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Family Law Update

Committee update from the International Bar Association Legal Practice Division

VOLUME 11 NUMBER 1 **DECEMBER 2018**

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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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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Dear Family Law Committee members,

The Family Law Committee has had an active year. It has participated in various projects and questionnaires relating to family law. It has had indirect representation at the Hague Conference in regard to Article 13(1)(b) Defences of the Hague Convention on the International Abduction of Children.

The Family Law Committee has also fed into various projects such as the planning of The Hague Convention Conference in Cape Town on 2 and 3 April 2019.

The website is in development and it is planned to post case law from various jurisdictions.

It has engaged a membership drive and has interactive correspondence with members of the Family Law Committee on an ongoing basis to exchange information and develop family law in various jurisdictions.

It has entrenched its relationships with, for example, REUNITE, Law Asia, the International Academy of Family Lawyers, the Academy of Adoption & Assisted Reproduction Attorneys and other international organisations related to family law.

This is my last tenure as Chair and I am honoured and privileged to have been able to serve in this capacity. Barbara Connolly is the new Chair and I am sure will raise the Family Law Committee to new heights. My best wishes and gratitude to the Family Law Committee.

Best wishes and regards,

Zenobia du Toit
Outgoing Chair
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From the Editor

As always, it gives me more than immense pleasure to put together this update, besides collaborating with the office bearers of the Family Law Committee and the editorial staff at the IBA office in London.

First of all, we would like to express our deep gratitude to our valued contributors from so many jurisdictions, who take time out from their extremely busy schedules to share their knowledge, wisdom, expertise and updates with the family law fraternity across the globe.

In terms of major family law conferences, the year began with the wonderfully enriching 21st Annual Family Law Conference, organised by Miller Du Toit Cloete and the Law Faculty of the University of the Western Cape, followed in quick succession by the International Academy of Family Lawyers (IAFL) Annual Meeting and the Asia Pacific Chapter Meeting held in Tokyo from 30 May–3 June. This was followed by very vibrant family law sessions organised by the Family Law Committee of the IBA in conjunction and cooperation with other committees of the IBA at the Annual Conference of the IBA held in Rome from 7–12 October 2018. Thereafter, the seminar on 'Interparental Child Removal, Domestic Violence and the Voice of the Child', held in New Delhi on 9 November 2018, witnessed very high-powered deliberations. Also, this event saw some very meaningful and incisive contributions from very senior diplomats from various missions and embassies in New Delhi, with added perspectives from international academics and specialist family law practitioners, on the 1980 Hague Convention on child abduction.

Relating to dedicated standalone family law events, the year concluded with the very intense IAFL conference held in Dubai on 12–13 November, which focused on the United Arab Emirates jurisdiction and the wider region to discuss current issues of concern to lawyers and other professionals involved in private client and family law work. The conference also had significant international representation of immense value.

It will be noticed that the common threads that emerge from the trail of the above-mentioned international family law events are: cross border inter parental child removal both in Hague Convention and non-Convention countries, children's issues, surrogacy, adoption and same sex relationship legal rights, all of which have attracted significant attention.

Before the year comes to a close, the Family Law Committee extends season's greetings to the legal fraternity.

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A tale of two cities – the divorce divide

An increasing number of family members are now establishing their lives focused on lifestyle: working in 'the City' of London while, for all intents and purposes, living elsewhere – sometimes not even in the same country.

As part of this phenomenon, it is becoming common for family members to live between Edinburgh (Scotland) and London (England). Wages in the City still outstrip those in the rest of the United Kingdom. The cost of housing in Edinburgh remains relatively buoyant, but it is still a far cheaper alternative to London. There are a number of good private schools, fresh air and a straightforward commute at either end of the week.

While it may be difficult in those circumstances to say that a couple is established in one place and not the other, establishing where a divorce ought to take place could be critical to the eventual outcome.

The laws in Scotland relating to divorce and regulating financial provision are relatively different from those in England, not least when it comes to the payment of ongoing financial support. We only need to look at the case of *Villiers v Villiers* [2018] EWCA Civ 1120 to see that an application for maintenance in England is likely to stand the applicant in much better stead than if he or she applies for ongoing financial support under Scots Law.

So how do the two compare?

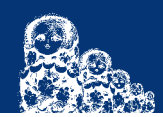
Let's take the fictional situation of James and Ailsa, both in their early fifties. They met at a relatively young age. Ailsa moved into James' university digs, a flat in central London, and they married soon afterwards. At the time of their marriage, they were both establishing themselves in their respective careers. Ailsa, having commenced a high-flying career as a solicitor at a large city firm, decided to take some time away from her career to raise their three children. James' career took off. His job in financial services now finds him working during the week in London where Ailsa and James first established themselves. Owing to Ailsa's Scottish connections, the couple decided that it would be a good idea if they set up home in Edinburgh to allow the children to go to a smart private school locally and for Ailsa to have the help of her family nearby.

Shortly before they married, James' mother passed away. She left him a house in the Lake District. The property was not worth much at the time it was gifted, but has now doubled in price and is worth around £600,000. James' job in the City earns him an income of £750,000 per annum. The family home in Edinburgh is worth around £1.6m. James' university digs in London have been a good investment and are now worth £2.2m. Despite living most of the time in Edinburgh, now that they are older, Ailsa has started to spend holidays and weekends with the children in James' London flat and she has started to think about moving back there.

Owing to the pressure of James commuting to and from London, the marriage is in some difficulty. Ailsa has suspicions about James' relationship with one of his colleagues. They both accept that their 30-year marriage is now at an end. Accepting that divorce is on the cards for both of them, it is now time to sort out the finances.

Scottish position

James' first port of call may be to see a divorce lawyer in London where he is working day to day. The first thing that he will learn is that the divorce laws in England are fundamentally different to those in Scotland. In circumstances where he and Ailsa are living together as husband and wife in Scotland, the law provides rules to regulate situations where there are competing proceedings. It would undoubtedly be the case that James would be advised to ensure that the last place that he and Ailsa last lived together is in Scotland. Often the place the parties last resided together is conclusive in deciding whether the divorce is to be under English or Scots Law. It sounds harsh, but people can take steps to ensure that divorce is under the law most favourable to them and would be wise to do so in this scenario. Scots law places distinct emphasis on the fair sharing of matrimonial property. Matrimonial property is, in brief,



all property acquired as a result of the efforts of the marriage. Assets that are held prior to the marriage and have remained as they are would not form part of the matrimonial property. The exception to this would be a family home acquired before the marriage for use as a family home.

Even in circumstances where the Lake District property has increased in value, the emphasis in Scotland is not in relation to any gain in value; but instead on the creation of wealth during the marriage. The same principles would apply in respect of James' flat in London, so long as it is clear enough that the flat in London was not bought in the first instance for use as a family home. The Lake District property and the London flat would therefore not form part of the matrimonial assets to be divided between James and Ailsa.

The focus in Scotland would be on the fair sharing of the matrimonial property, which would include the family home in Edinburgh and assets such as pensions, savings and any other assets that both James and Ailsa have acquired during the marriage. The starting point when looking at the question of financial provision upon divorce will be an equal sharing although there are various other principles that would apply. One of those principles would be the ability to look at any economic disadvantage that Ailsa has sustained as a result of giving up her legal career to look after the children, but this principle in practice has its limitations.

The other thing that Ailsa would be able to look at is any ongoing maintenance to be paid to her by James both in respect of the children and for her. In Scotland, ongoing financial support could be paid for a relatively limited period of up to three years post-divorce. The expectation would be that Ailsa would be able to retrain and regain employment in due course and if the finances are such as to give her sufficient capital, the ongoing maintenance in Scotland is likely to be even more restricted.

The extent and length of maintenance to be paid to her by James could make a real difference to Ailsa. Ailsa could look to secure an application for maintenance in England by virtue of James' habitual residence there. This could make a big difference for Ailsa, even if she were only to use the application to negotiate a more favourable maintenance provision against the backdrop of a Scottish divorce.

From James's perspective, if it is clear Ailsa will 'play' the maintenance card, he would be well advised to ensure that any application for divorce in Scotland deals with the maintenance question and there are ways he could go about doing this.

English position

If Ailsa were to issue divorce proceedings in England, she would find herself in a very different position. The starting point of the English divorce courts is equal division of all family assets. The court will look at a range of factors in determining the outcome. These factors include the parties' income, earning capacity, property, financial needs, obligations and responsibilities, their standard of living and the contributions that each of them has made or is likely to make in the foreseeable future. The court will consider the 'yardstick of equality' in considering a fair outcome. The courts in England and Wales have a wide discretion when applying these factors and outcomes will be determined on a case-by-case basis. The English courts' approach towards marital and non-marital property is less linear than in Scotland and it can attach much less weight to the distinction between marital and non-marital assets. It is by no means unheard of for the court to make orders in respect of assets that were inherited or built up by one party prior to the relationship. English courts have also been known to drive a coach and horses through trust arrangements if they consider the trust is referable to the marriage. The family courts in England and Wales can even disregard a pre-nuptial agreement entered into before the marriage if it is considered to be unfair.

Applying this to Ailsa and James, although James will doubtless make arguments about the non-marital nature of the Lake District house, Ailsa will claim that she should be entitled to 50 per cent of its value and the court will have the ability to order a sale or transfer of that property, or alternatively to order James to make financial provision in respect of a share of it. Likewise, Ailsa will be advised to make a claim against the London flat despite the fact that it was owned by James before he met her. This will be on top of her share of the family home in Edinburgh.

Next, the court will look at whether Ailsa's needs have been met. Ailsa may say that she requires a home in Edinburgh as well as a bolthole in London given the lifestyle to which she and the children have been accustomed. She will also seek a share of 50 per cent of James' pensions, which can be transferred to her outright.

As a result, Ailsa may well be looking not only at a share of all of the capital assets of the family, but could also argue that she should receive more than 50 per cent due to her needs, her contribution to the family and her inability to build her capital up again as opposed to James with his significant earning capacity.

In terms of income, Ailsa will potentially be eligible for a 'joint lives' maintenance order; a concept that will be alien to most non-English family lawyers. The effect of such an award would be to oblige James to support Ailsa from his income potentially for the rest of her life. Ailsa could even seek to persuade the court that she should be compensated for the 'relationship-generated disadvantage' that she has sustained in giving up her high-flying career to support her husband and children. Her income needs may be quantified in a six-figure sum.

It is not surprising that England and Wales (and more markedly London itself) has earned the reputation of the 'divorce capital of the world' for the financially weaker spouse.

Deciding which side

When it comes to deciding where to issue divorce proceedings, where there is a choice between two jurisdictions it is vital to consider at an early stage whether it is likely to be advantageous to look to divorce or apply for maintenance in one particular country or the other. Advice should be sought at the outset from specialist family lawyers in each jurisdiction in order to establish where would be the most favourable for the client before taking the step of issuing divorce or raising separate maintenance proceedings.

Given the proximity of Scotland to England and Wales, it is perhaps surprising that their laws could be so fundamentally different. The outcome to a couple such as James and Ailsa, in a situation that is becoming ever more frequent given the flexibility of the modern workplace and the ease of travel, may be dramatically different and it has never been more important for family lawyers to be aware of these differences right from the outset.

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The approach by judges to the assessment of the grave risk of harm in cases involving domestic violence

Article 13(1)(b) of the Hague Child Abduction Convention: revisiting *X v Latvia* and the principle of effective examination

It is now widely recognised that women and children face harmful, sometimes severely dangerous, conditions when they suffer domestic violence. As the definition of domestic violence has expanded over time, so has its complexities. This is amplified by factors such as the battered women syndrome and post-separation violence. Both features are not unfamiliar in Hague Convention cases. The key question is when is such violence a sound basis for applying Article 13(1)(b)? When is the threshold crossed? The return of a child under the 1980 Hague Convention is envisaged for a limited period of time until a decision is made about custody. To adhere to the *status quo ante* aim of the 1980 Hague Convention a summary return mechanism is essential. That said, the remedying of international child abduction must make room, unapologetically, for the interests of children in some cases where it is established that the domestic violence constitutes a grave risk of harm.

In January 2012, the Sixth Meeting of the Special Commission to Review the Operation of the Hague Abduction Convention highlighted the problem that allegations of domestic and family violence and the risks to the child were not always adequately and promptly examined. As with any international

convention, a uniform interpretation of the instrument is vital for it to operate fairly among Contracting States. This article emanates from a PhD research study[1] into the problem of the inconsistencies in the interpretation and application of Article 13(1)(b) in relation to allegations of domestic and family violence. Following the Sixth Meeting, a Working Group was set up to create a Guide to Good Practice on Article 13(1)(b).

