Future of Legal Services* (Oxford University Press 2010).

9 Roger Smith, *Digital Delivery of Legal Services to People on Low Incomes* (Legal Education Foundation 2017). Available online at www.thelegaleductionfoundation.org, last accessed 16 November 2017.

10 Issue of 18 May 2015. The journal closed and ceased publication in September 2017. Past issues remain available from the Law Society Library, the British Library and the repository libraries.

11 Unidentified research in connection with no fault divorce under the Family Law 1996.

12 See *Review of Civil Litigation Costs, Final Report,* 2009, available at www.judiciary.gov.uk. *The Jackson ADR Handbook*, (2013, 2nd edition 2016) is published by the Oxford University Press and its issue followed the recommendation in the Jackson Report for provision of such a guide for solicitors and ordinary members of the public with a view to raising awareness.

13 *Lindner v Rawlins* [2015] EWCA Civ 61.

14 Harriet Lodge, *Litigants in Person: Levelling the Playing Field* (Coventry University), 13 October 2017.

15 FDAC Evaluation Project (2008-2014), www.brunel.ac.uk.

16 A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Justice* (University of Exeter 2014).

17 See Smith, n 9.

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Child custody and 'enforcement' of foreign child custody orders in Sri Lanka

The Government of Sri Lanka has not entered into any conventions or agreements dealing with reciprocal enforcement of custody orders of courts of other jurisdictions (hereafter sometimes referred to as a 'foreign custody order'), such as The Hague Convention 1996. A Sri Lankan court is not bound by the order of a foreign court. Either of the parties can produce a foreign custody order in the course of a Sri Lankan custody application for the consideration of the Sri Lankan court, but a Sri Lankan court will not consider itself bound by such a foreign custody order. The question that arises then, is: what status does the foreign custody order have in Sri Lanka in the event that the parent who has been awarded custody wants to relocate the child to Sri Lanka?

In the event that one of the parents is seeking to 'enforce' a foreign custody order in Sri Lanka (for the purposes of this article,

the authors will assume that parent is the mother), she could apply to the relevant district court of Sri Lanka having jurisdiction where she resides seeking an order granting her the legal and physical custody of the child. The father would have to be named as a respondent and would have the right to object and be heard in such proceedings. If, eventually, an order were made granting custody to her, she could remain in Sri Lanka with the child based on the rights conferred on her by the custody order.

The court could grant orders of both an interim and final nature as the justice of the case would require.[1]

The Roman-Dutch common law of Sri Lanka governs the principles applicable to the custody of a minor child in Sri Lanka and, where the bond of matrimony subsists, the father has a preferential right to custody of the child subject to a paramount consideration, namely, the welfare of the child. The burden of satisfying the court that such consideration arises would be on the mother.[2]

The court will decide who is to have the custody of the child after taking into account all the factors affecting the case and after giving due effect to all presumptions and counter-presumptions that may apply, but bearing in mind the paramount consideration that the child's welfare is the matter that the court is there to safeguard.[3]

Where there has been no dissolution of the common home, the father's right to the custody of his minor child remains unaffected by the fact of the separation of the spouses and can only be interfered with on special grounds, such as danger to the life, health or morals of the child.

In the decision of *Fernando v Fernando,*[4] the Supreme Court held, *inter alia,* that both the modern Roman-Dutch law and English law were agreed on the principle that the interests of the child were paramount. The court declared that the modern Roman-Dutch law had moved away from rules directed at penalising the guilty spouse towards the recognition of the predominant interests of the child.

The foregoing principles are applicable in regard to custody of the child where there is a subsisting marriage. In the event that a divorce order were obtained from the foreign court, it is likely that the court as the upper guardian of the child would give lesser consideration to the father's preferential right and the issue of custody would be solely decided on the interests of the child.

In any event, the success of an application depends on the facts of each case.

The procedural process is such that the mother could make an application to the relevant district court seeking an interim and final order awarding her legal and physical custody of the child. The district court would thereafter issue summons on the father, giving notice of the application and allowing him the opportunity to respond and object to the application that has been filed by the mother.

Custody cases in Sri Lanka may broadly fall into two categories: (1) cases where a divorce is not sought and only custody issues are dealt with; and (2) cases where custody of the child is sought together with the divorce action.

Cases where a divorce is not sought and only custody issues are dealt with

The Judicature Act deals with applications where custody is sought in circumstances where a divorce has not been sought. In such cases, an application is originally supported in court and summons issued on the opposing party. The parties would invariably be represented in court by attorneys-at-law, and the evidence of both parties would be lead, together with their documentary evidence.

Cases where custody of the child is sought in a divorce action

The custody application is taken up simultaneously with the divorce action. Initially, a plaint is filed in the district court with competent jurisdiction. The opposing party files his answer. Parties lead their respective evidence with regard to matrimonial fault and the custody of the child in one proceeding simultaneously.

After considering the evidence of both parties, the district judge hearing the case will make an order considering the best interests of the child. The final order is made after a full inquiry, involving examination-in-chief, cross examination and re-examination of the witnesses.

An order made by the district court will be binding on the parties. In the event that the said order prevents the child from being taken out of Sri Lanka, further orders can be sought, for example, a travel ban whereby the Court will order the Department of

Immigration and Emigration of Sri Lanka to stop the mother and child from leaving the country.

As previously mentioned, the district court has the overriding responsibility and authority to act as the upper guardian of all minors.

Case law has held that a father's fundamental right to the custody of his child during the subsistence of the marriage may be overridden on the ground that, if the child is permitted to continue in the custody of the father, it would be detrimental to the life, health or morals of the child. For example, it could be argued that it would be detrimental to the life, health and (possibly) the morals of a young child if that child were forcefully separated at a very tender age from his or her mother. So long as the mother is shown to be fit to care for the child, it is a natural right of the child that he or she should enjoy the advantage of his or her mother's care and not be deprived of that advantage capriciously.

The court would make an order as to who will be awarded custody of the child after taking into account all factors affecting the case.

In the event that there are allegations of domestic violence against either of the parents, if proved, this would preclude such party (the parent) from succeeding with any application to a court in Sri Lanka, because the court, when reaching a decision, considers the best interests of the child. Even if the parties are separated through a final divorce order, the court considers the best interests of the child as paramount and, therefore, if there is any allegation against the father as to domestic violence, such allegation will, if proved, be taken into consideration by the court when arriving at a decision with regard to the custody of the child, at least with regard to the physical custody of the child. However, there would likely not be any automatic final order granted to the mother.

An allegation of domestic violence requires to be proved in the local court for it to be considered when a custody order is made.

It should be noted that custody orders of the Sri Lankan courts are only temporary orders, decided based on the facts at the time of the application being made. The mere fact that an order has been granted by a foreign court does not preclude either spouse from making an application to set aside or vary an order in the event that the circumstances change with time.

Another question that arises in this context is: what happens when a child is wrongfully removed or retained in Sri Lanka from a country that either does not accept Sri Lanka's accession to The Hague Convention on the Civil Aspects of International Child Abduction, for example, the United Kingdom, or when the child is wrongfully removed or retained in Sri Lanka from a country that has not signed or ratified the convention?

It is unlikely that an order to have the child removed from the jurisdiction would be made unless the father is awarded the physical custody of the child. Therefore, the father would have to institute custody proceedings in the relevant district court having jurisdiction where the mother resides. In the event that custody is granted by the district court to the father, the father would likely have the right to take the child to the jurisdiction of the foreign court based on the strength of the order.

If legal and physical custody were awarded to the father based on his preferential right (unless the preferential right were overridden consequent to evidence given by the mother that the father is unfit to care for the child and that it would not be in the best interests of the child), he could likely take the child to a foreign country.

In the event that country is a non-Hague country or a country that is a member country but has not been specified, or where Sri Lanka's accession has not been accepted by the member country, it is unlikely that the Central Authority would act and arguably the case that a court would likely not entertain a return application without first making an order regarding the custody of the child.

In cases where there is recognition of Sri Lanka's accession to the convention by a Member State, then, as per the provisions of The Hague Convention, the implementing legislation would be applicable and the court must consider the provisions of the foreign custody order when making an order as to whether there is a wrongful removal or retention.

Conclusion

There is no automatic recognition or enforcement of custody orders of foreign courts except in the context of Hague Convention proceedings. When there is a

foreign custody order in place and one of the parents wants to have the said custody order enforced in Sri Lanka, the respective parent would have to institute proceedings in Sri Lanka seeking an order that the said parent is entitled to legal and physical custody of the child.

Notes

1 Section 29 of the Judicature Act No 2 of 1979 as amended by Act No 37 of 1979.
2 *Karunawathie v Wijesuriya and another* 1980 2 SLLR 14.
3 *Ibid.*
4 *Fernando v Fernando* 1968 70 NLR 534.

Surrogacy dilemma resolution

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The Surrogacy (Regulation) Bill 2016 was tabled in the Lower House of Parliament in November 2016. It proposed a complete ban on commercial surrogacy, restricting ethical altruistic surrogacy to legally wedded, infertile Indian couples only, married for at least five years. A certificate of proven infertility of either spouse or couple from a medical board is mandatory. Overseas Indians, foreigners, unmarried couples, single parents, live-in partners and gay couples are barred from commissioning surrogacy. Only a close married blood relative, who must have herself carried a child and is not a non-resident Indian (NRI) or a foreigner, can be a surrogate mother once in a lifetime. Indian couples with biological or adopted children are prohibited to undertake surrogacy. Only medical expenses will be allowed to be paid. Commercial surrogacy, among other offences, will entail imprisonment of at least ten years and a fine extending to one million rupees. Compensated gamete donation has been banned. Surrogacy clinics will require mandatory registration. National and state surrogacy boards shall advise, review, monitor and oversee implementation of the new law.

In January 2017, the chairman of the Upper House of Parliament referred this legislation, as introduced in the Lower House, to the Standing Committee on Health and Family Welfare. The Committee, in Report 102[1] presented on 10 August 2017, has recommended major beneficial sweeping changes. Major stakeholders, experts, government representatives of various ministries and professionals lent their views with extensive interactions with the Committee. The changes recommended are laudable, practical, beneficial and harmonious to rights of parties.

The major recommendations of the 88-page report can be identified in nine features.