The research closely followed and observed the progress of the Working Group with great interest. As a part of the PhD research process, in January 2016, empirical study findings were submitted to the Working Group and in October 2016, preliminary policy recommendations. Following publication of the draft Guide to Good Practice in 2017, the full thesis, which included comprehensive comments on the draft Guide, was submitted and acknowledged by the Honourable Diana Bryant AO, QC, Chair of the Working Group and shared with members of the Group.

One of the key issues identified during the research is the inconsistency in the interpretation and application of the Article 13(1)(b) exception because of the approach by judges to the assessment of the grave risk of harm in cases involving domestic violence. Findings suggest that there are two different approaches to the way in which the assessment of the grave risk of harm is carried out. The first is where the court goes straight to considering protective measures on the assumption that the allegations of domestic violence are true. The second is where the court first considers the credibility of the allegations and examines the same against the backdrop of evidence available to the court. The draft Guide currently advocates in favour of both approaches (see Approach 1 and Approach 2 in the draft Guide to Good Practice, pp 28–89).

Having undertaken analytical and comparative research on the issue, the recommendation to the Working Group was that the appropriate approach is for judges first to investigate the merits of the grave risk of harm exception under Article 13(1)(b) before considering protective measures. It is further recommended that 'effective examination' should take place by means of a 'thorough, limited and expeditious' investigation, in line with *X v Latvia* (Application no 27853/09) Grand Chamber (2013). With effective examination comes an informed decision as to whether there is a grave risk of harm. Accordingly, there is a two-pronged approach to effective examination. The first is a merits exercise undertaken by considering 'arguable' allegations or 'claims'. Second, the examination should lead to a ruling on 'specific reasons in light of the circumstances of the case'. Understandably, there will be circumstances where disputed allegations cannot be tried or objectively verified, for example, where there are evidential difficulties. Nonetheless, even in such circumstances, *X v Latvia* is applicable, in that a merits exercise can be undertaken, however limited, with a ruling on specific reasons in light of the facts of the case, before considering the effectiveness of protective measures. Notwithstanding the time pressure attached to Hague Convention cases, it is achievable to undertake an examination of the allegations. It is suggested that the wording of Article 13(1)(b), if followed correctly, without any additional gloss and in its precise sequence, requires that there first be an examination of the harm to enable an assessment of whether there is a 'grave risk' that the child would be exposed to such harm if a return order is made. It is unsound to arrive at an assessment of whether the 'grave risk of harm' exists or can be ameliorated without investigating what that harm is.

Effective examination is feasible in a time-efficient and fair way where practicalities such as a concentrated jurisdiction, robust case management system, specialist Bar and specialist ancillary professionals including children guardians and psychologists are in place. A *via media* can be achieved given the objectives of the 1980 Hague Convention and in ensuring the swift management of child abduction proceedings.

As the Working Group gives priority to finalising the Guide to Good Practice, it is hoped that the submissions made between 2016 and 2018, in particular on best practices and policy recommendations, have influenced and assisted the Group in developing a practical and effective Guide. As to the approach to the assessment of the grave risk of harm, the Group in their revision of the draft Guide is invited to endorse Approach 2, namely that judges should first investigate the merits of the grave risk of harm exception before considering protective measures. The rationale is that it is possible to achieve real consistency with this approach.

Notes

* Onyója Momoh is a Barrister (England & Wales) and PhD (University of Aberdeen).

1 O Momoh, 'Domestic and Family Violence in the Context of the 1980 Hague Convention on the Civil Aspects of International Child Abduction' (PhD, University of Aberdeen, 2018). The author would like to thank her supervisors, Dr Katarina Trimmings and Professor Paul Beaumont, and the judges, Central Authorities and Reunite for participating in the empirical study.

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How final is a final order?

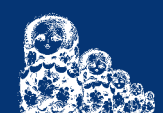
When a financial order is made after divorce, assuming there is no appeal, the parties usually believe that this is the end of the matter. The importance of finality is self-evident and has been stressed by the courts on numerous occasions – it is essential that people can rely on an order as bringing matters to a close so that they can move on.

There are sometimes difficulties enforcing an order, particularly when assets are located overseas – as the likes of Mrs Akhmedova[1] have found – but it is generally the case that the terms of the order, once made, are fixed. It is usual for an order to include a dismissal of claims, at least in relation to capital (see further below), which prevents further claims being brought in the future.

There are a number of limited exceptions to this:

- *Variation.* Orders for periodical payments (maintenance) remain variable upon an application by either party. It is also possible for a court to vary a lump sum, which is expressed as being paid by instalments. During the term of maintenance, the quantum of payments can be altered by the court and, depending on the type of order, it may or may not be possible to extend the term for which payments are made. If maintenance is ordered then the recipient's claims relating to maintenance are not dismissed, at least for the duration of the maintenance term.

  The subject of maintenance variation warrants a lengthy article in its own right, but it is worth noting here an important case from 2018 – that of *Mills v Mills*.[2] A former husband took his appeal to the Supreme Court to argue that his former wife should not have her maintenance increased so as to pay for rent on a property when her capital settlement some years previously had been intended to meet her housing need. The Supreme Court agreed with him, finding that, despite having lost her housing fund through poor investment, the wife should not have a second bite at the cherry and it would not be fair to require in effect that the husband pay twice.
- *Appeals.* An appeal against an order may be allowed if the court's decision was wrong or unjust because of a serious procedural or other irregularity.
- *Set aside.* It may be possible to set aside an order where there has been no error of the court in the following situations:
  1. There has been a material change in circumstances since the order was made. This is often referred to as a *Barder* event. The change of circumstances must be within a relatively short period of time following the order and must be such that it fundamentally undermines the basis on which the order was made. The hurdle is high and the example usually given is the death of one of the parties.
  2. The original order was based on mis-stated facts or material non-disclosure. The leading cases are *Sharland*[3] and *Gohil*,[4] where the Supreme Court confirmed that in the case of fraud the burden is on the non-discloser to show that the effect was not material.
  3. There has been a mistake such that had the true facts been known a different order would have been made, and the applicant could not have established the true facts at the time the order was made.



However, except as set out above, orders relating to capital (which might include transfers of property, lump sum payments and pension sharing orders) cannot generally be changed.

Undertakings

What of undertakings? An undertaking is not a court order; it is a solemn promise made to the court and a breach of an undertaking amounts to a contempt of court, which can be punished by a fine or imprisonment. Undertakings are frequently included in financial remedy orders and are an essential tool to facilitate the practical working of the order. An undertaking can be enforced as if it was an order, but is it fixed and final, or can it be varied?

In *Birch v Birch*,[5] the Supreme Court confirmed that the court has a discretion to release a party from their undertakings. Such a release can be conditional upon the party giving alternative undertakings in their place (the effect therefore looking like a variation of the undertaking, although in fact the court does not have the power to vary an undertaking).

The case was followed in 2018 by *A v A*,[6] where the question then had to be considered whether and how the court should exercise its power to release a party from their undertaking.

Briefly, the facts of *A v A* were that the husband and wife had been married for over 15 years and had five children together. The husband's successful construction business provided a high standard of living and the family accrued significant wealth. The wife looked after the home and children. They divorced and compromised their finances by a consent order in 2011.

The order provided that the family home and a Spanish property were to be sold with asking prices of not less than £8.5m and £3.75m respectively. The proceeds of sale would be divided equally between the parties. The husband was to pay the wife an additional £2m from his share of the properties, while he would retain the companies and there would be a clean break – that is, the wife would have no further income claims.

The wife wanted to purchase a property for £2.6m prior to the sale of the other properties. It was agreed that the husband would purchase it for her and she would repay him once she received her share of the net proceeds of the two matrimonial properties. The husband would therefore pay the £260,000 deposit and take out and service a mortgage for the remaining sum of £2.49m. He would also pay the wife £12,000 per month in maintenance as a loan until the family home sold. The wife gave an undertaking to repay these loans to the husband on the sale of the family home. Her income claims were dismissed as of February 2012.

If the properties had sold for their expected values within a reasonably short time, the wife would have been left with her mortgage-free property, liquid capital of between £3m and £4.5m and some pension subsequent to the implementation of the pension share. However, over six years later, neither of the matrimonial properties had sold and the offers that had been received were significantly lower than had been anticipated. The wife was therefore in significant and constantly increasing debt to the husband, which was reducing her capital and her ability to meet her needs. The husband's business in the meantime was doing very well.

It was not open to the wife to apply to vary the maintenance position as those claims had been dismissed. She therefore applied to be released from her undertakings to repay the money to the husband. The first instance judge agreed that there had been a significant change in circumstances and that although the wife should have to repay the £260,000 deposit to the husband, she should be forgiven the mortgage payments and maintenance loan.

The husband appealed. As of 1 August 2018 the wife's debt to the husband stood at £1.625m. Cohen J considered that insufficient weight had been given to the fact that the parties had freely entered into an agreement with legal advice and parties should generally be held to their agreements in accordance with the well-known principles in *Radmacher*.[7] However, the husband's financial success and the fact that he acknowledged he could afford to forgive the loan (although he was not willing to do so) were relevant factors in the decision-making.

The judge found that there had been a significant change of circumstances, which enabled him to exercise his discretion to discharge the wife from her undertaking, but fairness dictated that replacement undertakings should be put in place. The husband's appeal was therefore allowed in part – the wife was required to repay more of the loan, but not all of it. In due course, Cohen J went on to decide the substantive

outcome with the agreement of the parties and concluded that the wife should repay just over £1m of the £1.65m she owed.[8]

In deciding this, Cohen J weighed up the various factors including the needs of the wife. Needs are an elastic concept, and in this case they had to be viewed in the context of the parties having entered an agreement that provided for a clean break, the husband's increased wealth and the extent to which the wife's capital should be amortised to meet her income needs. The *Radmacher* principles support parties being held to their agreements; however, they also incorporate a safety net that one party should not be left in a predicament of real need while the other enjoys a sufficiency or more.

The judge stressed that cases where a party is released from an undertaking will be rare – the change of circumstances must be so significant and unforeseen that the very basis of the order is undermined, resulting in injustice. Further, the court will exercise its discretion moderately and only so as to avoid serious hardship – the remedy must not cause 'excessive prejudice' to the respondent, especially where a clean break has been agreed.

On the question of how the wife's capital assets should be treated – whether they should be amortised for the purpose of meeting needs (ie, whether she should have to use the capital as well as the generated income for her living costs) – the judge concluded that it would be fair to amortise some but not all of her award so as not to leave her without any security. The question of the degree to which a capital award should be amortised was considered by the Court of Appeal in the recent case of *Waggott*.[9] Mrs Waggott argued that she should not have to use her share of the capital to meet her day-to-day expenses when her husband continued to earn at a high level and so could preserve his capital – such an approach is discriminatory. However, the Court of Appeal cut her maintenance award down to a short fixed term, which means she will have to use her capital for income needs. This case is being appealed to the Supreme Court and it is hoped that this will result in clearer guidance on what is a discretionary and unpredictable subject. There is also currently a proposed change to the law being considered by Parliament (the Divorce (Financial Remedies) Bill) that would limit any spousal maintenance to a maximum term of five years, so 2019 has the potential to bring some significant developments.

As for *A v A*, this case should serve as a warning to lawyers drafting agreements to consider carefully what may (or may not) happen in the future and the potential consequences – always ask yourself: 'what if?' Had the wife's undertakings to repay the money to the husband been expressed as orders, in order to set them aside, she would have had to fall within one of the categories set out earlier in this article and it is very unlikely she would have been able to do so. While there had been a significant change of circumstances, she would probably not have met the *Barder* criteria. She would have been left in such debt to the husband that the intention behind the original order would have been frustrated. The fact that these were undertakings meant the court had a discretion, albeit a fairly limited one, to, as the judge put it, 'share the pain' between the parties and seek to balance the competing principles of finality and fairness.

Notes

1 *Akhmedova v Akhmedov* [2018] EWFC 23 (Fam).
2 *Mills v Mills* [2018] UKSC 38.
3 *Sharland v Sharland* [2015] UKSC 60.
4 *Gohil v Gohil* [2015] UKSC 61.
5 *Birch v Birch* [2017] UKSC 53.
6 *A v A* [2018] EWHC 340 (Fam) and *A v A* [2018] EWHC 2194.
7 *Radmacher v Granatino* [2010] UKSC 42.
8 *A v A* [2018] EWHC 2194.
9 *Waggott v Waggott* [2018] EWCA Civ 727.

Contact failure, parental alienation and therapeutic jurisprudence

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Contact failure and parental alienation

When the parents of children are at odds and the dispute develops into open conflict, the children very often find themselves exposed to arguments and verbal and physical fights; this undermines their sense of safety and stability. They hear things that one parent says to, or about, the other parent. The child may feel angry, abandoned and injured. He may find himself taking sides in the dispute as to where the children are going to live and who is going to make decisions about them. He may be told that the best interests of the child have to be determined by the court,[1] or he may find he is enlisted by one parent against the other.[2]

Sooner or later, especially in situations of high conflict between the parents, some children stop seeing one of the parents.[3] This is referred to in this article as 'contact failure'. There may be many reasons for contact failure:

- Where the child has been physically or sexually abused by a parent, or a parent has abused or killed the other parent, the child (or resident parent on the child's behalf) may be justified in breaking off contact with the perpetrator. This is justified estrangement.
- Sometimes a child will choose to break off relations with one of his parents so as to resolve (he thinks) the impossible conflict of loyalties that he feels.
- In other cases, both parents may bear part of the responsibility.
- However, in many cases, one of the parents has acted or said things to the child that have caused the breakdown of contact. This is true parental alienation.[4]

Apart from cases in which there has been proven abuse of the child by the rejected parent, time is of the essence in avoiding a total cessation of child–parent contact, and even more so in trying to restore contact when this has ceased altogether. Until beneficial contact is re-established, the child's feelings of guilt and/or his conviction that his hostility to one parent and alliance with the other parent are justified, only become more embedded. There is a risk of juridogenic damage;[5] as Walters and Friedlander have observed:

> 'Time is a major enemy in RRD (refusal-rejection dynamic) cases. The dynamic becomes increasingly entrenched… the longer the period of no contact between the rejected parent and the child. The excruciatingly slow pace at which the court system moves also delays efforts to resolve the problem and may be exacerbated by a prolonged evaluation, and as well as litigation over intervention. In fact, delay has often been employed as a legal tactic in such cases…'[6]

In the vast majority of cases, the parents come to court only after they move physically to live separately. But the conflict between them is apparent to their children long before this. Children start to suffer from stress from the outset.

Understanding the effects of alienation on children is crucial when considering if, when and how there should be intervention. There is a wealth of literature about the effects of alienation that consistently reports that alienated children are at risk of short- and long-term emotional distress and adjustment difficulties, far more than children from litigating families where there has been no alienation.[7]

Reluctance by courts and therapists to intervene is exacerbated by the classification of contact failure as 'mild' – where the child is reluctant to have contact but still sees the targeted parent and enjoys his stay.[8] While the description of the child's behaviour is accurate, the word 'mild' may give the impression that intervention is as yet unnecessary. This is completely wrong: there is a need for intervention at the first signs of reluctance, since the speed of deterioration, into disruption of visits and outright refusal, is very swift.

Therapeutic jurisprudence

Therapeutic jurisprudence, as described by David Wexler,[9] points out that judicial systems do not function in a sterile law-only environment, but affect the emotional lives of the litigants and others. The perception that the task of the court is not only to decide the specific legal issue before it, but also to solve the underlying problem that gave rise to the dispute, requires a holistic view of the parties and their relationships and situations.

In the family law field, where the parties typically have a long history together before the dispute arose, and are likely to remain in contact after the determination of the specific issue before the court, especially where minor children are involved, a holistic approach is essential. For this reason, using the methods and ideology of therapeutic jurisprudence is especially important; the court must be organised in such a way that all involved have access to professionals who are trained in recognising and dealing with contact failure.

Cases of contact failure, and especially parental alienation, need synchronisation of judicial and therapeutic activities and a holistic approach; all of the issues regarding a specific family should be allocated to one judge,[10] who can bring together all the judicial issues and all the investigative and therapeutic services relating to a specific child.[11]

This means that judges need to be educated about the etiology and adverse effects of parental alienation on children, and there needs to be a social services unit, immediately accessible at the request of the court, staffed by social workers and psychologists, who can start assessment of the child and his family, and make recommendations, as soon as the case reaches court.

In the Israeli system, a Social Services Unit (SSU) is attached to each Family Court, and in all cases the parties meet a social worker from the Unit, who is an impartial professional with wide experience in the field.[12] These professionals show the parents that the best interests of the children must be paramount – which may not be obvious to the parents who are expecting a litigious battle.

The SSUs are helpful especially in cases of high conflict, where the spouses are unable to reach agreement. In many high-conflict cases, one or both of the parties suffer from personality problems, including personality disorders, which may make them incapable of seeing beyond their own feelings and wants, and are likely to engage in maladaptive gatekeeping and alienating behaviours, which drive a wedge between their children and the other parent.[13] It is of paramount importance that such parenting behaviours should be identified and handled at the earliest possible stage, before the child ceases to have any contact with one of the parents.[14] The intake instrument used by the SSUs will usually disclose these problems, and often result in a recommendation to the court to refrain from referrals to mediation, since personality-disordered litigants may take advantage of such referrals to manipulate the proceedings and delay the eventual decisions.

Judges in Family Courts are frequently asked to deal with cases in which contact has already failed. The alienated parent may not have been aware of maladaptive and alienating behaviour of the other parent; for this reason, in many cases, a claim is filed in court only when contact has failed altogether. Once contact has stopped, it is extremely difficult to reinstate.

Where contact has failed the court needs to act promptly to reinstate contact. This is an emergency, and it is often essential to take immediate steps, even before a full diagnosis and hearing, and to make clear and unequivocal orders for the reinstatement of contact and therapeutic assistance.

In cases where parental alienation is alleged and contact has failed or is about to fail, the court should be empowered to hear the application *ex parte*, and give orders for immediate investigation and intervention by an experienced social worker (such as an SSU worker, in the Israeli system, or an outside expert), and should fix an *inter partes* hearing within seven days. At this hearing the judge should, in accordance with the principles of interdisciplinary work of therapeutic jurisprudence, make orders for resumption of contact where it has already failed, and in any case make clear and specific orders for contact, and for the parents to receive guidance and the child to receive therapy. Therapeutic jurisprudence principles would also require frequent reviews by the court (in the early stages, perhaps once every two weeks) of compliance with its orders and the progress in whatever areas have been ordered, so as to congratulate the parties for progress, but also to take steps so that a parent who fails to ensure contact of the child with the other parent, or to take part in consultation and advice sessions, or to make sure that the child receives the necessary therapy, as ordered by the court, can be sanctioned, by fines or imprisonment, for contempt of court.

Conclusion

Cases where contact between a child and a parent is at risk of failure, or where contact has already ceased, need to be treated as emergencies, with prompt judicial and therapeutic intervention, since the destructive effects of lack of contact on the child are exacerbated by delay, and the results are often irreversible.

The ideology and techniques of therapeutic jurisprudence should be integrated into the practice and procedures of courts dealing with cases of parental alienation, the benefits to the child will be substantial, as well as reducing the case-load of judges and the need for therapeutic interventions in the long term.

Notes

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Joint Sessions of the Italian Supreme Court of Cassation: a new reading of spousal maintenance

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By decision no 18287 of 11 July 2018, the Joint Sessions of the Italian Supreme Court of Cassation gave a new interpretation to alimony awards, under which the family dynamics and choices that are taken by former spouses under the bonds of matrimony cannot be neglected when the marriage ends. According to the decision, spousal maintenance not only has a welfare function, but also a role of compensation and equalising, which implies the need to consider the contribution provided by each spouse to the realisation of family life. This does not mean that spousal maintenance must restore the standard of living enjoyed by the 'weak' spouse during the marriage. It only means that the regulation of financial relations following a divorce must consider the contribution that every spouse has – under any form – made over the marriage, taking into account the age of the spouses and the duration of their marriage.

The decision at hand is the last step in a long journey.

The 1990s were characterised by the principle under which spousal maintenance must allow the maintenance of the matrimonial lifestyle.

In 2017, the Italian Supreme Court (decision no 11504 of 2017) abandoned the criterion of 'living standards' enjoyed in the process of marriage and instead identified, as a criterion for the recognition of the right to alimony, the economic independence of the applicant spouse. According to the Supreme Court of Cassation, there is no right to spousal maintenance where the spouse has their own means of support, regardless of an assessment of the actual possibility of continuing to enjoy the standard of living held during the course of the marriage. The court continued with the following principle of law, that is, a judgment on the recognition of spousal maintenance must be structured in two phases: the first, aimed at ascertaining the *an debeatur*, namely the recurrence of the inadequacy of the means and the impossibility of obtaining them with exclusive reference to the person of the applicant, self-sufficiency and economic independence of the same; and the second (if any) dedicated to the quantitative determination of the alimony.

The decision in no 11504/17 altered the welfare function that has traditionally characterised the divorce allowance, and noted that the parameter of married life standards:

> 'if applied also during the *an debeatur* phase – radically collides with the nature of the institution of divorce and with its juridical effects: in fact... with the divorce decree the matrimonial relationship is extinguished not only on a personal but also on an economic-patrimonial level... so that any reference to this relationship ends illegitimately with the restoration, even if limited to the economic dimension of the married life "conducted there – in an wrongful perspective, so to speak, of" continuing "of the marriage bond".'

In the context of the vivid debate about spousal maintenance that this 2017 decision initiated, in 2018 the Joint Sessions of the Italian Supreme Court intervened again, trying to establish a balance between the many needs that the issue presents.

Pursuant to the 2018 decision, the 'standard of living' used in the 1990s cannot avoid the risk of creating annuity positions from the personal contribution of the former spouse to the formation of the marriage. In addition, such a stance does not give due importance to the contribution provided by the former spouse in conducting and carrying out complex domestic activity and appears in any case inadequate and old-fashioned compared to a change in the value of personal choices and their consequences in terms of self-responsibility. The Joint Sessions also stresses the need to rebalance this orientation not only considering European standards, but also the constitutional principles.

Regarding the approach to calculating alimony established in 2017, according to the Joint Sessions, it fails to consider the principles of self-determination as the basis of the choices that the spouses have decided to make during the marriage. The Joint Sessions note that 'the reversibility of the choice regarding the marriage relationship does not necessarily lead to a related flexibility and flexibility with regard to the subjective conditions and the economic sphere of the former spouse at the time of marriage termination'.

The Joint Sessions therefore considered assuming a different position from the past, starting from the principle of self-determination by means of which the personality of the individual is also developed 'within the social groups'.

In accordance with the principle of solidarity, the assessment by a court relating to the conditions of spousal maintenance (inadequacy of resources and inability to obtain them for objective reasons) must be firmly anchored to the characteristics and the division of roles within the family. The economic and patrimonial situation of an applicant for alimony constitutes the basis of the assessment of adequacy behind the spousal maintenance. However, this should not be taken as an 'absolute' prerequisite; that is, free from the reasons that produced it. It is therefore necessary:

> 'to ascertain whether the condition of economic patrimonial imbalance is to be attributed etiologically to common determinations and domestic roles, in relation to the duration of the marriage and the age of the applicant. Where inequality has this root cause and it is established that the economic imbalance resulting from the divorce derives from the sacrifice of professional and income expectations based on the assumption of a role consumed exclusively or predominantly within the family and from the result of an active contribution to the formation of the common heritage and that one of the other spouse, this characteristic of family life must be taken into account when assessing the inadequacy of the means and the inability of the applicant spouse to obtain them for objective reasons.'

The Joint Sessions established the following principles:

1. spousal maintenance has not only a welfare function, but also a compensatory and equalising function;
2. this compensatory function derives directly from the decline in the solidarity principle referred to in articles 2, 3 and 29 of the Constitution and of equal dignity of the spouses; and
3. in the judgment aimed at ascertaining whether any significant disparity in the act of dissolution of marriage is dependent on the choices of family life, a number of elements must be taken into account, such as:
   (a) the contribution that each spouse has made to family life, to the formation of both the personal and common patrimony;
   (b) the economic and professional expectations eventually sacrificed;
   (c) the age of the applicant; and
   (d) the duration of the marriage.

As noted by the Joint Sessions, the new development in the law is largely consistent with the framework of the legislation of the European Union countries (in particular, France and Germany). Although in these countries the equalising/compensatory nature attributed to the divorce alimony is related to the forecast of the temporariness of the obligation, the comparison nevertheless allows an identification of some common principles, such as, among other things, the pre-eminence of the principle of self-responsibility and of the equalisation/assistance criterion as a function of rebalancing the economic/patrimonial inequality resulting from the dissolution of the marriage.