1. 'Compensated' instead of 'altruistic' surrogacy is proposed, with the amount of adequate and reasonable compensation to be fixed by authorities, besides 'mandatory appointment of a competent authority to obtain full informed consent of surrogate mothers'.
2. The Committee recommends that surrogacy can be availed of by live-in couples, divorced women, widows, NRIs, persons of Indian origin and overseas citizen of India cardholders to avoid prejudice and discrimination, but foreign nationals cannot commission surrogacy in India.
3. Recognising 'the fundamental right to reproduce to have a child as a person's personal domain', a five-year waiting period thought to be 'arbitrary, discriminatory and without any definable logic', has been recommended to be reduced to one year with the right to go for a second chance at surrogacy in case of any abnormality in the previous attempt.
4. Holding the limiting of the practice of surrogacy to close relatives as 'non-pragmatic and unworkable', the Committee has recommended that 'both related and unrelated women should be permitted to become a surrogate'. The Committee further recommends 'screening of intending couple for medical assessment, social economic background, criminal records and related checks before commissioning surrogacy'.
5. The requirement of 'a certificate for infertility from an appropriate authority' has been recommended to be substituted by medical reports.
6. The Committee recommends practical changes in the constitution of the National and State Boards of Assisted

Reproductive Technology for resolution of legal implications and maintenance of appropriate records.

7. The Committee suggests that 'sex selective techniques' in surrogacy should be harmonised with existing laws and since 'surrogacy and related procedures are not criminal activities, punishment should be commensurate with the level or degree of infraction committed'.
8. Amongst miscellaneous recommendations, the Committee recommends written registered surrogacy agreements, adequate insurance coverage for an unborn child, provision of a birth certificate with names of commissioning parents, establishment of an independent agency with quasi-judicial powers for resolution of disputes of parties involved in surrogacy, and mandatory DNA testing for genetic determination to determine parenthood.
9. The Committee observed that the Assisted Reproductive Technologies (ART) Bill 2008 has been revised in 2010 and 2014, is sitting with the government and should be brought forth before the Surrogacy Regulation Bill 2016.

Restricting limited conditional surrogacy to married Indian couples and disqualifying other persons on the basis of nationality, marital status, sexual orientation or age does not appear to qualify the test of equality. Right to life enshrines the right to reproductive autonomy, inclusive of the right to procreation and parenthood, and it is for the person and not the state to decide modes of parenthood. It is the prerogative of person(s) to have children born naturally or by surrogacy in which the state, constitutionally, cannot interfere. Moreover, infertility cannot be compulsory to undertake surrogacy. A certificate of 'proven infertility' is a gross invasion of the right to privacy, which is part of the right to life under the Constitution. All these legal maladies find redressal in the erudite Committee report.

The Indian Council for Medical Research, working under the Ministry of Health and Family Welfare, finalised the National Guidelines for Accreditation, Supervision and Regulation of Artificial Reproductive Technology (ART) Clinics in India, 2005. It stipulated that there shall be no bar to the use of ART by single women who would have all the legal rights and to whom no ART clinic may refuse to offer its services for ART. By anomaly, single men could also claim this right. These guidelines have not yet been rescinded.

Anomalous and inconsistent as it may seem, in the matter of inter-country adoptions, the government has a diametrically opposite policy. It statutorily propagates fast-track inter-country adoptions from India for foreigners. The Juvenile Justice (Care and Protection of Children) Act 2015 allows a court to give a child in adoption to foreign parents irrespective of their marital status. The latest guidelines governing adoption of children, notified on 17 July 2015, have streamlined inter-country adoption procedures, permitting single parent adoptions with the exception of barring single male persons from adopting a girl child.

Surrogacy, popular for the past 12 years, has been shut down overnight. Tripartite constitutional fundamental rights of stakeholders stand violated in the process. A right to reproductive autonomy and parenthood, as a part of a right to life of a single or foreign person, cannot be circumvented.

The possible government logic banning foreign surrogacy – to prevent its misuse – seems counterproductive. Barometers of domestic altruistic surrogacy will be an opportunity for corruption and exploitation, sweeping surrogacy into unethical hands in an underground abusive trade. Relatives will be generated. Surrogates will be impregnated in India and shifted to permissible jurisdictions with lax laws. The ends will defeat the means. Surrogacy may still flourish with abandon. Sweeping it under the carpet will not help. Ignoring its prevalence cannot extinguish it at a stroke. The parliamentary committee recommendations taking due note have done very well. The suggestions must find favour. A beneficial surrogacy law is the need of the hour.

Notes

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1 Parliament of India Rajya Sabha Department-Related Parliamentary Standing Committee on Health and Family Welfare Rajya Sabha Secretariat, New Delhi, 'August 2017/One Hundred Second Report On The Surrogacy (Regulation) Bill, 2016' presented to the Rajya Sabha on 10 August 2017 and laid on the table of Lok Sabha on 10 August 2017.

What is the alternative to marriage for opposite-sex couples?

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According to recent Office for National Statistics figures, the number of unmarried couples living together has more than doubled in the space of 20 years. It is the fastest-growing family type in the United Kingdom, accounting for 17 per cent of all families. These changing societal attitudes lead us to question whether the level of protection that the law currently provides for this growing family type is sufficient or whether reforms are needed.

There is currently a misconception by a worrying proportion of the population that 'common law marriages' exist in the UK. In reality, no legal right, at present in the UK, is given to an unmarried couple simply by virtue of the fact they are living together. The only claims they can make against each other are based on land law and equity provisions and are for financial support strictly on behalf of children and ownership of properties. There is no consideration for concepts such as need, which plays such a pivotal role when dividing assets ancillary to divorce (if applicable). This article will therefore discuss what legal instruments can be used by cohabiting couples to provide them with minimal protection as well as legal recognition of their status.

It will also draw a comparison with France, where the *Convention de Concubinage* has encountered the same problems as its English equivalent. The cohabitation agreement – and civil solidarity pact, known as PACS – was originally created to bring some legal protection to same-sex couples before they could get married in 2013, but appears to be mostly used by heterosexual couples as an alternative to marriage. The numbers of opposite sex couples getting 'PACSed' has increased significantly since its creation in 1999, reaching 188,947 couples in 2015, while the number of opposite sex couples getting married has fallen from 283,036 in 2005 to 228,565 in 2015.[1] It could be argued then that, by providing a real alternative to marriage, it has met the needs of a changing society.

The civil partnership: not yet an option

In the appeal in *Steinfield & Keidan v Secretary of State for Education (opposite sex partnerships) 2017*,[2] a human rights challenge was made against the Civil Partnership Act 2005 for restricting access to civil partnerships to opposite sex couples. The appellants in this case, an opposite-sex couple, argued that preventing them access to this type of union was a violation of their rights under Article 14 (prohibition against discrimination) and Article 8 (right to family life) of the European Convention on Human Rights. The rationale for this was that same-sex couples have the option to either opt for a marriage or a civil partnership while opposite-sex couples only have the option to marry if they want to give a legal frame to their relationship.

This appeal was rejected, but following this, a bill proposing to open civil partnership to opposite-sex couples was presented by Tim Loughton. It will have its second reading in the House of Commons on 2 February 2018.

Civil partnership may finally become an alternative in the future. Nevertheless, a civil partnership offers in substance the same protection as marriage. It could become an option for opposite-sex couples whose objections to marriage are more ideological, such as in *Steinfield & Keidan*. The question is: what if a couple is looking for a different level of protection?

Is a cohabitation agreement a viable option?

Unlike nuptial agreements, which focus on planning for future consequences ancillary to divorce, cohabitation agreements, in the same way as French marriage contracts, have the legal frame for the organisation of life as a cohabiting couple. This is because, in the same way as the French marriage contract, a cohabitation agreement is based on contract law. As a result, it can cover anything desired by the parties, but would usually cover things like an inventory of who owns what and in what proportions, who

pays what proportion of rent, mortgage and bills during cohabitation and details about financial provision for children and how property will be divided on the breakdown of the relationship.

This is a good starting point, but cohabitation agreements still need to have sufficient enforceability and consideration for concepts such as fairness and needs for them to be a viable alternative to marriage.

The uncertainty over the enforceability of certain clauses such as those in relation to financial provision for a child might be part of the problem in giving this option credibility, as there are very few cases on this issue and none of them are recent. One of the most recent, *Darke v Strout*,[3] nevertheless points towards an increase in the level of enforceability as the agreement made between separating parties with regards to maintenance payments for their child was enforced by the court.

For the rest, as a cohabitation agreement is based on contract law, if those principles are applied, there is no reason why it shouldn't be enforced by a non-family judge applying the principles of contract law.

The real problem with cohabitation agreements, which flows from their basis in contract law, is the lack of protection for the weaker economic party. As explained above, no regard will be given to notions such as fairness or needs. As a result, situations can arise where the primary carer of a child is forced out of their home and ends up in a place that is not appropriate for a child while the other party keeps the home for themselves. Cohabitation agreements do not give any real legal recognition to the parties' relationship because they do not have a status. Technically, the law regards parties in the same way whether they have just moved in together, have been living together for two years, or more or have children together.

More statutory rights for cohabiting couples? An ongoing pressure for reform

Lord Marks of Henley-on-Thames introduced the latest bill on cohabitation rights to implement the Law Commission's 2007 proposal on separation. The first thing to note about this bill is that the pool concerned has been carefully selected. Only couples that have cohabited for at least two years or have had children together are to be covered by the bill. Couples entering that category but who do not wish to be covered by the legislation can opt out.

It is also important to state that the aim of the bill, as stated by its author, is not to give cohabiting couples the same right as married couples, but to provide them with a basic level of protection on separation or death. For example, there is no provision in the bill for a cohabiting version of spousal maintenance as in the Matrimonial Causes Act (MCA) 1973.

Unlike the MCA, the bill aims to keep a contractual approach, having as its goal putting the parties in the same position as had the cohabitation not happened and limiting the orders available to the judges to 'clean break' orders unless there is an economic disadvantage that cannot be balanced out by the payment of a lump sum or the transfer of a property.

You can clearly see its contractual roots when looking at what a party must show to obtain a financial settlement order:

- s/he is now at an economic disadvantage as a result of the relationship; and
- the other party has gained a benefit as a result of a qualifying contribution made by the applicant. The qualifying contribution does not have to be a financial one, but still has to be relevant enough having taken into account a certain numbers of factors in the relationship to be able to have a fair picture of it.

Several bills were put forward before this latest version as the issue has been ongoing for a while. Moreover, this bill still has a long way to go before it becomes law. It had its first reading in the House of Lords on 5 July 2017 and the second reading of that bill is yet to be scheduled. It is, therefore, in no way close to be an alternative option to marriage.

A search for inspiration into the French system

The French cohabitation agreement

The *concubinage* is defined by French statutes as a de facto union between two persons of the same or different sex who are living together in a stable and continued way.[4] French legal practitioners created a *Convention de Concubinage,* taking inspiration from the English cohabitation agreement, but this convention did not have the expected success in France. Interestingly, the reasons for its failure are the same as for its English counterpart: it is ruled by general contract law principles, which make it possible for a party to request its enforcement by a non-family law judge and/or to obtain damages

when one of the *concubins* does not respect its provisions.[5] It is enforceable, but can be easily challenged.

It is also worth noting that, despite its contractual freedom, the interest of the *Convention de Concubinage* is limited by the principle of individual freedom. No terms relating to personal status (ie, change of surname), assistance or being faithful can be agreed in it. It could, therefore, be argued that the convention is only an accumulation of multiple contracts.[6]

As opposed to the convention, the PACS has had great success since its creation. An analogy between this legal protection and the English cohabitation agreement is therefore more helpful.

The French PACS

The PACS (*pacte civil de solidarité*) was established by statute in 1999. It takes the form of a statutory contract between two members of a couple (the partners) in order to organise their life together. Unlike the English civil partnership, it is open to both same- and opposite-sex couples.

As for marriage, the couple has to elect a regime and they have two options:

1. *a séparation de biens*, where each partner keeps their own assets. If a partner buys a house, it will only belong to them and will not be shared;
2. *l'indivision*, where if the couple or one partner buy a property, it will be shared 50/50.[7]

The regime is elected when the partners sign the PACS. From that point, they also commit themselves to live together and financially support each other. Unless they decide otherwise in the PACS, the contribution is proportional to their incomes.

How could we use it in the UK?

With the PACS, partners can make decisions about asset division as well as financial contribution while living together and these are enforceable. As the protection focuses on finance and property, partners have mostly used the PACS as a property division tool.

The *Conseil Constitutionel* ruled that there is no statutory right to financial maintenance between ex-partners for loss of income. Nevertheless, it is admitted that partners can decide this issue by contractual stipulations as long as it does not affect the freedom to break up.[8] Therefore, it is unlikely that exact figures would be written down for the equivalent of spousal (or even child) maintenance when signing the PACS. They will be calculated with regards to the incomes and expenses of the partners at the time of the break-up.

The law specifies that ex-partners must deal with maintenance on their own. If they did not include maintenance provisions in the PACS and cannot find a settlement after the separation, they can seize a civil court[9] to rule on it.

Nevertheless, as it is possible for parties to stipulate financial support in the PACS, a partner may be liable for failing to comply with what they agreed in it or in the convention dealing with the consequences of the break-up. In case of breach, the partner can be forced to enforce the contract and/or pay damages.[10]

Moreover, compensation may, in theory, be granted for extra-contractual fault.[11] Article 515-7 of the Civil Code provides for this possibility for ex-partners. Each clause that would prevent someone from exercising this right would be set aside by the judges. This right to obtain compensation is constitutional.[12] Nonetheless, in practice, compensation is hard to obtain because judges are reluctant to accept the idea of repairing moral harm after a break-up. Indeed, the ex-partner must prove that the break-up was unfair and particularly brutal.

One major rule in contract law states that provisions against the public policy doctrine are forbidden. As such, it is not possible to decide that one partner will use the other's last name or that they will not be faithful.

It is also not possible to decide in the initial PACS convention the consequences of a break-up for the children of the relationship, first, because the law was originally created to bring legal protection to same-sex partners and, at that time, children were not a possibility, and second, because the law regarding divorce ruled that any financial support must be decided with regards to the parent's financial situation at the relevant date. The same principle would be applied with regards to the child's custody as the situation could change between the day the partners sign the convention and the day they break up.

After they break up, ex-partners should agree the practical and financial consequences for the children. Their agreement on custody and financial support will be drawn up in a contract, which will then be presented to the judge to be sealed.[13] That seal will make the contract enforceable. If no

agreement can be found, parents will be able to seize a family court and the judge will give a judgment on the matter.

The PACS contract is a useful tool as it allows partners to gain more protection during their life together as well as after a break-up. However, in practice, and perhaps because of the mentality of French society, its role has been very limited to property division. Nevertheless, it is a good starting point when thinking of a way to improve the English alternative to marriage.

Notes

1 National Institute of Statistics and Economic Studies, available online at www.insee.fr/fr/statistiques/1281436, accessed 14 November 2017. In 2011, 32 million people declared themselves to be a part of a couple. Nearly 24 million were married, a little more than 1 million had PACS and 7 million were cohabiting.
2 *Steinfield & Keidan v Secretary of State for Education (opposite sex partnerships)* [2017] EWCA Civ 81.
3 *Darke v Strout* [2003] EWCA Civ 176 ADR.L.R. 01/28.
4 Article 515-8 of the Civil Code.
5 Article 1231-1 of the Civil Code.
6 Yann Favier, *Rupture du Couple: Effets Patrimoniaux* (Ellipses 2015).
7 Articles 515-5 and 515-5-1 of the Civil Code (exceptions exist).
8 Jean Garrigues, *Droit de la famille* (Dalloz 2015).
9 Article 515-7 of the Civil Code.
10 Article 1231-1 of the Civil Code.
11 Article 1240 of the Civil Code.
12 Constitutional Council Decision, 9 November 1999, Nos 99–419 and Article 4.
13 Article 373-2-2 of the Civil Code.

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The short divorce in Italy

In 2015, it finally became possible to divorce in Italy without going to the courthouse.[1]

With the new divorce law, the period of legal separation necessary for divorce was reduced to one year if the cases are contested and six months in the case of consensual separation. Before 2015, a couple divorcing by consent or not had to wait three years to be divorced.

A separation decree may be granted when there are facts that would render the continuation of married life intolerable or have a serious and damaging impact on the upbringing of the children.

Separation may also be granted by mutual consent. Separation by mutual consent and uncontested divorce are also possible without judicial procedure.

A short divorce is possible only if there is no dispute between husband and wife.

Before the reform, it was necessary to wait for three years after the spouses appeared before the tribunal president in the process of personal separation, even if the litigation procedure had become consensual.

With the reform, the three-year period has been reduced. Article 1 of the law on the short divorce in this regard states: '...twelve months after the appearance of the spouses before the court president in the personal separation procedure and six months in the case of consensual separation, even when the litigation is be transformed into consensual'.

With the short divorce, spouses may appear before the civil servant of the municipality (mayor) to formalise and conclude a marriage separation or dissolution agreement, or even a cessation of civil effects and modification of the conditions of separation or divorce.

Thanks to the 'short divorce', couples can divorce without a lawyer.

Short divorce cannot be used in the case of minors or children, including those of the age of majority, with severe or economically disadvantaged persons.

Spouses can enjoy short divorce on condition that the agreement does not contain acts with which the transfer of property rights is made.

It is not possible to make use of the short limb in the case of disputes between spouses.

Given the conditions of short divorce, to make a divorce official requires two visits to the mayor, who, as a civil status officer, will carry out the short divorce in two steps: the first being to encourage the couple to reflect on their decision to separate or divorce, and the second being to divorce the couple if they do not reconcile.

The average length of marriage at the time of separation is approximately 17 years. Over the last 20 years, the share of long-term marriage separations has doubled, from 11.3 per cent in 1995 to 23.5 per cent in 2017.

To conclude, the cost of short divorce in Milan is €16, payable by the couple to mayor's office.

Note

1 Published in the Official Gazette, 11 May 2015, No 107 Law on Short Divorce (Law No 55, 6 May 2015).

Expat divorce through churches in Abu Dhabi

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A new scheme has been announced in Abu Dhabi that will allow non-Muslim expatriates to divorce through their church. Early reports indicate that these powers will also extend to assisting the parties to reach financial settlements consequent upon that divorce, which would represent a dramatic change to the family law landscape in Abu Dhabi. It is a move that has been very well received by the expatriate family law community in the United Arab Emirates (UAE).

Unless able to successfully apply the laws of their home countries (which is an option in the UAE, but is not regularly applied in practice), non-Muslim expatriates living in the UAE are subject to the UAE Federal Law 28 of 2005 relating to personal status. These statutory provisions are effectively consistent with Sharia law and differ significantly to the applicable law in England on a divorce.

In the United Kingdom, a party may be entitled to a lengthy spousal maintenance term, as well as a share of the family's capital assets. However, under UAE laws, only a wife may receive spousal maintenance and only then for a period of three months. A party can only receive an equal share of assets held in joint names and will simply retain those assets held in their sole name. There is no provision to transfer property between the parties or deal with property based abroad. The differences between these laws can often come as an unwelcome surprise for expatriates in the UAE and they often discover these restrictions when it is too late.

Dr Salah Al Junaibi, Director of Institutional Communications at the Abu Dhabi Judicial Department, told *The National* newspaper in the UAE: 'We do not want to impose a religious rule on non-Muslims. They now have options and this is now every individual's legal right. Instead of non-Muslim couples seeking to settle their marital disputes in civil courts that are based on Sharia, they can now get a binding settlement by a non-Muslim arbitrator, such as a priest at their place of worship. In this instance, the role of mediation can be handled and authenticated by the church.'

Our firm welcomes this modern and progressive scheme and we are excited about the effect it will have on family law matters in the region. Our cases involve expatriates from the UK who have no choice but to seek recourse through the UK courts given the limitations on the financial provision available to them locally.

Providing such expatriates with a facility that could mean their divorce and financial remedy issues are resolved in the county of their residence is a significant step forward. Litigating a case in one country while both parties live in another is not ideal and can create a variety of barriers to the parties reaching an outcome. Having a locally-based facility that both parties can have confidence in is very encouraging.

As a firm, we are committed to methods of alternative dispute resolution and always try to find ways to resolve matters without recourse to court. This is made difficult at present because expatriate parties can find themselves in a jurisdictional race to avoid the limitations of the local divorce regime and then are left without much choice but to pursue their case abroad in the UK.