This decision of the Joint Sessions clearly demonstrates how the contributory/compensatory element relevant for the determination of alimony can easily be combined with the welfare element, where both aim at restoring a situation of equilibrium that has failed with the dissolution of the marriage bond.

Contemporary medical perspective of surrogacy in the Indian context

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What is surrogacy?

The word 'surrogate' is rooted in the Latin verb 'subrogare' (to substitute), which means 'appointed to act in the place of'. It means a substitute, especially a person deputising for another in a specific role. As per the Draft Assisted Reproductive Technology Bill 2014, 'surrogacy' means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belongs to her or her husband, with the intention to carry the baby and hand it over to the commissioning couple for whom she is acting as a surrogate.[1]

History

The first surrogacy arrangement is believed to have happened about 2,000 years before the birth of Christ and was mentioned in the Old Testament of the Bible. Sarah and Abraham were unable to conceive and Sarah hired her maid Hagar to carry a child for her husband. Subsequently, Hagar gave birth to a son, Ishmael, for Sarah and Abraham. The concept of surrogacy is also rooted in Hindu mythology, as despite being born from the womb of Rohini, Balraam was regarded as the son of mother Devaki and the elder brother of Lord Krishna.

Types of surrogacy

There are two types of surrogacy: traditional and gestational. Traditional (also called genetic or partial) surrogacy is the result of artificial insemination of the surrogate mother with the intended father's sperm, making her a genetic parent along with the intended father.

Gestational or IVF surrogacy (also called host or full surrogacy) is defined as an arrangement in which an embryo from the intended parents, or from a donated oocyte or sperm, is transferred to the surrogate's uterus. In gestational surrogacy, the woman who carries the child (the gestational carrier) has no genetic connection to the child.

Surrogacy may be commercial (compensated) or altruistic, depending upon whether the surrogate receives a financial reward for her pregnancy. In commercial surrogacy, the surrogate is reimbursed for any medical costs and paid for her gestational services. With altruistic surrogacy, the surrogate is found through friends or acquaintances. She may be reimbursed for medical costs directly related to the pregnancy and for loss of income because of the pregnancy. Becoming a surrogate is a life-changing choice that can be tremendously rewarding, but it's not without its challenges. The surrogate is required to commit to another family for a year or more as she undergoes medical and psychological evaluations and procedures, endure all of the challenges related to pregnancy and labour, and carry a baby that isn't her own. But many women accept these challenges and believe the positives far outweigh the negatives. Surrogacy gives the surrogate the unique opportunity to give an incredible and selfless gift to another person or couple, but it also provides her with life-changing financial benefits and can create lasting, meaningful relationships between her and the family she helped to create.

Who needs surrogacy? The indications

Women may be unable to carry a child to term for the following reasons:

- Congenital or acquired absence of a functioning uterus. Congenital absence of the uterus such as Mayer-Rokitansky-Kuster-Hauser (MRKH) syndrome is relatively rare, with an incidence of one per 4,000–5,000 new-born girls.[2,3]
- Hysterectomy for various reasons. Obstetric complications during delivery or as a result of medical disease such as cervical cancer could also be a cause for hysterectomy and lead to uterine infertility in spite of healthy ovaries.
- Significant structural abnormalities or the presence of multiple fibroids.
- Severe adenomyosis.
- Persistently thin endometrium owing to endometrial TB.
- Asherman's syndrome.
- Repeated miscarriages, repeated unexplained IVF failures despite retrieval of good-quality embryos.
- Repeated IVF failure owing to a non-receptive uterus.
- Certain medical conditions (eg, heart and renal disease), which might be life-threatening for a woman during pregnancy, are also considered as indications for surrogacy, provided that the intended mother is healthy enough to take care of a child after birth and that her life expectancy is reasonable.
- Biological inability to conceive or bear a child, which applies to same-sex male couples or single men, also approaches surrogacy.

Steps involved in surrogacy process

The steps involved are as follows:

1. patient selection;
2. source of surrogate (assisted reproductive technology bank);
3. selection and screening of prospective surrogate;
4. intensive counselling – the key factor;
5. legal requirements, financial contracts and transparency of arrangement;
6. proper controlled ovarian stimulation and IVF technique;
7. preparing the surrogate;
8. synchronising the cycles of the surrogate and the genetic mother;
9. window period for embryo transfer; and
10. obstetrics care of surrogate.

Selection of patient

Patients with medical indication only are considered for surrogacy. In-depth consultation and counselling on all aspects of the treatment are carried out while selecting the patient.

Couples and individuals considering surrogacy should cautiously research surrogacy laws, study its pros and cons and even speak with various surrogacy professionals in order to gain a true understanding of surrogacy.

Source of surrogate (assisted reproductive technology bank)

The surrogate can be selected from the National Registry of Assisted Reproductive Technology Banks in India of the Indian Council of Medical Research. A woman from

family or a known person to the couple may act as a surrogate mother.

However, she should belong to the same generation as the woman desiring her as a surrogate.

Selection and screening of prospective surrogates[4]

A thorough medical, obstetrical and psychological screening is carried out. The following factors should be considered:

- Surrogates are generally 21–35 years old (25–35 years as per the Surrogacy Bill 2016), married and with one child of her own who is at least three years old.
- The consent of the surrogate's spouse is mandatory for her to become a surrogate mother.
- A typical screening process involves an extensive medical and psychological assessment as well as thorough criminal and financial background checks.
- Routine tests include a hysteroscopy or other procedure to determine the general health of the surrogate's uterus.
- Tests such as CBC, FBS, HBA1C, Hb Electrophoresis, HIV, HBsAg, HCV and genetic tests are carried out. Additionally, an ECG, cervical smear and mammogram are recommended.
- Pelvic and abdominal ultrasonography should be carried out to evaluate the capability of the woman's uterus to carry a pregnancy to term.
- Medical fitness should be assessed by a physician.

Intensive counselling

In-depth counselling of all the parties engaged in the surrogacy arrangement is of paramount significance. They must be confident and comfortable with their decisions and have trust in each other, so that no party is felt to be taking advantage of the other. Many concerns must be discussed with both the genetic couple and the proposed surrogate, including:

1. For the genetic couple:
- a review of all alternative treatment options;
- the need for in-depth counselling;
- the practical difficulty and cost of treatment by gestational surrogacy;
- the psychological risks of surrogacy;
- potential psychological risk to the child;
- the chances of having multiple pregnancies;
- the possibility that a child may be born with an abnormality; and
- the importance of obtaining legal advice.

2. For the surrogate:
- the full implications of undergoing treatment by IVF surrogacy;
- the possibility of multiple pregnancies;
- the possibility of family and friends being against such treatment;
- the medical risks associated with pregnancy and the possibility of caesarean section; and
- the possibility of experiencing a sense of bereavement when giving the baby to the genetic parents.

Proper controlled ovarian stimulation and IVF technique

The intended mother is stimulated with a hormonal injection (FSH or HMG) to form multiple eggs, which are retrieved through an oocyte collection procedure and fertilised with the husband's sperm in order to form embryos.

Preparing the surrogate

The surrogate's uterus is medicated and prepared with hormones to receive the formed embryos.

Obstetrics care of surrogate

Once a pregnancy is confirmed in the gestational carrier, depending on the facility of the assisted reproductive technology clinic, she either stays in the surrogate house or at her own home. The concept of the surrogate house has recently attracted a lot of attention for various reasons. The idea of the surrogate house was developed from the wish of many surrogates to provide them with a shelter during the pregnancy as many of them wish to hide the practice from relatives and friends owing to the stigma that prevails in rural areas because of a lack of awareness of the scientific procedure behind surrogacy. The surrogate house is a place where the surrogate stays for her entire antenatal period until the date of delivery and all her medical and personal requirements are taken care of. The obstetrics care of the surrogate is extensive owing to the preciousness of the pregnancy. In a surrogate house, surrogates stay under the supervision of 24-hour nursing staff along with a dietician, physiotherapist, counsellors and a gynaecologist for her medical care. Surrogates benefit from complete rest and healthy, nutritionally complete meals, which help to keep them healthy during their pregnancy. As they stay in a group, they get lot of emotional,

moral and psychological support from other surrogates. Also, they are allowed to meet their family and children and be in constant touch with their families via phone. They can go to their home as and when they want and the young children of surrogates are allowed to stay with their mothers at the surrogate house during weekends and school holidays. It is voluntary for surrogates to stay in the surrogate house. Any surrogate who wishes to stay in her own home can always do that.

In the surrogate house, the surrogate has an obstetrics assessment every 20 days until the date of delivery, obstetrics scans at 6–8 weeks, and further scans at 11–13 weeks (anomaly scan), 20–22 weeks (anomaly scan 3D–4D), 28 weeks and 34–36 weeks (growth scan). Any additional scan is subject to the obstetrics need.

The intended couple are sent regular mail regarding the surrogate's pregnancy in the form of her weight gain, vitals, foetal growth and antenatal investigation reports and scans. Post-delivery, the surrogate is kept under observation for a minimum of 15 days before discharge.

Risks associated with surrogacy

The major risk associated with surrogacy is that of obstetrics complication. Multiple order pregnancy is the most common complication. Recently, many recommendations have been made by the American Society for Reproductive Medicine and European Society of Human Reproduction and Embryology (ESHRE) committees for single embryo transfer, yet only 15–20 per cent of clinics follow single embryo transfer norms. But this is an improvement from previous years and more and more clinics are accepting this policy. Pregnancy, birth and the post-partum period can include complications such as pre-eclampsia and eclampsia, urinary tract infections, stress incontinence, gestational diabetes and rare complications such as amniotic fluid embolism and the possibility of postpartum bleeding, but these risks are associated with pregnancy in general and are not specific to surrogacy.

Apart from physical risk, surrogacy may be a cause for emotional trauma. A study by Foster (1987) stated that many surrogate mothers face emotional problems after having to relinquish their child. However, a study by Jadva et al (2003)[5] indicated that although some women experience emotional problems in handing over the baby, as a result of the reactions around them, these feelings appeared to lessen during the weeks following the birth.

Various aspects and concerns involved in surrogacy

Psychological impact of surrogacy

Despite increasing success rates, surrogacy poses a new complexity in terms of the psychological aspects and again requires a multidisciplinary approach. Surrogacy brings to light a tangle of possible relationships, which could be emotionally taxing at times. The main element in the success of surrogacy lies in exploring and deeply understanding its psychological effects and the key is the quality of the relationship between the intended parents and the gestational carrier.

Identity and rights of child

A child born through assisted reproductive technology is presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child will have a legal right to parental support, inheritance and all the other privileges of a child born to a couple through sexual intercourse. Children born through the use of donor gametes do not have any right whatsoever to know the identity (such as the name, address, parentage, etc) of their genetic parent(s).

Conclusion

Surrogacy is an important method of assisted reproductive technology wherein a woman carries a pregnancy for another couple. Numerous couples around the world require surrogacy services for various reasons. Since legislation introduced in 2002 to the Surrogacy (Regulation) Bill 2016, surrogacy in India has come a long way. Although this arrangement seems to be beneficial to all parties concerned, there are multifarious social, ethical and legal issues associated with it, which have made this practice unpopular in many parts of the world. In recent times, where the need for surrogacy is increasing day by day, delicate issues associated with this practice need to be addressed properly.

Efforts should be taken to increase the awareness of surrogacy in society to make this arrangement more open and acceptable. The formulation of laws, appropriately

designed to protect the rights of surrogate mothers, intended parents and children can make this practice approachable and a gratifying experience for all the parties involved. Banning surrogacy will only give rise to underground arrangements. To solve this issue, a national and international framework must be set up. Proper regulation, ethical practice and commitment on the part of all stakeholders can help to resolve the issue and put an end to all controversies associated with it.

Notes

* Dr Nayana Patel is a medical director and gynaecologist.

1 Draft Assisted Reproductive Technology (Regulation) Bill. Ministry of Health and Family Welfare, Government of India; New Delhi: Indian Council of Medical Research, 2014.
2 E Lindenman, M K Shepard and O H Pescovitz, 'Mullerian agenesis: an update' (1997) 90 Obstet Gynecol 307–312.
3 K Aittomaki, H Eroila and P Kajanoja, 'A population-based study of the incidence of Mullerian aplasia in Finland' (2001) 76 Fertil Steril 624–625.
4 M Wikland, L Enk and L Hamberger, 'Transvesical and transvaginal approaches for the aspiration of follicles by the use of ultrasound' (1985) 442 Ann NY Acad Sci 683–689.
5 P R Brinsden, 'IVF surrogacy' in P R Brinsden (ed), *A Textbook of In Vitro Fertilization and Assisted Reproduction* (London: Taylor & Francis 2005), 393–404.
6 S Golombok, L Blake, P Casey, G Roman and V Jadva, 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54(6) J Child Psychol Psychiatry 653–660.

Whatever happened in *Owens v Owens*? A cautionary tale in English divorce law

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Owens v Owens[1] is now famous as the driver for the proposed reform of the present law of divorce in England and Wales, which in theory has long lagged behind the modern no fault systems of many other jurisdictions. However, prior to the unfortunate result in the *Owens* case, in which the marriage had plainly broken down (unsurprisingly in view of the offensively outdated manner in which the husband treated the wife), many thought it was not particularly urgent to update even a statute passed in 1973, since it was recognised that it was at least 40 years since the practising profession had settled comfortably into a methodology for achieving practical workability of such an old statute, even in radically changing times.

English law has historically been adept at creative statutory interpretation, thus making do with judicial nuances in the common law to achieve results that do not do violence to the words of the original statute but which instead achieve what Parliament intended, but perhaps by an unintended interpretational route. There have been examples of this in various fields of English law, and even in the law of divorce under the Matrimonial Causes Act 1973.[2]

As a result, it was perhaps surprising that virtually as soon as the Supreme Court dismissed Mrs Owens' final appeal against the refusal of the decree for which she had proceeded on the basis of the 'mild behaviour petition', which has worked to end marriages for so long, the current Minister for Justice and Lord Chancellor, David Gauke, indicated that he would now bring forward proposals for introduction of reform to the existing law, so as to introduce the 'no fault divorce' for which a long-standing lobby had been ignored by the government for many years.

However, it seems that this was not simply owing to a sudden and unaccustomed government interest in family law reform, or because of the persistent campaigns of the Solicitors' Family Law Association, now known as 'Resolution', or even perhaps owing to a fresh interest in law reform generally by a new Lord Chancellor (who is coincidentally the first to be legally qualified since 2010, since when a great deal of manifestly much more urgent family law reform has received no government priority). Rather it seems to be because the *Owens* case had somehow got so completely out of hand that (driver for reform or not) it had become an obvious embarrassment.

Precisely how this case failed to deliver a decree to a petitioner (whose husband appeared to be even more outdated than the 1973 statute itself) is a mystery, especially upon close examination of the judgments of the Court of Appeal[3] and the Supreme Court, although neither overturned the first instance decision of HH Judge Tolson QC of the Central London Family Court. Indeed, the selected quotations from the pleadings, and from the transcript of the first instance hearing (which are carefully set out in the two appeal judgments), record such a three-dimensional picture of the respondent husband that it is difficult to see how a decree of divorce could not be granted against such a man, who had apparently not yet registered that wives are no longer subservient dependants who can safely be criticised, reprimanded and humiliated in public like delinquent children, but that (as equal partners in contemporary marriage) they are entitled to courtesy as well as protection from such abuse, which does not have to be physical to be objectionable in law, as many an order under the domestic violence protection of Part IV of the Family Law Act 1996 demonstrates; and which means husbands are not exempt from this requirement to desist from even verbal abuse.

Judge Tolson indeed recorded that the husband was 'somewhat old school',[4] perhaps recognising that his domineering attitude made it clear that he was still living in that era immediately after the Second World War in which the initial Divorce Reform Act was researched and enacted, where wives were still expected to defer to their husbands, did not usually have their names on the legal title to the matrimonial home, even had no rights during marriage to make formal decisions about their children, which was the sole prerogative of the husband and father, and when family judges of the then quaintly named Probate, Divorce and Admiralty Division of the High Court were experiencing some difficulty in distinguishing the new fact of 'behaviour' from the old law under the pre-1969 ground of 'cruelty'– which had previously posed little difficulty in application for them, since they had been performing that task since the first Matrimonial Causes Act in the mid-19th century, until it was finally abolished in 1969 and replaced by the new and unfamiliar concept of 'behaviour'.

However, having gone so far as to hope that 'the husband would forgive [the judge] for describing him as somewhat old-school', Judge Tolson did not take this keen perception any further so as to look behind what he clearly saw as the wife's seemingly less-than-perfect evidence, both as to the content and the manner of its delivery, which obviously failed to impress him, and which he had already variously dismissed as having been 'cherry picked', 'isolated instances', 'minor disputes' and 'an exercise in scraping the barrel'.[5]

There is a strong suspicion that it was thus probably at an early stage of the first instance hearing that the outcome of the case first began to be derailed. This was probably because Mrs Owens (despite having indubitably suffered all the disagreeable incidents on which she relied) was not a strong witness, whose diffidence in repeating detail of her misery at her husband's boorishness the judge found unconvincing; whereas the husband was a convincing witness, whom the judge believed when he quietly batted back cross-examination with blandly phrased denials and the occasional simple explanation that he had been misunderstood (and indeed he just did the same, with obvious success, in response to questions from the judge himself). Choosing whom to believe was, of course, entirely permissible, since it is up to the judge of first instance to form a view of credibility, since he (unlike the appellate courts) sees the parties' body language and has observed them giving evidence before him, just as he must consider 'any excuse or explanation which this respondent might have in the circumstances'.[6]

Nevertheless, there must also be an even stronger suspicion that a woman judge would have been likely to handle the case differently: in her case probably instantly seeing behind the wife's apparent diffidence in detailing the bruising result of her experience of the husband's rudely controlling behaviour, and recognising in his quietly factual responses the clear point that he knew that the petitioner must proactively prove her case, and, if she could not be sufficiently convincing, that as respondent he need do nothing but cast some doubt on it, in which case he would win (though that would only be because she lost). There have, in recent years, been several demonstrations of the different mindset of women judges, ranging from Baroness Hale's watershed article 'Why should we want more women judges?'[7] to *Feminist Perspectives on Family Law*[8] and *Feminist Judgements, From Theory to Practice*.[9] Above all, a woman judge might have

recognised, even more clearly than Judge Tolson's categorisation of the respondent as 'old school', how drastically the pre-1969 'Olde England' had processed the social changes brought about by the Second World War and dragged itself into modern times, since these barely six decades have changed what women will put up with even more than the Legal Aid Act 1949 changed their ability to use the law to leave husbands who mistreated them.

Second, although one can share Judge Tolson's disregard of paragraph 1 of Mrs Owens' petition (since it refers unnecessarily to the husband's obsession with work, which had not only provided her with a very good standard of living but must by 2016 have been well in the past since by then he was 78 and the peak of his working life long past), the rest of her statement of case duly relied on the contemporary, Resolution-inspired trend to underplay the language and number of allegations in a petition in the cause of not making it impossible for the parties ever to speak to each other again following divorce.

Moreover, since it has long been accepted that large numbers of *undefended* divorces can, and have been, granted on the basis of three or four instances of 'behaviour' that evidence that the petitioner cannot reasonably be expected to live with the respondent, Mrs Owens was obviously unprepared for the blow-by-blow account of incidents that Judge Tolson required, since Mr Owens was obviously doing such a good job of showing disbelief that she couldn't possibly have thought he was berating her. Sadly, he may have been better prepared by his legal team than she was. A woman judge might also have appreciated the likely gender battle issue and taken steps to level the playing field between the unequal arms of the parties, since, if Mrs Owens was to be believed, this is what the case was about.

Nevertheless, although the case was *defended* (which inevitably meant a contested hearing), it has been accepted since the later 1970s that what was called the 'mild behaviour petition' could in appropriate circumstances be sufficient to evidence the right to a decree without unduly antagonising the other party or inspiring an urge to defend. This coincided with the strong influence on the interpretation of the then new Matrimonial Causes Act 1973 of the experienced family judge, Ormrod LJ,[10] utilising, as he put it, 'the first, the worst and the last' of the incidents complained of and perhaps also including one that was 'witnessed'. It has also long been accepted that the test to establish such behaviour is partly objective – what would a reasonable person think of the conduct in question?;[11] and partly subjective, looking at 'this husband and this wife'.[12] This test should not be any different whether the case is defended or not, since in theory the law is the same in both cases, only the testing of the evidence in a defended situation being distinct, since in an undefended case the court official now perusing the papers submitted will only look to see if the statement of case: (1) could be sufficient for a decree, that is, is not totally trivial; and (2) whether objectively it satisfies the hybrid objective and subjective test that has emerged from case law in the years since 1973.

When, on 15 January 2016, the case was initially before the judge of first instance at the first oral hearing (which was necessary since the case was defended by the respondent), there was apparently independent evidence available, though not called, of one of the most disagreeable incidents relied upon by the petitioner, which is referred to in the Court of Appeal judgment[13] as the 'restaurant incident', on which it was pleaded in the petition that the respondent had 'made stinging remarks about the Petitioner which made her and [their fellow diner] F, the male friend invited by the Petitioner to dine with them, feel visibly uneasy'. It seems that the respondent could not even leave his public disparagement of the petitioner there but, as the petition next alleged, he then 'snapped at the Petitioner when, after speaking to a waiter about the food, she then asked what point the conversation had reached "you missed out by thinking it necessary to talk to the waiter", upsetting and embarrassing the petitioner in front of F. F rushed to the Petitioner's defence as he clearly agreed that the respondent's critical remarks were unjustified'. Moreover, this was not only one of the occasions on which the respondent sought to explain away his behaviour, by claiming that it was the petitioner who was at fault, not he – on the grounds that she was rude in 'calling over and engaging with the waiter while F was talking to the two of them' but also a clear example of his determination always to have the last word, since he apparently also could not resist adding in his answer to the petition 'Any embarrassment that may have been caused by the Petitioner was of her own making' – and that he had

only 'sought to engage her attention to indicate that F was in the course of speaking to them'.

Despite his dissatisfaction with Mrs Owens' evidence and the manner in which she gave it, it is difficult to understand the judge's apparent disregard of the respondent's unpleasant behaviour in this particular incident, when he later dismissed the petition on the basis that she had 'failed to prove, within the meaning of section 1(2)(b) of the Matrimonial Causes Act 1973 that her husband had "behaved in such a way that [she] cannot reasonably be expected to live with [him]".' Unlike the first significant incident of 'behaviour' pleaded on behalf of the Petitioner, which is referred to as the 'airport incident',[14] this public chastisement of the wife in front of their friend (and anyone else who might have been listening in the restaurant) was *witnessed*, and thus in logic could not simply be airbrushed out as the respondent claimed, since the way in which he spoke to her was not only a completely unacceptable manner in which a husband might be expected to address his wife in public but also an entirely inappropriate, controlling and abusive way in which to speak to anyone in modern times in which verbal as much as physical abuse is not tolerated. A woman judge might have been more appreciative of the importance of this point, which deserves some attention.

While the judge apparently accepted, as already mentioned, that the husband was 'somewhat old school', and that he could also find that the wife was 'more sensitive than most wives',[15] it does not seem essential to be unduly sensitive for a wife to take issue with being spoken to in public in the manner referred to, since not only is contemporary marriage regarded as a partnership, but controlling and coercive behaviour is now formally articulated within the canon of domestic abuse,[16] and is alleged by the petitioner on the part of the respondent in other paragraphs of her petition, such as in the case of the 'airport incident',[17] where the Court of Appeal noted that the petition pleads that he 'was visibly chastising her in front of numerous strangers'.

In the circumstances that the judge of first instance was clearly familiar with the authorities, including such cases as *Livingstone-Stallard v Livingstone-Stallard*, the facts of which had some obvious similarities with the Owens' situation, it is odd that instead of distinguishing that case Judge Tolson relied on sweeping generalisations to categorise his view of the petition as 'hopeless' (his judgment paragraph 2), 'anodyne' (paragraph 7), 'scraping the barrel' (paragraph 13), that it 'lacked beef' (paragraph 7) and was 'at best flimsy' (paragraph 12). He added that the wife had 'exaggerated the context and seriousness of the allegations to a significant extent', commenting that 'they are all at most minor altercations of the kind to be expected in a marriage' and that 'some are not even that'.[18] This is surely a breathtaking comment if it was seriously meant to express a norm in relation to contemporary marriage. Clearly marriages have ups and downs but regular and persistent public criticism of a wife by a husband as though she was some kind of ignorant inferior or a rebellious teenager in need of correction is surely not a feature of the contemporary marriage partnership.