We wait with interest to see the specific role given to the church by legislation (which has not yet been published) and to see how the church itself seeks to ensure that it follows the developing principles of financial remedy law in the outcomes it helps reach. It is important to remember that, in the UK, for an agreement to be converted into an enforceable order, it must have the approval of the court and, to obtain approval, it must fall within the range of acceptable outcomes envisaged by the Matrimonial Causes Act 1973. Lawyers within our firm look forward to working with the church and any other such organisation in Abu Dhabi to help ensure the efficacy of the agreements reached back in the UK.

Through the development of this scheme, Abu Dhabi has shown its intention to embrace the expatriate community and ensure the long-term success of the region as a hub for business and growth.

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India and Israel: two approaches to triple *talaq* divorce

On 22 August 2017, the Supreme Court of India gave a judgment, declaring that the practice of *talaq-e-biddat*, divorce by a Muslim husband of his wife by declaring three times that she is divorced, violates the Constitution of the Union of India and is set aside.[1]

The justices of the Supreme Court devoted large parts of their opinions to describing and commenting on the sources of Sharia law, the four main schools of the Sharia and legislation on Muslim divorce in countries that declare themselves secular and those that define themselves as Islamic.

In particular, the Court, by a majority of three justices against two, declared that this type of divorce – described in the judgment as triple *talaq*, which is recognised in Muslim law (but frowned on by almost all authorities) – is in violation of Article 14 of the Constitution, which guarantees equality before the law and equal protection of the law. The Court found that triple *talaq* is 'instant and irrevocable' and that it is 'manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it' (para 396). A law of 1937, the Muslim Personal Law (*Shariat*) Application Act, which had been interpreted as recognising and enforcing triple *talaq*, was struck down under the power of the Court under Article 13, as being inconsistent with the fundamental rights in Part III of the Constitution.

In the opinions of the justices, reference was also made to Article 15, which prohibits discrimination on grounds of religion, race, caste, sex or place of birth, and Article 25(1), which provides for freedom of religion, subject to public order, morality and health, and the other provisions of Part III. The United Nations Human Rights Convention was also referenced.

The justices in the minority agreed that triple *talaq* is improper and should be banned, and that 'all concerned are unequivocal, that besides being arbitrary the practice of *talaq-e-biddat* is gender discriminatory' (para 295). However, they preferred to make use of Article 142, which empowers the Supreme Court 'to make such order as is necessary for doing complete justice', and directed the Union of India to consider appropriate legislation, particularly with reference to *talaq-e-biddat*; they also injuncted Muslim husbands for six months from pronouncing *talaq-e-biddat*, pending legislation.

Like India, Israel has a substantial Muslim population and is a liberal democracy in which the rule of law, the independence of the judiciary and fundamental freedoms are at the heart of the legal system. The system mandates respect for every human being and religious freedom to the extent that these are not in conflict with the basic norms of society; but, if they conflict, the needs and protection of the population and institutions of the state must prevail.

In family matters, the State of Israel administers Sharia courts, and appoints and pays the salaries of the *Kadis*, Sharia judges. These courts (regional courts of first instance and an appeals court) have jurisdiction in matters of personal status, including marriage and divorce, custody, spousal maintenance and child support.

However, the Israeli approach to triple *talaq* is different from India's approach. Instead of an outright ban, the legislature chose not to interfere directly with the personal law of the parties, but to impose sanctions to discourage the use of the unilateral method of divorce. The first Knesset passed the Women's Equal Rights Law in 1951, which added a new section to the Criminal Law Ordinance. This provision is now section 181 of the Penal Law 5737-1977, which provides as follows:

> 'A man who dissolves marriage ties against the will of the wife, when at the time of the dissolution there was no final judgment of the competent court or tribunal obligating the wife to the dissolution, shall be punished up to five years imprisonment.'

This means that, while the triple *talaq* divorce is recognised by the Israeli authorities, including the Registrar of Population, as being binding on the parties, this will not preclude the police from indicting the

husband and the court from convicting and sentencing him. Indeed, the state Sharia courts, while confirming the status of the parties as divorced, make it clear that a criminal offence has been committed.

An additional sanction is the award of compensation to the divorced wife. In *Houriach Jamil Mahmoud Sultan v Hasan Kamel Sultan*,[2] Israel's Supreme Court decided in 1984 that, where a man divorced his wife in contravention of section 181 of the Penal Law, the wife was entitled to sue him for compensation for breach of statutory duty under section 63 of the Civil Wrongs Ordinance. The Court found that the provisions of section 181 of the Penal Law were intended for the protection and benefit of the wife. The damage caused includes deprivation of her entitlement to maintenance from the husband, loss of prospects of being married, shame, suffering and financial losses.

Basing themselves on this precedent, family courts in Israel regularly make awards of tens of thousands of shekels, sometimes reaching sums equivalent to $30,000, in light of the fact that, in traditional Muslim families, divorced women have very little prospect of remarriage and that, in many cases, they lose contact with their children.

The difference in approach between India and Israel may be based on the self-description of the two states, which were founded in the late 1940s after being ruled by the British. They both inherited and have adapted common law traditions and many basic constitutional concepts, without diverging too far from their British roots.

However, in the preamble to the Indian Constitution, the people of India resolve that their state shall be a 'sovereign socialist secular democratic republic', whereas Israel's Proclamation of Independence declared the establishment of a Jewish state, based on 'freedom, justice and peace as envisaged by the prophets of Israel'. Both documents guarantee freedom of religion, conscience, education and culture, and equality of social and political rights. In Israel, the Basic Law: Human Dignity and Liberty, passed in 1992, which has quasi-constitutional status, states in Section 1A that its objects are to anchor the values of the State of Israel as a Jewish and democratic state.

A state that proclaims itself as secular, while preserving freedom of conscience and religion, may find itself capable of defining religion narrowly and declaring traditional practices to be outside the confines of protection despite their roots in religious sources. A state that declares its foundations to be those of a specific religion, which has at least three millennia of law and custom, traditions and practices, will be more circumspect in interfering directly with the tenets of another religion, and its courts will refrain from investigating the details and sources of a specific practice.

For this reason, Israel's legislature and courts have not seen fit to investigate the details of triple *talaq* or to make decisions that affect the Sharia itself. Conduct that is deemed to undermine the state and damage its citizens are dealt with in the usual way in a democracy: by legislation that imposes a criminal sanction, punishing perpetrators for contravention and forcing them to compensate those who are damaged by the infraction.

Notes

1 Writ Petition (C) No 118 of 2016, *Shayara Bano v Union of India*, 2017 SCC Online SC 963.

2 Civ App 245/81 *Houriach Jamil Mahmoud Sultan v Hasan Kamel Sultan* (PD 38 (3) 169).

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Brexit – where are we now?

At the moment, on an almost daily basis, we have further reports as to the situation regarding the United Kingdom's exit from the European Union. Perhaps the most significant development recently has been the European Union (Withdrawal) Bill 2017-19 (the 'EU bill'), which was introduced to the House of Commons on 13 July 2017 and was due to be considered further in September.

What we do know, however, is that the Government Department for Exiting the EU has published information about the EU bill, which is designed to 'ensure that the UK exits the EU with maximum certainty, continuity and control'.[1] The EU bill repeals the European Communities Act 1972, but also brings all EU laws onto the UK statute books. This means that laws and regulations made over the past 40 years, while the UK was a member of the EU, will continue to apply after Brexit. If those laws did not apply, it would leave a huge gap in UK law. According to the EU's legal database, there are currently more than 12,000 EU regulations in force.

As highlighted in our last update, the two pivotal EU regulations for family law are:

- Brussels IIa, which regulates divorce jurisdiction and parental responsibility regarding children; and
- the EU Maintenance Regulation, which regulates the jurisdiction for, and enforcement of, maintenance agreements and court decisions between the UK and the EU.

In order that those regulations are workable, there must be reciprocity. It is not enough for the law to be valid in the UK; it must be recognised and applied by all EU Member States to have any useful effect. Therefore, although the EU bill will ensure that the regulations are brought into UK law, and although the government has expressed hope that EU Member States will reciprocate recognition, the bill cannot, of course, bind other members of the EU.

For example, whether the English court has jurisdiction for a divorce case is currently determined in accordance with EU Regulation Brussels IIa. If the regulations are adopted wholesale by the UK, the current jurisdictional criteria (habitual maintenance and domicile) will remain the same following Brexit. However, the key difference will be in the (not unusual) circumstance in which two or more EU Member States have jurisdiction to hear the divorce. Prior to Brexit, the question of which court would be able to proceed with the divorce would depend on which court issued the petition first. Post Brexit, however, if one spouse issues a petition in another EU Member State, that jurisdiction will not be bound by the fact that divorce proceedings commenced first in England as the latter will not then be a Member State. Whereas before Brexit, the court in the second country would have to stay proceedings pending an English court's determination as to whether it has jurisdiction, post-Brexit, that country can proceed with the petition regardless, if it so chooses. The bill would not help to solve this problem.

We are currently uncertain as to which of the old UK bilateral treaties will still be applicable between the UK and EU Member States. General consensus seems to be that the 1996 and 2007 Hague Conventions will be significant, but will not entirely fill the huge legislative void that may well result once the UK has left the EU in cases involving the international recovery of maintenance and the recognition and enforcement of orders relating to children and parental responsibility.

The government has published a policy paper entitled 'Providing a Cross Border Civil Judicial Cooperation Framework – A Future Partnership Paper', which makes plain its intention to negotiate an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis. The government wishes to continue to be a leading member in the Hague Conference and to participate in those Hague Conventions to which the UK is already a party and continue to participate in the Lugano Convention. However, with regard to the Lugano Convention and the Hague Convention on Maintenance, the UK's current membership is dependent on being in the EU and so, to be a member post-Brexit, the government will need to negotiate its way in – which may prove tricky.

One issue that has been clarified by the government is that decisions of the Court of Justice of the European Union (CJEU) made before Brexit will be used to interpret retained EU law. However, decisions of the

CJEU made after exit day will not be binding on UK courts and tribunals, and domestic courts and tribunals will no longer be able to refer cases to the CJEU after exit day.

The implications of the UK's departure from the EU remain unclear and, in relation to cross jurisdictional disputes, are entirely dependent on what the UK is able to negotiate in terms of reciprocity. One area to watch is in relation to pre-nuptial agreements. It appears from the EU Commission and the UK government's respective position papers that they currently concur that, if a couple reached an agreement pre-Brexit as to which court should determine their maintenance claims on divorce, they could be bound by that agreement post-Brexit. However, whether there continues to be agreement between the UK and the EU on this or any other issue remains to be seen.

Note

1 Documentation available online at www.gov.uk/government/publications/information-about-the-repeal-bill, accessed 14 November 2017.

Family court tells Australian couple they are not the parents

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In a recent decision, the Full Court of the Family Court has ruled that an Australian couple who went overseas for surrogacy are not the parents of their child under the Family Law Act.

In the case, *Bernieres and Dhopal*,[1] Mr and Mrs Bernieres had a child through surrogacy in India. They first went before Berman J of the Family Court seeking orders that they had parental responsibility for the child and that the child live with them – and declarations or findings under the Family Law Act that they were the child's parents.

Berman J made the orders that they had parental responsibility and that the child live with them, but declined to make the parentage declaration.

Mr Bernieres was the biological father of the child. An egg donor was the biological mother.

The couple, who lived in Victoria, had not undertaken surrogacy in compliance with the law of Victoria because:

- the surrogacy was commercial, as oppose to altruistic;
- the IVF was not commissioned with the assistance of a Victorian-registered assisted reproductive treatment (ART) provider; and
- the procedure was not carried out in Victoria.

Therefore, section 60HB of the Family Law Act did not apply to the case. Section 60HB provides:

'(1) If a court has made an order under a prescribed law of the State or Territory to the effect that:
  (a) A child is the child of one or more persons; or
  (b) Each of one or more persons is a parent of a child;
  then, for the purposes of this Act, the child is the child of each of those persons.
(2) In this section: "this Act" includes:
  (a) The standard Rules of Court; and
  (b) The related Federal Circuit Court Rules.'

Furthermore, Mr and Mrs Bernieres sought a declaration under section 69VA of the Family Law Act. Berman J was of the view that he could not do so because that section was not a 'stand alone power but rather requires "parentage" of a child to be an issue in proceedings in respect to another matter'. Berman J further went on to say that the Family Court, despite being a superior court of record, did not have an inherent power to grant a parentage declaration 'other than those authorised by the Act and its inherent power extends only to administer justice and prevent abuse of process'.

Berman J noted that the circumstances surrounding the birth of the child were 'not dealt with directly either by the relevant state legislation or by reference to section 60HB' and that this may be unsatisfactory. However, 'the definition of a parent should [not] be

extrapolated because of a legislative vacuum'. He went on to say that, in the category of persons who satisfy the definition of parent while not necessary closed pursuant to sections 60H and 60HB of the Family Law Act, 'any perceived hiatus is a matter for legislation and not judicial interpretation'. Therefore, as the Victorian legislation did not provide for the circumstances of the child's birth, Mr Bernieres was not the parent of the child for the purposes of Victorian law. Berman J said he could 'well understand the dismay of [Mr and Mrs Bernieres] that they are not able to secure for all purposes that which they fervently seek namely, recognition and a declaration of parentage'. He therefore noted the need for 'urgent legislative change'.

Berman J's call reflected a similar call by a statutory body, the Family Law Council, in 2013 for legislative action. There has been no legislative change nor any proposed legislative change.

The Full Court decision

The Full Court was comprised of Bryant CJ and Strickland and Ryan JJ.

The justices accepted the approach taken by Thackray CJ in *Farnell and Chambua*[2] (the Baby Gammy case) that sections 60H and 60HB of the Family Law Act overrode the general parenting presumptions under the Family Law Act.

Furthermore, the justices agreed with the tentative position taken by Ryan J in *Mason and Mason*[3] where Bryant CJ said in effect that there is a scheme between state and federal law as to who is and who is not a parent, and that therefore a person is or is not a parent determined by state and territory status of children legislation.

Therefore, the approach taken by Johns J in *Green-Wilson and Bishop*[4] that someone is a parent under general provisions of the Family Law Act even if not a parent under the equivalent Status of Children Act is the wrong approach.

The justices went on to note that section 60H(1), by which the birth mother and de facto partner or husband are the parents of a child conceived through artificial conception procedure, did not apply to surrogacy situations:

> 'On its plain meaning, if section 60H(1) is applied to a surrogacy arrangement… it results in the birth mother and her husband or partner being the parents, and the child not being the child of any person who provided genetic material. Thus, neither of the commissioning parties can be the parents of the child under this subsection, and it is clearly designed to cover conventional artificial conception arrangements where the birth mother and her partner are to be the parents of the child.'

The justices did not consider section 60H(2) and (3) of the Family Law Act. As they noted, 'judicial opinion is divided as to whether those subsections impliedly exclude' any donor or genetic material from recognition as a parent. If the approach taken by Ryan J in *Mason and Mason* applied to section 60H (2) and (3),[5] then, on the face of it, a donor would not be a parent under those sections. However, in the decision of *Groth and Banks,*[6] a known donor could be a parent.

Whilst it might be thought that section 60HB only applies to domestic surrogacy arrangements, the justices said:

> 'Thus, it is plain that section 60HB now specifically addresses the position of children of and under surrogacy arrangements, leaving section 60H to address the status of children born by means of conventional artificial conception procedures. Further, the plain intention of section 60HB is to leave to each of the States and Territories to regulate the status of children born under surrogacy arrangements, and for that to be recognised for the purposes of the Act. In other words, section 60HB covers the field, leaving, as we say, section 60H to address conventional artificial conception procedures.'

As they said:

> 'The unfortunate result of that conclusion is that the parentage of the child here is in doubt. There is no order made under the relevant State legislation (and nor could there be)… There is no question that the father is the child's biological father, but that does not translate into him being a parent for the purposes of the Act. Further, the mother is not even the biological mother, and thus is even less likely to be the "legal parent".'

Because of the effect of section 60HB (and perhaps section 60H), therefore a parentage declaration could not be made.

Mr and Mrs Bernieres sought to have the child considered to be a 'child of the marriage' but, from similar reasoning, the Full Court found that the child was not a child of the marriage, in part because of section 60HB.

Effect of the decision

It has been estimated that approximately 250 children a year are born to Australian intended parents via overseas surrogacy arrangements. It is clear now that, because of this decision, most Australian intended parents are not the parents of any child born overseas through surrogacy. It is really irrelevant as to whether the surrogacy is commercial or altruistic. Because the Family Court referred to the relevant state legislation (which is fairly consistent on this point), the effect is clear – intended parents are not parents of children born through surrogacy overseas.

Are there any exceptions to the ruling as to who is a parent under the Family Law Act?

Yes, there would appear to be four exceptions in which someone can still be a parent under the Family Law Act when surrogacy is undertaken overseas.

Exception 1: comity cases

If someone is living overseas and has undertaken surrogacy lawfully there, and is recognised as a parent there, then the general parenting presumptions under the Family Law Act do not apply that that person should be recognised as a parent under the Family Law Act.

Exception 2: a second parent adoption

Now we come to the truly Kafkaesque situation where a biological parent may not be a parent but the second (either biological or non-biological) parent will be a parent under Australian law. In some parts of the United States, surrogacy is governed by post-birth parenting orders, typically granting custody to one of the intended parents, then terminating the parental rights of the surrogate and her partner, and then a second order making the other intended parent a parent. This second order is typically a second parent adoption order (sometimes called a step-parent adoption order).

It is unclear now whether the first parent will be recognised as a parent under Australian law. After all, they won't have complied with relevant state and territory status of children legislation. Whether the overseas order concerning the first parent will be recognised is uncertain.

However, it would appear reasonably clear that the second parent adoption order, which recognises the second parent as a parent of the child, would recognise that person as a parent under the Family Law Act. Why this is so is fairly technical. One of the definitions of 'child' under section 4 of the Family Law Act (the definition section) says:

'(a) In Part VII [that part of the Family Law Act that deals with children and parental responsibility] includes an adopted child and a stillborn child; and

(b) In Subdivision E of Division 6 of that Part [the part of the Family Law Act that deals with taking children overseas improperly], means a person who is under 18 (including a person who is an adopted child).'

Further, under that section, 'parent' is defined as: 'When used in Part VIII in relation to a child who has been adopted, means an adoptive parent of the child.'

Furthermore, where there might be legitimate concern about whether the adoption needs to have occurred in Australia or needs to have occurred in accordance with, for example, with The Hague Intercountry Adoption Convention, the definition of 'adopted' in that section is much wider: 'In relation to a child, means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.'

Exception 3: registration of US surrogacy orders

It is possible in limited circumstances (and has occurred twice) that US surrogacy orders are able to be registered under the Family Law Act. In those cases, the order of the US court that declares the intended parents to be the parents of the child will therefore make the parents under Australian law, if the order is registered, the parents of the child in Australia.

In the two decisions, the Family Court made plain the Court's reluctance to register US surrogacy orders when there has been commercial surrogacy. This may be a very limited option.

Exception 4: South Australia

Under the Family Relationships Act 1975 (SA), those intending to undertake surrogacy overseas from South Australia can obtain the approval of the South Australian Attorney-

General before undergoing their journey. The South Australian Attorney-General in turn has to be guided by the State Framework for Altruistic Surrogacy and the Family Relationships Regulations – neither of which at this stage have been written, even though the law has been in place since July 2015.

If a couple (and it would only apply to couples) is able to obtain the Attorney-General's consent, and they then pursue surrogacy successfully overseas, they can be recognised under South Australian law as the parents by obtaining a parentage declaration in the Youth Court of South Australia (which would therefore be sufficient for the purposes of section 60HB of the Family Law Act).

A parent for other purposes

Australians who go overseas for surrogacy may be recognised otherwise as parents for the purposes of:

- passports;
- superannuation (retirement funds);
- child support; and
- citizenship.

Notes

1 [2017] FamCAFC 180, available online at www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCAFC//2017/180.html, accessed 6 December 2017.
2 [2016] FCWA 17, available online at: www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/FCWA/2016/17.html, accessed 6 December 2017.
3 [2013] FamCA 424, available online at: www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/2013/424.html, accessed 6 December 2017.
4 [2014] FamCA 1031, available online at: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCA/2014/1031.html, accessed 6 December 2017.
5 Section 60H(2) of the Family Law Act specifies how a woman giving birth to a child as a result of an artificial conception procedure may be the parent. Section 60H(3) specifies how a man may be the parent.
6 [2013] FamCA 430, available online at: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCA/2013/430.html, accessed 6 December 2017.