Similarly, the judge dismisses the wife's case as a bundle despite expressly referring to her 'increased sensitivity to the husband's old school controlling behaviour',[19] which it seems in his view did not amount to 'a consistent and persistent course of conduct' but were 'isolated incidents consisting of minor disputes'. Nevertheless, even taken at their lowest, these incidents could not fail to indicate a noxious atmosphere in the marriage, especially when an accumulation of minor incidents (of significantly less nastiness) was what had obtained a decree for Mrs Livingstone-Stallard in 1974; moreover, that case was before the subsequent social change, which then transformed the contemporary 1970s marriage from an unequal relationship still dominated by the husband to the equal partnership that is the norm today. In short, it is not easy to see – as he did not compare the two cases and declined the petitioner's request for more detailed reasons – why Judge Tolson took the view he did, unless it was simply that he believed the respondent's constantly exculpatory explanations for his critical and controlling conduct because he considered that such boorish behaviour was only normal because Mrs Owens had been engaging in an affair, of which there is some evidence when he refers to 'the batch of allegations which can be categorised as "the husband's reaction to the affair"'.[20]

Accordingly, it is easy to see why, despite the Supreme Court's unanimous judgment on the law, Baroness Hale only reluctantly agreed to dismiss the appeal to that Court (paragraphs

50–54 of the Supreme Court judgment) because it 'depended upon the cumulative effect of a great many small incidents (which were said to be indicative of authoritarian and demeaning conduct over a period of time)'; as a result of which she considered the 'proper disposal was to allow the appeal, and send the case back to the first-instance court to be tried again' although this was not what Mrs Owens sought. In the circumstances, the Lord Chancellor's support for early reform is the obvious solution to improve contemporary outcomes.

Notes

1 [2018] UKSC 41.
2 *Cleary v Cleary* [1974] 1 WLR 1142, which clarified the permissible interpretation of s 1(2)(a) of the 1973 Act so that in an adultery case the petitioner need not find it intolerable to live with the respondent specifically owing to the adultery fact on which the petition is based.
3 [2017] EWCA Civ 182.
4 Paragraph 49 of the Court of Appeal judgment, quoting the third section of Judge Tolson's judgment.
5 Paragraph 48 of the Court of Appeal judgment, quoting the second section of Judge Tolson's judgment.
6 *Rayden on Divorce* (12th edn, vol 1), 219, para 31 of the Court of Appeal judgment.
7 *Public Law* (2001), 489–501.
8 Alison Diduck and Katherine Donovan (Glass House, 2006).
9 Rosemary Hunter, Clare McGlynn and Erika Rackley (Hart, 2010).
10 See Jacqueline Burgoyne, Roger Ormrod and Martin Richards, *Divorce Matters* (Penguin, 1987).
11 *Rayden on Divorce* (12th edn, 1974, vol 1), 216, on the basis of which the Court of Appeal quoted Cairns LJ in *O'Neill v O'Neill* [1975] 1 WLR 1118 at 1121; or what would a jury think, per Dunn LJ (another experienced family judge of the early post-1973 interpretative era of the new statute) in *Livingston-Stallard v Livingstone-Stallard* [1974] Fam 47: see [2017] EWCA Civ 182 respectively at paras 30 and 29.
12 *Livingstone-Stallard v Livingstone-Stallard* and *Balraj v Balraj* (1980) 11 Fam Law 110, per Cumming-Bruce LJ, 'there is of course a subjective element in the totality of the facts that are relevant': see [2017] EWCA Civ 182 at para 32.
13 [2017] EWCA Civ 182, para 12, in which the respondent persisted in loudly berating his wife within the hearing of 'numerous strangers' and 'would not let the matter drop'.
14 Paragraph 12 of the Court of Appeal judgment.
15 Paragraph 49 of the Court of Appeal judgment.
16 Serious Crime Act 2015, s 76.
17 See n 15 above.
18 Paragraph 46 of the Court of Appeal judgment.
19 Paragraph 49 of the Court of Appeal judgment.
20 Paragraphs 47 and 48 of the Court of Appeal judgment.

Legal and practical aspects of parental agreement in Ukraine

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It has been a crucial issue recently as to how parents who have separated can continue to perform their parental rights and obligations towards their child after the breakdown of their marriage. Thus, the parental agreement (hereinafter the 'agreement') was introduced as an effective solution, making many disputable issues that occur between parents easier to resolve, including but not limited to questions on payment of alimony, establishment of the child's place of residence and other essential issues, which form an important part of a child's life.

Legal basis of the agreement

The general rules on concluding, amending or terminating the agreement are provided in the Civil Code of Ukraine (CCU), whereas specific provisions on issues that arise out of family relations and are reflected in the agreement are found in the Family Code of Ukraine (FCU). In particular, section 1 of Article 157 of the FCU establishes that all questions concerning the upbringing of a child are the obligation of both parents, where one of the possible ways of parents performing such an obligation after their separation is to conclude an agreement.

Content of the agreement

Even though the FCU does not provide a list of what the agreement must include, its content may be derived from other provisions of the FCU. Having regard to the specific mixed characteristic of the agreement, it may include provisions of different separate agreements under the FCU, in particular:

1. on the establishment of amount, designation of parent and procedure of paying alimony; and
2. on the establishment of the place of residence of a child.

Being of a mixed nature, the contents of the agreement are mostly allocated and ruled by the provisions of the FCU, which, on the one hand, deal exclusively with the above-mentioned separate agreements. However, on the other hand, the agreement may include other terms, which narrowly settle specific conditions of the parent-child relationship, namely:

1. meetings regime with the other parent;
2. provisions on the child's health conditions and medical insurance, education (whether in Ukraine or abroad), participation in educational competitions (whether in Ukraine or abroad), health recovery abroad with one of the parents; and
3. regime of travelling abroad with the child, including the procedure of obtaining the agreement of the other parent on the child's travel abroad.

Taking the above as a basis, this article looks at the recent developments of the Supreme Court of Ukraine regarding the requirements for the signatories of the agreement, the circumstances of declaring it invalid and grounds for its termination.

Requirements for its signatories

In a very recent case, the Supreme Court of Ukraine decided upon a claim of a mother of three to cancel the decisions of the court of first and second instances owing to the wrong application of the substantial law of Ukraine.

The facts of the case were as follows. The father applied to the District Court, claiming that the parental agreement should be considered invalid, since at the time of its conclusion he was not registered as the father of his three children on their birth certificates and thus he was not bound to make alimony payments to the mother of their children under the agreement. The mother applied a counterclaim for his paternity examination.

The District Court satisfied both the claim and counter-claim, namely the agreement was declared invalid and the paternity of the father was confirmed.

The mother, being clearly unsatisfied with such an outcome, applied to the Court of Appeal of Kiev; however, the decision of the court of first instance remained unchanged.

Thus, the mother applied to the Supreme Court of Ukraine in the hope that justice would overturn the unjust decisions of the two previous courts. Expectantly, despite the arguments of the father, stating that he was allegedly not obliged to take care of his children owing to absence of his name on their birth certificates, the Supreme Court of Ukraine declared that the FCU does not provide for the necessity for confirmation of paternity by the birth certificates of their children while concluding an agreement.

As a result, by its decision, the Supreme Court of Ukraine cancelled the decisions of the previous instances, thus leaving the agreement valid, by stating that the most important aspect while concluding the agreement is not a mark in their birth certificates but rather the blood connection with the children.

In conclusion, there is no need to be registered as the parent of the children in order to conclude a valid agreement.

Practice of resolving disputes that arise out of the agreement

The most common claims raised by applicants coming out of the agreement include the following:

- to declare the agreement invalid;
- to remove obstacles in communicating with the child/children;
- to collect the debt in paying alimony under the agreement; and
- to terminate the agreement.

Since the matter of invalidity and grounds for termination of the agreement prevail by quantity of applications to the courts, the two claims below illustrate recent cases of the Supreme Court of Ukraine.

Circumstances under which the agreement may be declared invalid

The general rules of invalidity of the agreement are established in Article 215 of the CCU, which provides that a party may apply to the court on a limited scope of grounds for invalidity. Such grounds, among others, include: wrong form of the transaction, absence of notarisation and contradiction of the transaction with the intent of its signatory and others.

Thus, taking the above as basis, the following case, which was decided by the Supreme Court of Ukraine in 2015, shall be considered.

The mother applied to the District Court, claiming:

1. to declare the agreement invalid, since she had not signed it; and
2. to obtain alimony from the father to support their daughter financially.

The facts of this case provided that after the parents agreed to separate, they decided that the father should live with the son and the mother with the daughter.

At both the first and second instances, the court declined the application of the mother. Even though by the results of the forensic examination it was concluded that the signature that was put under the line 'mother' was indeed made by another person, it was decided that the signed agreement was valid. The main reason behind declining the forensic examination was: 'The expert only got to examine one copy of the agreement, while other two copies were not provided to him.'

However, being a crucial issue, the mother further applied to the Supreme Court of Ukraine, claiming to cancel the two previous court decisions, to declare the agreement invalid and to oblige the father to pay alimony for the support of their daughter. By the decision of the Supreme Court of Ukraine, the previous courts failed to examine the facts of the case in detail and the decision to decline the results of the forensic examination was premature. Thus, the Court partly satisfied the mother's claim and forwarded the case to the first instance for a new trial.

Summing up, the Court declared the agreement as terminated since neither the father nor the mother was performing their obligations under the agreement. Further, the Court obliged the father to pay maintenance to the mother to support their daughter financially.

This means that a list of grounds for termination of the agreement is exhaustive and is difficult to prove. Therefore, where the agreement is terminated the other parent is entitled to request to pay maintenance under the general rules of the FCU.

Termination of the agreement

Besides the provisions of the CCU, which provide for the invalidity of agreements, it also provides for an exhaustive list of grounds to terminate it. Article 651 of the CCU provides that: 'Amendment or cancellation of the agreement shall be allowed only by the parties' consent, unless otherwise is established by the agreement or the law.'

The question of termination of the agreement was brightly highlighted in a case decided by the Supreme Court of Ukraine in 2016. The main facts revolved around the mother's application to the District Court to declare the agreement invalid, followed by the father's counterclaim to terminate it.

Over the course of the proceedings it was made clear that the reason behind the mother's intent to declare the agreement invalid and the father's will to terminate it was because of a drastic change in the financial capabilities of the father. He was not able to continue paying maintenance under the agreement, and because of this reason, the mother claimed to collect the maintenance payment with penalties due from the date of the arrears.

The father stated that he was ready to pay one-third of the overall sum of his income; however, he insisted on terminating the agreement, since he had no further ability to support their child financially.

The District Court satisfied the mother's claim: the father was obliged to pay the sum of the maintenance jointly with the penalty for arrears whereas his counterclaim to terminate the agreement was declined.

Both the Court of Appeal and Supreme Court of Ukraine agreed with the decision of the District Court and left it unchanged. Their argument was that there was no such ground to terminate the agreement 'due to serious change of financial condition of the party'. The Court stated that 'In accordance with Article 192 of the FCU the size of the alimony, established by the court decision, may be further decreased or increased by the application of the payer or the receiver of the alimony in case of change of material and family conditions, deterioration or enhancement of health of either party and in other circumstances, provided by the FCU.'

Since in this case it was established that the father was employed, his health conditions had not changed, he was not bound to pay maintenance to any other children and he did not have to financially support anyone else, the minimum grounds to change the sum of the maintenance payment and to terminate the agreement were not met.

Therefore, from this case it may be derived that in order to terminate the agreement the provisions of both the CCU and FCU, which provide for the grounds to do so, must be clearly met, otherwise the court will decline the application just as in the case above.

Conclusion

Having looked at the main issues that occur while concluding the agreement arising out of the requirements for its signatories,

execution, grounds for its invalidity and termination, it is clear that the agreement assumes an important place within the methods of performing parental obligations as to raising a child under Ukrainian law.

Considering the wide scope of matters that may be included in the text of the agreement, its mixed nature allows a possibility to deal with different questions simultaneously as illustrated above. Nevertheless, the most important feature, which is enshrined in the agreement, is its pro-child approach, which places the child first and may regulate each and every aspect of the child's everyday life in detail. That is why parents must always bear in mind the consequences of breaching the agreement, since the first person to suffer would be their child. Thus, in order to avoid any unneeded harm, parents should always be cautious about their actions and provide their child with the life conditions that they deserve.