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Shared custody and child support in the Spanish Civil Code

Introduction

Law 15/2005 of 8 July, amending the Spanish Civil Code and the Law on Civil Procedure in matters of separation and divorce,[1] includes, among other matters, legislative reform that addresses certain issues affecting the exercise of children custody whose object is to seek the best realisation of their benefit and interest, and to have both parents perceive that their responsibility towards them continues, despite separation or divorce, and that the new situation requires even greater diligence.

In accordance with Law 30/1981 of 7 July, in an objectively incomprehensible way, a practice has been developed that is consistent with the past model which, in many cases has prevented children from having, after separation or divorce, a fluid relationship with both parents. The consequence of this practice has been that children needlessly suffer injury that can be avoided.

Thus, any measure that imposes obstacles or difficulties on the relationship of a parent with their descendants must be protected by serious motives and must be justified as protection against a certain evil or the best realisation of their benefit and interest. Consequently, the parents must decide whether custody will be exercised only by one or both of them in a joint manner. In any case, they will determine, for the benefit of the child, how the child will relate best to the parent who does not live with him, and will seek the realisation of the principle of co-responsibility.

Even if joint custody of children is chosen, this does not mean that decisions should not be taken on the distribution of child support. This will depend on the economic capacity of each of the parents: the principle of proportionality, according to the Spanish Civil Code.

The new regulation: shared custody of children

The shared custody is in full legislative debate, jurisprudential and doctrinal, in our country since Law 15/2005 of 8 July introduced it expressly in our Civil Code.

Despite the limitations with which this reform dealt with shared custody and individual custody, the Supreme Court, in its judgment of 29 April 2013, pointed out that the wording of Article 92 of the Civil Code does not allow the conclusion that it is an exceptional measure but, on the contrary, it must be regarded as normal and even desirable, because it allows the right of children to have relations with both parents, even in situations of crisis, whenever possible and insofar as it is possible.

Although from the reform of the Civil Code and the pronouncements of the Supreme Court the judges and tribunals are more inclined to its implementation, in practice, there has not been a significant increase of the resolutions agreeing this modality of custody. In 2013, the custody of children was granted to the mother in 76.2 per cent of cases; in 5.5 per cent of cases custody was obtained by the father; and in 17.9 per cent of the cases of separation, custody was shared.

In the absence of a law that regulates co-responsibility and a lack of regulation at the state level in this matter, the courts have been defining a model of custody that is outlined by way of jurisprudence, pending the definitive approval of a shared custody law.

Since the Supreme Court passed its judgment of 29 April 2013, the exceptionality with which shared custody was contemplated, established a set of criteria to assess the appropriateness of its application. In this respect, there have been many issues related to this custody model that, given the legal vacuum, the Court has had to pronounce. The Supreme Court emphasised, in its last judgment (STS 194/2016 of 29 March), the importance of the lower courts respecting the doctrine of the Supreme Court in the interests of legal certainty, because we are faced with 'a system in need of a homogeneous solution by the Courts to similar matters'. Nevertheless, legal security is difficult to respect because the interest of the child in the specific case leaves a wide margin of discretion to the judge in order to adopt the profile of custody that adapts to the specific case (which prevents formulating a specific doctrine).

As a result of the aforementioned judgment of April 2013, the Supreme Court initiated a jurisprudential line in favour of shared custody, although it has also stressed the need to prove and justify the convenience of such a model. The criteria established in the judgment of 2 April 2013 must be integrated with facts and evidence as stated in judgment No 515/2015, dated 15 October 2014.

It has been found on countless occasions that the request for shared custody has to do more with the search for a judicial decision that does not agree to the payment of child support expressly to one of the spouses; however, this interpretation is contrary to the law.

It cannot be considered as a necessary or unavoidable effect of joint custody the extinction of the obligation of one parent – or both – to pay child support. A balance and reasonable stability in the quality and intensity of their integral care should be sought. Even in the case of shared custody, the judge must analyse the economic possibilities of the parents in relation to the needs of the children to resolve what is appropriate depending on the indicated parameters.

Determining child support

When dealing with questions related to measures concerning children in family court proceedings, whether custody or measures of right of access, or in cases of separation and divorce, the lower courts of Spain face the difficulty of determining the amount of child support based in the guidelines[2] of the Civil Code. Normally, judges need to take into account the income of both parents also in cases where joint custody applies.

As a general rule, there is a difference between whether the child attends a public or private school. The Consejo General del Poder Judicial has elaborated some guidelines for the utilisation of the tables[3] in courts and tribunals. The tables have a guiding nature that always respects the independence of judges and magistrates, both in and beyond their usual use, and in their application to each concrete case.

Table 1 (cost per child) provides an estimate of expenses, excluding items related to housing and education, to support a child as a function of the combined income of the two parents, leaving the judge to decide how these expenses will be divided between the two parents in each individual case. This table is applicable in shared custody

cases. Although many modalities exist in the concretion of this type of custody agreement, the use of Table 1 has included a model of distribution of the cost as a function of time that the children spend with each parent.

Table 2 (child pension) provides for the distribution of such costs, excluding housing and education, proportionally to the income of each parent, in cases of single-parent custody with alternating weekend stays, one or two weekly afternoons, and half holidays, by fixing the child support that would correspond to the non-custodial parent (which would be B) when the custodial parent is considered to cover their contribution to the maintenance of the child for the rest of the time the child remains with them. In this case, if the children's right to housing is covered by the attribution of the use of the family home to the custodial parent, the child support should only be increased to cover ordinary education expenses.

The tables can be used in the processes of nullity, separation and divorce, guardianship and custody of children and child support, previous provisional measures, contemporaries and precautionary measures of the previous processes, support payments between relatives and the precautionary measures of filiation processes, paternity and maternity, whether these proceedings happen in the courts of first instance, family courts or violence against women courts. The tables can also be useful for proceedings in the first instance and in the second instance before the provincial court and, if they proceed, on appeal before the Supreme Court.

Predetermination of the incomes and special needs of the children

The use of the tables requires the previous determination of the net incomes (not gross) of each parent and the possible existence of special needs the children may have, all of which must conform to the rules of evidence, including any presumptions based on external signs.

The net wage incomes are calculated in 12 annual monthly installments with the prorated inclusion of extra payments and whatever other potential additions can be perceived (for example, productivity bonuses or bonuses from objectives). In the determination of net income, salary withholdings and advances that can be borne by the recipient will not be deducted and neither will the personal costs that are paid for with that salary (mortgage, rent) given the preferential character of child support in favour of minor children.

Exclusion of housing and education expenses

Housing costs (mortgage, rent, etc) and education of the children are excluded in the elaboration of the tables and should be considered in an independent manner by legal operators. Therefore, the resulting quantity according to the tables should be increased with such concepts according to their amount and distribution criteria.

No special needs

The tables assume that children do not have special needs derived from disabilities, illnesses or other circumstances. If this is not the case, this variable must be taken into account for the final child support amount.

Extraordinary expenses

The fixed child support amount set forth in Table 2 does not include so-called extraordinary expenses, the specific nature and form of payment of which must be determined separately.

In the foregoing, the reason that moves parents to choose joint custody must be based on the fact that such a system is the most respectful of the interests of the child or adolescent. In no case should clients consider that the adoption of shared custody de facto excludes payment of child support.

Notes

1 BOE No 163 of 9 July 2005. In force since 10 July 2005.
2 Orienting Tables to determine the benefits of children in the family procedures developed by the Judicial Power Council, available online at www.poderjudicial.es, accessed 13 November 2017.
3 In 2013, the Consejo General del Poder Judicial decided to elaborate some guidelines in order to have an homogeneous criteria when determining the child support to be paid. After five years, the tables will be renewed.

The dark side of the moon: horrors of illegal immigration

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Syria has no information about 39 Indians from Punjab who went missing after ISIS took control of Mosul in 2014. In the Malta boat tragedy in 1996, 289 South Asians, including about 170 youths from Punjab seeking illegal foreign passage, found a watery grave in the Ionian Sea. The tragedy was repeated when about 20 Punjab residents heading to the United States reportedly drowned near the Panama-Colombia coast when a vessel ferrying the illegal immigrants capsized. A survivor brought back the unfortunate tale of woe. Sad but true, merchants of death run thriving rackets of human smuggling without fear or abandon, trapping gullible youths with dollar dreams. Innocent citizens are duped daily and this organised crime perpetuates horror and misery flourishing by the day with impunity and utter disregard for law.

Smuggled migrants are vulnerable to exploitation. Their lives are put at risk. The victims have suffocated in containers at high seas, perished in deserts, drowned in oceans or have been herded as forced labour in slave camps. Smugglers of human beings conduct their activities brazenly with no regard for safety of life. Survivors tell harrowing tales of their ordeal. Forced to sit in body waste, deprived of food and water, they have watched those around them die, to be thrown overboard and dumped at sea or perished on road sides. Those apprehended languish in foreign jails with no hope of return. Smuggling of illegal immigrants generates high net worth profits at the hands of mafias who fuel corruption and ignite organised crime. Such movement is a deadly business, which, like terror strikes, has to be combated with grave urgency.

Punjab is the only state to enact the Punjab Human Smuggling Act 2012, which was rechristened as the Punjab Travels Professional Regulation Act 2012. It seeks to provide a mandatory registration and licensing regime for any and every category of persons conducting any activity akin to a travel agent that involves arranging, managing or conducting affairs related to sending people abroad. It debars agents operating without a licence. Violation entails penalties. Punishment up to seven years of imprisonment is prescribed and compensation is payable by an agent to an aggrieved person upon adjudication. Cheating as defined in criminal law is applicable. Regardless, the malady thrives as agents choose not to register. Unscrupulous fly-by-night operators take advantage, trading in hoodwinking gullible youth to foreign pastures. Those trapped are obliterated, never to return and condemned to die.

Prevention is better than cure. Here, no law made by Parliament provides either. The Emigration Act 1983 authorises a Protector General of Emigrants to authorise emigration clearance to Indian immigrants to prevent exploitation at the hands of recruiting agents who duck mandatory registration and licensing by claiming that they do not conduct recruitment. In stark reality, recruitment agents exploit Indian workers with unfair contracts on false promises, never to be caught, being registered under no law. The Punjab law is avoided by claiming that agents are consultants requiring no registration under the state law. It is free trading with no check or control. Authority of law vested in the state must be exercised to enforce this law.