Notes

1 Decision of the Supreme Court of Ukraine on the Signatories of the Agreement No 633399??-15 dd.23.03.2016 (accessible via link: http://reyestr.court.gov.ua/Review/57003858).
2 Decision of the Supreme Court of Ukraine on the Invalidity of the Agreement No 6-16175??15 dd.28.10.2015 (accessible via link: http://reyestr.court.gov.ua/Review/53163086).
3 Decision of the Supreme Court of Ukraine on Termination of the Agreement No 22-?/778/3822/16 dd.17.11.2016 (accessible via link: http://reyestr.court.gov.ua/Review/62858057).

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Child custody and guardianship: issues and challenges in India

Statutory provisions of Indian law

All codified personal laws of different religious communities in India identify biological parents as the natural guardians of their children. In the case of Hindus, section 6 of the Hindu Minority and Guardianship Act 1956 (HMGA) prescribes that the natural guardian of a Hindu minor shall be the father, and after him the mother, provided that the custody of a minor who has not reached the age of five years shall ordinarily be with the mother. The HMGA rests the appointment or declaration of any person as a guardian of a Hindu minor by a court on the welfare of the minor as the paramount consideration. However, in the absence of any statutory procedural remedy being available under the HMGA, all inter-parental child custody issues are invariably adjudicated through guardianship petitions preferred under the Guardian and Wards Act 1890 (GWA), which is a secular law and is invoked by all persons in India irrespective of religion and nationality. The Hindu Marriage Act 1955 (HMA) and the Special Marriage Act 1954 (SMA) also provide for the adjudication of custody issues of children as an ancillary issue in pending proceedings under the respective enactments. However, inter-parental, intra-country or inter-country child removal by a parent is not statutorily recognised as an offence or a wrongful act in India. In such a situation, the entire evolution of a jurisprudence on the subject of inter-parental child removal in India has evolved through beneficial interpretation of the courts from time to time. In matters of intra-country child custody disputes, the law has been consistent that the determining paramount factor will be the welfare and best interests of the children. Superior financial or other rights of litigating parents will be subordinate in such determinations and, wherever possible, the wishes of the child will be ascertained in adjudicating such disputes.

However, the vexed question of cross-border inter-parental child removal not finding any legislative definition remains a subject of varying judicial interpretation of the Supreme Court of India. India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980, acceded to by 98 other countries and thus wrongful removal and retention of a child domestically defies recognition and acceptance under codified Indian law, even though it is an offence internationally. A corpus of 30 million

non-resident Indians living globally in 180 countries with multifarious relationships creates an immense potential for unresolved child custody disputes upon a parent relocating to India or beyond its territorial borders, by violating foreign court orders or being in infringement of parental rights in foreign jurisdictions.

The HMGA declares that the natural guardian of a Hindu minor boy or an unmarried girl shall be the father, and after him, the mother, provided that the custody of a minor who has not reached five years of age shall ordinarily be with the mother. The HMGA does not contain any independent, statutory or procedural mechanism for adjudicating custody rights or declaring court-appointed guardians. The reference to the word 'Court' in the HMGA relegates a parent or any other person seeking appointment as a 'guardian' 'to invoke the provisions of a 127-year-old colonial law', that is, the GWA in India, and, wherein the aggrieved or violating parent is constrained to seek exclusive temporary custody of his biological offspring during the pendency of such hearing.

Residence determines jurisdiction

To be entitled to maintain a petition for guardianship under the GWA, the guardian judge will have jurisdiction only if the 'minor ordinarily resides' within the territorial limits of the authority of the District or Family Court. In the celebrated judgment of *Ruchi Majoo v Sanjeev Majoo*, AIR 2011 SC 1952, the Supreme Court of India held that in exercising its powers under the GWA, the guardian judge is competent to entertain a petition only if the 'minor ordinarily resides' in its jurisdiction as:

> 'a Court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a Court in that country. The party aggrieved of such removal, may seek any other legal remedy open to it. But no redress to such a party will be permissible before the Court who finds that it has no jurisdiction to entertain the proceedings.'

The phrase 'minor ordinarily resides' in the GWA has been construed by some High Courts in different decisions as not being identical to mean 'residence at the time of the application' or 'residence by compulsion at a place however long, cannot be treated as the place of ordinary residence', the purpose being to avoid mischief that a minor may be stealthily removed to a distant place and forcibly kept there to gain jurisdiction. Thus, the 'minor ordinarily resides' has been interpreted to mean a 'place from where he had been removed or in other words, the place where the minor would have continued to remain but for his removal'. In such a situation, a guardian judge may thus decline to exercise jurisdiction if the minor child resident abroad does not 'ordinarily reside' within his territorial limits, but is simply present there on the date of the filing of the guardianship petition.

Parens patriae writ jurisdiction

Against the backdrop of this statutory position, the Supreme Court and the High Courts in India, in the exercise of their extraordinary writ jurisdiction under Articles 32 and 226 of the Constitution of India respectively, issue a prerogative writ of habeas corpus exercising jurisdiction as *parens patriae* in their best discretion to adjudicate upon conflicting claims of parents for the welfare of children. Hence, the evolution of a beneficial law on inter-parental child custody issues has been a progressive phenomenon emerging through judgments of the various High Courts in India based on varying precedent settled by the Supreme Court of India.

The writ of habeas corpus for seeking the implementation of child rights where the parents are fighting for the custody of their offspring was settled by the Supreme Court of India in *Gohar Begum v Saggi alias Nazma Begum*, AIR 1960 SC 93, by following principles applicable to such writs in England to deliver the custody of infants. In *Nil Ratan Kundu v Abhijit Kundu*, AIR 2009 Sup SC 732, following English and American law, the Supreme Court of India held that 'the basis for issuance of a writ of Habeas Corpus in a child custody case is not an illegal detention', but 'the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate'. Hence, the invoking of the writ of habeas corpus by a non-resident parent

for child custody on the strength of a foreign court custody order is the only efficacious, speedy and effective remedy, since the minor 'ordinarily resides' abroad and there is a bar of jurisdiction under the GWA for a guardianship petition before a guardian judge.

Varying positions of Indian case law

In matters relating to inter-country parental child removal, the position of the law has varied. In *Surinder Kaur v Harbax Sandhu*, AIR 1984 SC 1224 and in *Elizabeth Dinshaw v Arvand Dinshaw*, AIR 1987 SC 3, the Supreme Court of India, exercising summary jurisdiction, returned the removed minor children to the foreign country of their origin on the basis of foreign court custody orders. This was done on the basis of the principle of the comity of the courts and the prerogative of the jurisdiction having closest contact with the child to determine all inter-parental child custody disputes.

However, in *Dhanwanti Joshi v Madhav Unde*, 1998(1) SCC 112, and in *Sarita Sharma v Sushil Sharma*, 2000(3) SCC 14, the Supreme Court of India favoured keeping the welfare and best interests of the child in mind over all other aspects. Accordingly, foreign court orders were held to be only one consideration in adjudicating child custody disputes, which were to be decided by domestic courts on the merits of each case.

Subsequently, in *Dr V Ravi Chandran v Union of India*, 2010 (1) Supreme Court Cases 174, the Supreme Court of India held that foreign courts had already passed custody orders or consent orders between the parties and had granted the divorce to the parties and had the jurisdiction to deal with the custody matters of the child, who should be returned to the respective country from where he/she had been removed.

In *Arathi Bandi v Bandi J Rao*, Judgments Today 2013 (II) SC 48, the Supreme Court of India held that the mother was singularly responsible for the removal of the child from the jurisdiction of the United States courts and summary jurisdiction was exercised for the return of the child to the US.

In *Shilpa Aggarwal v Aviral Mittal*, 2010 (1) Supreme Court Cases 591, the Supreme Court of India held that the country in which the child has been living during his initial years of life will be the determining factor with respect to the jurisdiction which has the most intimate contact with the child for the purposes of adjudicating issues relating to custody. Accordingly, Courts of that country will have the jurisdiction to decide custody issues of the child. This would also be in consonance with the principle of comity of courts.

The Supreme Court of India in *Surya Vadanan v State of Tamil Nadu*, 2015 (5) Supreme Court Cases 450, set at rest a five-decade chain of precedents laid down by courts in India to evolve a consistent approach in multijurisdictional child custody disputes and laid down the following principles:

- The principle of comity of courts and nations must be respected. The best welfare/interest of the child should apply in such cases.
- The principle of 'first strike', that is, whichever court is seized of the matter first ought to have privilege of jurisdiction in adjudicating the best interest of the child.
- The rule of comity of courts should not be abandoned except for compelling special reasons to be recorded in writing by a domestic court.
- Interlocutory orders of foreign courts of competent jurisdiction regarding child custody must be respected by domestic courts.
- An elaborate or summary enquiry by local courts must be held when there is a pre-existing order of a competent foreign court. It must be based on reasons and not ordered as routine when a local court is seized of a child custody litigation.
- The nature and effect of a foreign court order, reasons for repatriation, moral, physical, social, cultural or psychological harm to the child, harm to the parent in the foreign country and promptness in moving a concerned foreign court must be measured before ordering the return of a child to a foreign court.

Recent updated position of Indian case law

However, in *Nithya Anand Raghavan v State of NCT of Delhi and Another*, AIR 2017 SC 3137, the Supreme Court of India abolished the principle of the comity of courts and the principle of 'first strike' in matters relating to inter-country, inter-parental child custody disputes and laid down the following principles to be followed:

- The concept of *forum conveniens* has no place in wardship jurisdiction.
- The principle of the comity of courts is not to be given primacy in child custody matters.
- Child removal cases are to be decided on the merits on the welfare of the child principle.
- Foreign court orders are only one factor to

be taken into consideration.
- Courts are free to decline relief of return of child within its jurisdiction.
- Courts may conduct summary or elaborate enquiry on questions of custody.
- High Court exercises *parens patriae* jurisdiction in cases of custody of minors.
- Remedy of habeas corpus cannot be used for the enforcement of foreign court directions.
- Use other substantive remedies permissible in law for the enforcement of foreign court orders.
- The High Court can examine the return of a minor without being 'fixated' on the foreign court order.
- The 'first strike' principle is abolished as being in conflict with the welfare of the child.
- Summary jurisdiction to return a child to be exercised in the interest and welfare of the child.

Further, in *Prateek Gupta v Shilpi Gupta and Others*, 2017 SCC OnLine SC 1421, the Supreme Court of India held as follows:
- It has been reiterated that the notion of the 'first strike principle' is not subscribed to and the judgment of the Supreme Court in *Nithya Anand Raghavan* has been subscribed to.
- Notwithstanding the principles of the comity of courts, and the doctrines of 'intimate contact and closest concern', the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of the overall well-being of the child.
- In the process of adjudication on the issue of repatriation, a court can elect to adopt a summary enquiry and order the immediate restoration of the child to its native country, if the applicant parent is prompt and alert in the initiative to do so. The overwhelming exigency of the welfare of the child will be the determining factor for such a process.
- The doctrines of 'intimate contact and closest concern' are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter an alien environment, language custom, etc, with a focus on the process of overall growth and grooming.
- There is no forum convenience in wardship jurisdiction and the welfare of the child as the paramount consideration will be the mandate.
- Considering that the child in question was barely two-and-a-half years old when he came to India and is now over five years old, a child of tender years, he ought not to be dislodged from the custody of his father while proceedings are pending before the guardian judge in Delhi.

Current existing directions

The Supreme Court of India in the case of *Nithya Anand Raghavan* (above) enunciated new directions in matters relating to custody in inter-country parental child removal cases by departing from the principles of the comity of courts and the first strike jurisdiction, which had been laid down earlier in the verdict of *Surya Vadanan* (above). While now holding that the jurisdiction of the writ of habeas corpus cannot be used and converted for executing the directions of a foreign court, the Supreme Court of India has ruled that the High Court may examine the return of a child to a foreign jurisdiction if it would be in the interests and welfare of the minor child. This would be done in the exercise of the *parens patriae* jurisdiction of the High Court without being 'fixated' with the foreign court order directing the return of the child within a stipulated time, which would however be only one factor to be taken into consideration.

In *Surya Vadanan* (above), the Supreme Court of India following *Surinder Kaur Sandhu* (above) held that the best interests and welfare of the child should be determined by the jurisdiction having 'most intimate contact' and 'closest concern' since a foreign court would be 'better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court'. In *Nithya Anand Raghavan* (above), though it has been held that 'the principle of comity of Courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native state', the 'closest concern' doctrine does not seem to have been clearly shelved in determining the welfare of the child.