Placing the Emigration Act and the Punjab Travel Professionals Regulation Act side by side clearly shows that they enshrine regulatory mechanisms for recruiting agents and travel agents separately. Viewed objectively, both carry complimentary purposes in their own spheres. They are neither inconsistent nor repugnant to each other. In fact, the two laws complement each other as they provide similar objectives, aims and functions for recruiting and travel agents respectively. Punjab has enacted a law that no other state in the country has made. In fact, human smuggling is a silent issue in the Emigration Act.

Naive youths fall prey to agents and land up working as slave labour in ammunition dumps or fields in Iraq or end up condemned to live as illegal immigrants abroad in pitiable conditions with no hope of return if they

manage to survive hazardous channels of death. Smuggling of migrants is a highly profitable business with low risk of detection. For criminals, it is increasingly attractive to deal in human merchandise and this business of death is becoming more and more organised, in which professional international networks wantonly flourish transcending global borders and regions. India has a dire need to check this global menace. However, the Emigration Act, which is an act to consolidate and amend the law relating to emigration of citizens of India, neither defines human smuggling nor even looks at the problems connected with the trade. Thus, the need for Parliament to legislate an Indian human smuggling law is crucial. Piecemeal state legislation with limited ambit of application will restrict scope only to state territorial borders. A central law is, therefore, the composite solution. Initiatives of Parliament must set this ball rolling. Bringing back Indians in coffins is not enough. It does not salvage the situation, but compounds it.

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Best strategies to deal with potential child abduction under UAE law

Introduction

If a couple are divorcing, and the father is resident in the United Arab Emirates (UAE) but the mother is based in another jurisdiction, the mother may fear that, if the child travels to the UAE with the father, the child will not be returned to the mother's jurisdiction as the UAE is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980.[1]

The purpose of this article is to outline what the potential remedies are for the mother should the situation arise. The mother could take the following course of action in the UAE.

First option: file a custody case before the UAE courts

The mother has the right to file a case against the father to have the child returned to her through the family courts. The case has to go through a reconciliation committee to seek an amicable separation prior to proceeding to a court hearing. If the parties reach an amicable agreement to separate, an agreement is executed by both parties, which may determine any other relevant matter in relation to the divorce. Once the agreement is executed, the judge will sign and stamp the agreement. In the event that the parties do not agree to an amicable divorce, the parties may be given a no-objection letter to refer the matter to the family courts in the UAE. This is a procedural step the parties have to go through prior to court hearings.

In accordance with Article 16 of the Personal Status Law No 28 of 2005:[2]

'1. The lawsuit is not accepted by the court in matters of personal status except after showing it to the commission of family guidance except the matters of wills and inheritance and temporal and immediate lawsuits, and temporal and immediate orders of alimony, custody, guardianship, and hopeless cases such as that of marriage and divorce.
2. If a settlement had been reached between the parties before the family guidance, this would have been proved in the peace process-verbal signed by the parties, and the competent member of committee and this record would have been signed by the competent judge, who would have the authority of execution, and it is not allowed to appeal against it by any way of appealing except it violated the provisions of law.
3. The Minister of Justice, Islamic Affairs, and endowments issues the executive list which organizes the role of family

guidance commission.'

Filing a case in the UAE courts

According to Article 42 of the Civil Procedures Law and its amendment issued in 2015, a case is filed in the UAE when it is registered by filing a statement of claim.

Article 42 of the Civil Procedures Law issued by virtue of Federal Law No 11 of 1992[3] reads as follows:

> 'The action is filed before the court according to the claimant request with a declaration deposited at the court clerks' department. The declaration shall include the following data:
>
> 1 Name, surname, profession or job, domicile, and the workplace of the claimant and the name, surname, profession or job, domicile, and the workplace of his representative.
> 2 Name, surname, profession or job, domicile, and the workplace of the defendant and the name, surname, profession or job, domicile, and the workplace of his representative if he works for the others. If the defendant or his representative has no domicile or known workplace, his last domicile, residence or workplace shall be considered.
> 3 Determining a selected domicile for the claimant in the state if he has no domicile therein.
> 4 Action merit, requests, and its supports.
> 5 The date of submitting the declaration to the court.'

First potential problem

Even if the mother could obtain custody from the local courts or could have the child returned, she might not be able to locate the child because the father might put a travel ban in place. The legal reference for such applications is as follows:

- as per the Personal Status Law of the UAE, the guardian of a child (usually the father) has the right to place a travel ban on the child's passport to ensure that the child is not taken out of the country while the issue of custody is still being finalised;
- such rights are defined in Articles 151 and 149 of the Personal Status Law, which states that the custodian or guardian may place a travel ban on the child, in which case neither party will be allowed to travel outside the UAE with the child without the other party's consent;
- however, it needs to be noted that, in the case that the custodian of the children (the mother usually) wants to travel, she can do so only after getting temporary travel permission from the court. Such temporary permits are usually provided for a period of one to two months only and the court might require that she produce a guarantor with her passport prior to issuing such a permit.

The solution

Such rights can be waived if the father gives his prior written consent to not apply for a travel ban and not to keep the child's passport. It is common practice that any agreement signed between the couple includes such a waiver.

Second potential problem

The father might claim custody locally in a counter-claim to this claim, on the ground that the mother is based in a different country. Specifically, in accordance with Article No 151 of the Personal Status Law,[4] the child has to be with the father in the same country.

The solution

Prior written consent has to be obtained from the father before the child travels to the UAE.

Second option: filing a criminal case for child abduction in the UAE

If the mother has a custody court order from the local courts or from an international court, she can file a criminal case for child abduction before the UAE Judicial Authority.

In the event that the father does not return the child to the country of the mother and there is a foreign judgment rendered in favour of the mother, the mother has the right to file a child abduction case against the father in the UAE. As per Article 328 of the Criminal Penal Code Law No 3 of 1987:

> '…whoever is the guardian of a child and abstains from delivering the child to a person of who he is a legal claimant in pursuance of a judgment or order from a judicial authority, shall be punished by detention or by a fine.'

It should be noted that the wording of the above clause is not specific to a local

judgment or court order; therefore, hypothetically, a foreign court order or judgment could be used to invoke a criminal complaint about child abduction in the UAE.

One major disadvantage of this route is the fact that the judge may order detention, a jail sentence or a fine against the father, which may not be in the best interests of both parties. In this situation, the deportation of the accused is not mandatory.

Third option: filing a child abduction case in another jurisdiction followed by INTERPOL red notice sent to the UAE

In the event that the father does not comply with the foreign court order, the mother has the following options.

Our local laws require initiating a criminal action for child abduction. Such application may be followed by an INTERPOL/ extradition application against the father.

Interpol Red Notice application to the UAE

UAE law requires having an Interpol Red Notice, which shall be filed on the basis of a criminal complaint or judgment from another jurisdiction. This Interpol Red Notice is the required letter for the extradition case to be initiated in the UAE.

Potential problem

There are some cases where the extradition requests sent to the UAE courts from a foreign court cannot be accepted, such as if the UAE courts have jurisdiction to decide on the same case, even if a criminal procedure has not been initiated as per Article No 8(2) of Extradition Law.

Also, the UAE courts could issue a criminal judgment for child abduction (as per Article 328 of the Criminal Penal Code Law No 3 of 1987).[5] In this case, the extradition request could be at risk.

Other technical problems that could put the request for extradition in jeopardy

The father could give his child a residence visa in the UAE, as is his right as a guardian, which automatically gives the local courts jurisdiction in accordance with Article No 6.4 of Personal Status Law No 28 of 2005.[6] If he did this, and received judgment *in absentia*, the father could use it as one of his legal arguments to suspend the extradition procedures.

Other potential risks

The local courts could have jurisdiction if the father filed a claim in the court *in absentia* against the mother, claiming that her location is unknown. In this case, the court could accept jurisdiction in accordance with Article 6.5 of Personal Status Law No 28 of 2005.[7]

In such situations, the mother will have to file an appeal within 30 days of the date she obtained knowledge of the judgment. Such appeals shall fall under the Appeal judge's discretionary power.

Fourth option: enforcement of a foreign custody court order in the UAE courts (Mirror Order)

Article 235 of the UAE Civil Procedure[8] prescribes conditions for the enforcement of foreign judgments in the UAE through the Dubai Courts, (the following is an unofficial English translation; emphasis author's own):

'1. Judgments and orders issued in a foreign country may be ordered to be enforced in the UAE on the same conditions as prescribed in the laws of that country for the enforcement of similar judgments and orders issued in the UAE.

2. An enforcement order shall be applied for under the normal litigation procedure in the court of the first instance within whose jurisdiction the enforcement is required. Enforcement may not be ordered until the following has been verified:
   a) *That the UAE courts do not have jurisdiction in the dispute in which the judgment has been given or the order made*, and that the foreign court that issued it has jurisdiction therein under the international rules for legal jurisdiction prescribed in their laws.
   b) That the judgment or order has been issued by a court having jurisdiction under the law of the country in which it was issued.
   c) That the opposing parties in the case in which the judgment was given were summoned to appear and duly appeared.
   d) That the judgment or order has become final under the law of the court that issued it.
   e) That it does not conflict with a judgment or order previously issued by a court in the UAE and

contains nothing in breach of public morals or order in the UAE.'

If the local courts accept jurisdiction to issue a judgment on the basis of the child's residence visa or if the father claims (untruthfully) that the mother's location is unknown, then the application for enforcement of foreign order could be seriously at risk.

Best legal solution to deal with the matter in advance

In such cases, the client is always advised to enter into a settlement agreement before the local courts in the UAE, where the father has to attend personally and a lawyer can represent the mother. This will enable the parties to agree on the period of the child visitations, that the father will never claim the child's passport, that he will never put a travel ban in place, and a date to return the child.

The advantages of taking such measures are as follows:

1. Executing a settlement agreement offers no risk to the parties. The applicability or enforceability of the agreement is similar to a final local court order. Furthermore, it is unlikely that the settlement agreement will be in conflict with the public order. Hence, the process would be quick and efficient.
2. The timeframe to execute a settlement agreement will be much faster than applying to enforce a foreign order in the UAE.
3. This process allows both parties to secure the terms and conditions that they want in advance, prior to bringing the child to the UAE.

Conclusion

In case of lack of an aforementioned signed and executed settlement agreement, the other two methods – namely enforcement of a foreign court order and an extradition application – may fall under the remit of the local courts' absolute discretionary power. This may be time-consuming, and result in arguments before the local courts, making the whole process unnecessarily long-winded. Also, assuming the local courts do not obtain jurisdiction under the two scenarios aforementioned (the father provides a residence visa to the child and files a case based on the child's UAE visa, or the father files a case in the UAE courts by not truthfully disclosing the mother's location), the execution of a settlement agreement in advance may be the recommended option.

Notes

1 Hague Conference on Private International Law, Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Hague XXVIII, available at www.refworld.org/docid/3ae6b3951c.html, accessed 13 November 2017.
2 Personal Status Law in the United Arab Emirates, Federal Law No 28 of 2005.
3 Article 42, Federal Law No 10 Issued on 20/11/2014 Corresponding to 27 Muharram 1436 H On the Amendment of Certain Provisions of the Civil Procedures Law issued by virtue of Federal Law No 11 of 1992.
4 Personal Status Law in the United Arab Emirates, Federal Law No 28 of 2005.
5 Article 328, Federal Law No (3) of 1987 on Issuance of the Penal Code: *'Whoever is the guardian of a child and abstains from delivering the child to a person, of whom he is a legal claimant in pursuance of a judgment or order from a judicial authority, shall be punished by detention or by a fine'.*
6 Article No 6.4, Personal Status Law in the United Arab Emirates, Federal Law No 28 of 2005.
7 Article No 6.5, Personal Status Law in the United Arab Emirates, Federal Law No 28 of 2005.
8 Article 235 of the UAE Civil Procedure Code, Federal Law No 11 of 1992 ('Civil Procedure Code').

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Experts' meeting on domestic/family violence and the 1980 Hague Child Abduction Convention

More than 60 experts, comprising chief justices, judges, academics and practitioners of law, converged for a day-long meeting on 12 June 2017 at the University of Westminster, London. The topics up for discussion in the arena of private international law issues were domestic/family violence and the 1980 Hague Child Abduction Convention (the '1980 Convention'). The meeting was planned a year in advance. Detailed questionnaires were circulated well in advance of the meeting. The meeting had four thematic sessions, and after each session was over, there were succinct summaries of each session.

The anchor of the meeting was Professor Marilyn Freeman from the University of Westminster Law School. After her welcome address, an introduction was given by Philippe Lortie, the First Secretary of the Permanent Bureau of the Hague Conference on Private International Law. He acknowledged the importance of judicial cooperation on a global scale in the realm of international family law issues, started by then-Justice Peter Singer of the High Court of London. Lortie dwelled on the guide to good practice *qua* the 1980 Convention. He said 97 countries are parties to the 1980 Convention. He also hugely appreciated the written feedback of the delegates to the questionnaire circulated before the meeting.

The opening remarks were presided over by Judge Sikri, Senior Judge of the Supreme Court of India. He highlighted that the welfare of the child should be a central focus, rather than the rights of the litigating parents. In his address, he linked the theme of the meeting with globalisation and urged for the need of international family law issues, *qua* the non-resident Indian fraternity, to keep pace with commercial laws. These were observations he also made as the keynote speaker at the inaugural address of the International Academy of Family Lawyers annual meeting in New Delhi on 15 September 2016. At the London meeting, he also cited the limitation of judge made law in the instance of a country not being a signatory to international instruments.

Opening remarks were also made by Salla Saastamoinen, Director for Equality in the Directorate-General Justice and Consumers, European Commission. She highlighted the concept of European protection orders that were introduced a year ago, but also stated that no statistical data or research regarding the same was available at this point.

The first thematic session was 'Retrospective views on the 1980 Convention, the issue of domestic/family violence and the evolution of national domestic violence regimes (1980 to 2017)'. This session was chaired by Professor Nicholas Bala from Queen's University, Ontario, Canada. He highlighted the changing national legal approaches to domestic violence at present by stating that there is now a better understanding of domestic violence. This assertion was corroborated by the availability of more research and professional education on the subject. At the same time, it was highlighted that women still do not report domestic violence on account of intimidation, guilt, loyalty or economic or immigration concerns. In the discussion, it also emerged that 'exaggerated and undocumented abuse claims' in the context of Hague proceedings were attempted in order to thwart the return of a removed child.

Lord Justice Moylan, Court of Appeal, London, and Member of the International Hague Network of Judges for England and Wales, very eloquently chaired the second thematic session on the evolution of central authority and judicial good practices related to the 1980 Convention and domestic/family violence. One of the key questions was whether there is proper investigation or process of enquiry with regard to domestic

violence in different jurisdictions. In this session, Sudha Shetty, Assistant Dean from the University of California, Berkeley, cited the instance of University College London having created a guide for lawyers who handle domestic violence cases. Judge Boon, Deputy Liaison Judge for the District Court of The Hague, said it was very difficult to assess the allegations of domestic violence in child abduction cases. It was discussed that the concept of a centralised jurisdiction is more holistic and beneficial from the point of view of domestic enabling legislation. The issue of mediation in abduction cases, but not for substantive issues, was also mentioned. There was reference to the Istanbul Convention, which mandates the level of evidence required to establish a grave risk. Significantly, the European Union signed the Istanbul Convention on 13 June 2017.

Chief Justice Bryant of the Family Court of Australia chaired the discussion in the third thematic session on the 'New Guide to Good Practice on Article 13(1)(b) of the 1980 Convention and other mechanisms to strengthen international cooperation on this issue'. The issue of domestic violence and grave risk stands innately and inherently incorporated in Article 13(1)(b). It has emerged that each of these cases are fact-specific, and it was sadly lamented that returning parents may not have access to justice. Reference was also made to 'pressure cooker mediation'.

The fourth thematic session was a 'Discussion of a potential new international instrument on protection orders'. London-based Anne-Marie Hutchinson, QC (Hon) OBE pointed out that the immigration issue is a very serious one in child abduction matters. Lortie stressed the need for research on the outcome of these cases. There was a consensus by a majority of the delegates that there is a lack of research in this area of law. Professor Jeffrey Edleson, Dean of the University of California, Berkeley, said the impact of the decision was 'very severe on taking parents', even on return to the country of habitual residence.

In the final session, co-chaired by Lady Justice Black, Head of International Family Justice, Court of Appeal, London, and Member of the International Hague Network of Judges for England and Wales, and Lortie, some of the topics discussed were: proper domestic implementing legislations where necessary to make the implementation of the 1980 Convention more meaningful; the creation of bench books; and continued encouragement of cross border judicial cooperation.

OPINION PIECES

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Poland: a Supreme Court

It is terribly easy to write in an international journal, periodical or at a conference about issues referable to domestic procedure in international child law forgetting that, in fact, it is taken for granted in the United Kingdom and many other countries that the judiciary is appointed reasonably, own objectivity and that corruption within the judiciary is, for us, a far-fetched fantasy. However, issues in the newspapers and online regarding the attempts by the Polish government in Parliament (only presently vetoed by its president) suggesting an attempt at rigging the appointments to its Supreme Court for none other than political right-wing purposes is concerning. It all insists that those from reasonable jurisdictions should stand back for a moment, not worry presently about sharing updates for other international practitioners but instead for other international practitioners to come together to abhor what is seemingly going on in Poland itself.

As this is written, the European Union is considering fining Poland, referring Poland to the Court of Justice of the European Union, and even apparently suspending Poland from the EU itself. It seems that decades under a communist totalitarianism have not taught it much in its insistence upon an apparently fundamentalist Catholic creed being absorbed into its lawmakers and those who then, as Supreme Court judges, interpret its laws or, as its government would prefer, do not interpret after all but do the government's bidding. Arguably, one set of fundamentalist laws of communism has been overtaken by another, leading to an incapacity for objectivity and reasonableness.

Of course, we hear about the United States and US President Donald Trump's recent appointment, which was passed by the Senate, of a right-wing judge who apparently owned some moderacy when, giving evidence before a Senate Committee before his final agreed appointment, he assured them that he was objective and would follow the rule of law: this is of some comfort, thankfully, but the anxiety of hearing of the history of the individuals prior to and after appointment is palpably disconcerting.

While no system is perfect and there have been historic and remaining concerns particularly regarding the judges of England and Wales, comparisons with Poland are remote. However, it is well to remember these matters as concerns remain regarding some countries and their methods of appointment, which we must all, in a sense of duty, be prepared to openly acknowledge and discuss as now we do.

Gay lawyers

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It is 50 years since homosexuality was decriminalised in the United Kingdom and the media is making much of it. It is important for family lawyers in the IBA to be aware and celebrate this. The decriminalisation of homosexuality did not ensure that men and women could be open about their homosexuality at all, less so gay family lawyers in the UK. It is only some ten years or so since civil partnership came into law in the UK, with marriage following more recently for homosexuals. This change has had a large effect upon gay lawyers being open as barristers, solicitors and even as judges, going as far as the High Court and the Court of Appeal. Sad for those of the judiciary who married and/or remain reticent with their homosexuality concealed because they are older and those who never became QCs or judges precisely because of their homosexuality despite their extreme capability as lawyers. But these positive changes, if at all, are a very recent phenomenon.

IBA family lawyers must consider using this important anniversary in the UK to press upon their derived countries where homosexuality is still illegal to try and affect change. Not only does this affect individual citizens, but also lawyers participating in their family courts and, needless to say, the appointment of judges.

There are very few openly gay judges worldwide and there are very few gay family lawyers in many countries. Homosexuality and its practice remain a criminal offence in some countries. While there are cultural norms and apparent practices forbidding homosexuality, there is little point in heralding and projecting human rights for the citizens of these countries if the lawyers involved in the legal process are also denied human rights or are concerned to talk about homosexual issues within human rights for their citizens.

Indeed, it is all terribly easy for those gay practising lawyers in the UK, established, middle-aged and secure, but nevertheless for them there may have been appalling discrimination in England and Wales by judges against gay family lawyers of the UK who should never have been allowed to become judges. If those judges have been prejudiced against gay lawyers, it is likely they will be more prejudiced against their citizens in the decision-making for that or other reasons.

However excellent the changes in the UK, they will not reveal a tidal wave of good behaviours yet, or at all, but they remain significant and should be used as necessary examples for family lawyers in countries worldwide where gay family lawyers are faced with prejudice from clients and their judiciary who may all be hypocritical. IBA family lawyers must silence them and must continue or commence due protest however much they feel it is appropriate in their respective jurisdictions.