The decision in *Nithya Anand Raghavan* also requires that 'the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person' and holds that 'instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child' as 'indubitably, merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se'. Further, it has been held that 'ordinarily, the

custody of a "girl" child who is around seven years of age, must ideally be with her mother'.

The Supreme Court of India in its latest judgment in *Prateek Gupta* (above), delivered on 6 December 2017, following the earlier court precedent given in *Nithya Anand Raghavan*, decided on 3 July 2017, has again firmly decided that the issue of the return of a child, removed from its native country by a parent against the other parent's wishes, will be predominantly based on the welfare of the child principle. Differing to previous judgments given over the past five years, wherein children were directed to be returned to their foreign homes, the Supreme Court has now rejected the primacy given to orders of foreign courts on the issue of custody of minor children. Consequently, legal principles of such determination will no longer find preference and foreign court orders directing the return of children will now not find automatic implementation. Determination of the welfare of the child now lies with the domestic courts.

Recent decision ordering return of children

In *Jasmeet Kaur v Navtej Singh*, 2017 SCC Online Del 10593, based on the factual matrix of the case, the issue before the High Court of Delhi was regarding section 9 of the GWA, which makes specific reference to the words 'ordinarily resides'. Accordingly, it was held that since both the parties were US citizens, the expression 'ordinarily resides' clearly conveyed that a place of permanent residence in this case would be the US and not Delhi. The parties were married in the US and were permanent residents there for ten years. The daughter was born in the US and the son had been born in India when the wife came in 2016 and refused to go back to the US. Her guardianship petition was dismissed by the Family Court, Delhi in 2016 owing to lack of jurisdiction and the High Court affirmed the judgment. The High Court held that the children and the mother were not ordinarily resident in Delhi. The High Court of Delhi directed the wife to return to the US on the conditions agreed to by the husband. However, this order was set aside by the Supreme Court of India in *Jasmeet Kaur v Navtej Singh*, 2018 SCC Online SC 174, with a direction on 20 February 2018 to the Family Court to decide the matter on the merits in six months to determine the welfare of the children. Thereafter, the Family Court at Delhi, by a detailed judgment dated 20 August 2018 in *Jasmeet Kaur v Navtej Singh*, 2018 SCC Online Family Court (Del) 1, dismissed the guardianship petition and declined the sole guardianship/custody rights of the mother after adjudication of the matter on merits. The Delhi High Court in *Dr Navtej Singh v State of NCT*, 2018 SCC Online Del 7511, simultaneously by a decision dated 6 March and orders of 20 May 2018, in a habeas corpus petition has been pleased to direct that the mother and the two minor children of the parties should return to the US upon fulfilment of the conditions prescribed, failing which the children, along with their passports, will be handed over to the father for travel to the US. At the time of writing, an appeal is pending with the Supreme Court of India in this matter against this judgment of the Delhi High Court.

Mirror order jurisprudence

The noteworthy evolving jurisprudence in the above case is noted in the compliance made by the US court in passing 'mirror orders' for implementation of the directions of the Delhi High Court judgment dated 6 March 2018 in *Dr Navtej Singh* (above) as a condition precedent for directing the return of the mother along with the two children to the US. The Delhi High Court had directed that the father shall move the US Court for recall of US Court orders dated 17 November 2016 and 25 January 2017:

> 'insofar as they direct respondent no. 2 to grant temporary physical and legal custody, and the sole legal and physical custody, of the two minor children to the petitioner... The two minor children shall continue to remain in the custody of respondent no. 2 even after she returns to USA, till so long as the competent court in USA passes fresh orders on the aspect of temporary/permanent custody of the aforesaid two minor children after granting adequate opportunity of hearing to both the parties.'

The Delhi High Court also stipulated further arrangements to be made by the petitioner to meet all the expenses of the second respondent and the minor children until she found a suitable job or restarted her professional career.

Upon the judgment of the Delhi High Court in *Dr Navtej Singh* (above) being placed before the US Court, fresh orders dated 14 May 2018 were passed by the US Court, partially recalling its earlier orders dated

17 November 2016 and 25 January 2017 granting sole custody to the father. Under the fresh US Court orders dated 14 May 2018, the children shall now remain in the custody of the mother. The US Court directed that the mother will return immediately to the US with the minor children, who shall remain in the custody of the mother with the father having reasonable interim visitation. The US Court also approved the affidavit of undertaking of the father confirming his conduct of compliance with the directions of the Delhi High Court contained in the judgment dated 6 March 2018 in *Dr Navtej Singh* (above).

Conclusion

The above evolving mirror order jurisprudence in child custody matters in India, wherein the US Court passed mirror order directions to comply with the judgment of the Delhi High Court, can be a possible way forward to establish a precedent for the return of children to their homes of foreign jurisdictions. This mirror order formula evolved by judicial mechanisms through the far-sighted wisdom of the Indian courts to ensure the best interests and welfare of the children, as well as to provide them a family life with love, care and the affection of both parents, can be cited as a possible method for the return of children to foreign jurisdictions, until a law on the subject is enacted and some adjudicatory legal resolution process is evolved by any prospective law. It is hoped that if such an evolving mirror order jurisprudence finds judicial approval in India, children removed to India will benefit by being reunited with both parents in their foreign abode. If such a practice is endorsed, it may also encourage foreign courts to permit children residing abroad to visit their extended families in India, if an assurance is found for their return by a mirror order jurisprudence. This may perhaps be the best stop-gap arrangement that can be evolved through the mechanisms of the courts until a legislative solution is found to inter-parental child removal. Until then in India, matters will continue to be decided on ad hoc parameters, in the best interests and welfare of the children on a case-by-case basis.

Notes

1 Ranjit Malhotra and Anil Malhotra are the authors of *The Removed Child and The Law in India*, published by Malhotra & Malhotra Associates, Chandigarh (2018), ISBN 978-93-5321-776-1, released 9 November 2018.

Section 377: amendments of a 380-degree size and speed required in family and immigration law

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This article attempts to look at the immediate need for scope and reform in the domain of family and immigration law pursuant to the handing down of the bold historic judgment of the five-judge Constitution bench by the Honourable Supreme Court of India on 6 September 2018. Not much attention has been given to this aspect of the matter at this point of time. Of course, it is early days. But the fact of the matter is that there is a dire need to prioritise the legal reform needed in this area of the law stemming from this historic judgment. It is a question of human dignity, liberty and freedom, which under no circumstances can be delayed.

Clearly, it appears that a fast-track series of legislative amendments in the realm of family law, especially marriage law, reframing the marriage registration rules at the state level and updating the immigration rules at the central level, is imperative. This is an area that will need meticulous attention. As an immediate outcome and upshot, corresponding changes to matrimonial law and child custody and guardianship law are also required. The legal issues surrounding adoption and surrogacy will also have to be borne in mind.

In relation to Hindu law, the relevant provisions of the Hindu Marriage Act 1955 will have to be amended and of course followed vigorously by corresponding amendments in the state rules, framed by different states and union territories under the powers conferred under the said central legislation. Imagine a scenario wherein a same-sex married couple walked in to the office of the Registrar of Marriages today to have their marriage registered. They are most likely to be confronted with bureaucratic obstacles.

Provisions for marriage between same-sex relationships will have to be appropriately incorporated into the Hindu Marriage Act 1955, although the Special Marriage Act 1954 already provides for marriage between any two persons. But, as per conventional wisdom, the phrase 'any two persons' has always been interpreted to mean any two such persons professing any religion at all. Generally, the Special Marriage Act 1954 is invoked to solemnise cross-border marriages, where one of the spouses, being a foreign national, is habitually resident and domiciled overseas. Pre-nuptial agreements do not find statutory recognition under the Indian legal system, while the same have been given judicial recognition under judge-made law. A time will come when the pre-nuptial agreements of same-sex relationships will also have to be accorded judicial approval, depending on the facts and circumstances of the cases in hand.

This then leads us to the elucidation of the Protection of Women from Domestic Violence Act 2005. The logical chronology that stems from the inclusion of same-sex marriages also needs to be given statutory recognition under the umbrella of the domestic violence legislation, while the domestic violence legislation already statutorily recognises live-in relationships. Dwelling on this aspect of the matter, this will also have to be taken forward to bring within its sweep same-sex live-in relationships. The domestic violence plea could well also be agitated in same-sex relationships.

Moving on from marriage-related legal issues, the compass on the drawing board oscillates and nudges in the direction of adoption, child custody and guardianship laws.

Insofar as custody and guardianship issues are concerned, in particular the relevant provisions of the Guardian and Wards Act 1890, read with the provisions of the Hindu Minority Guardianship Act 1956 and coupled with the mandate of the Hindu Adoptions and Maintenance Act 1956, will have to be appropriately amended. Certainly, as a natural consequence, the Surrogacy (Regulation) Bill 2016 will also need to be re-examined.

The Law Commission of India submitted a comprehensive consultation paper on reform in this area of the law on 31 August 2018. Justice B S Chauhan, the present Chair of the Law Commission of India, has been working tirelessly, also looking at robust reform in the area of family law. He and his team have more work to do, which of course could not be envisaged when he submitted his report on 31 August 2018. The Law Commission now needs to catalogue an addendum to its earlier, above-mentioned principal report tabulating areas of laws, enactments and rules that would require immediate plugging and repair to ensure a positive meaningful beneficial interpretation of the large sweeping ramifications of this revolutionary jurisprudence of the Constitution bench.

Moving on, India's immigration rules do not even recognise same-sex relationships. Such a scenario poses huge problems for high-end expatriates, who technically cannot bring their same-sex spouses on dependent visas to India during the currency of their employment or posting in India. In such situations, the fallout has been to bring in same-sex spouses/partners to India on tourist visas. This tweaking of the immigration rules comes with a downside. There has to be a break in the cohabitation. Repeat trips have to be made so as to comply with visitor visa rules. Likewise, the presence of a large diplomatic community in India has similar concerns. Even the cloak of diplomatic immunity is of no help.

Clearly, in the penultimate analysis, further culmination of expertise of the Honourable Law Commission of India is warranted pursuant to its most recent report submitted on 31 August. The core issues in family law and immigration law analysed in this article need to be dealt with as soon as possible.

Note

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UK leaving the EU and Brussels II Revised: a return to the mirror order

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Brexit approaches in the United Kingdom as the world must know and, as many practitioners also know, the impact of dealing with cases in the family courts, where a matter referable to an European Union issue remains, is problematic.

The joy of Brussels II Revised was that there came into place a mechanism for judge and practitioner whereby a form could be downloaded, clarifying a private law order in England and Wales being registered in the foreign competent court of the foreign EU state through government agencies pursuant to this reciprocal Treaty.

While other Treaty options arguably remain, what is forgotten is that not only has this Treaty assisted the judge and practitioner but, more importantly, the parents too from England and Wales pursuant to the recent order here exercising contact in the foreign EU state after all. The child too obviously benefits without saying that it is of course all about them.

Now, though, there is the possibility of an order having to be attached to a correspondence letter as in the past, an address of the foreign court having to be obtained and the properly sealed order being sent, likely by post, onwards. Such orders and polite accompanying letters have sometimes not arrived or have not in fact been mirrored automatically in the past when such mirroring was the only reasonable option of registration. Foreign courts have in the past – as they still do, alas worryingly being countries outwith Brussels II Revised – sometimes required fresh applications simply to mirror even a most recent decided order from here.

Worse, in this jurisdiction, no longer with any legal aid in most private law cases for mothers and fathers these litigants in person will be left to attempt these mirroring procedures, which will likely fail, assisting the parent abroad or who has gone abroad to avoid such ordered contact if they wish and ensuring the likelihood of contact to a child being diminished for the parent left behind here.

This is referable also to public law cases where transfer of proceedings is requested for the foreign EU state to assume the legal considerations of a child instead of here. The International Liaison Judges will be busier here than they clearly are already and Family Judges at County Court level now fully seized of all understanding of Brussels II Revised having to learn further procedures.

There is little that can be done but for all of us to wait and see but the reality of the demise of legal aid has anyway ensured that certain cases owning points of law not travelling through from first instance to appellate court by example on international child law issues also and the safeguards of access to justice and access to registration abroad as described being also very much diminished.

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View from UAE on parental child abduction: from defeating extradition request against one parent to pursuing one against another

A Russian married couple were residing in the United Arab Emirates along with their daughter. The wife was allegedly accused of involvement in a fraud incident in Russia dating back to the time between October 2007 and August 2009. Several years later, the Russian authorities moved to the UAE court to extradite the wife allegedly involved in the aforesaid event. Pending an extradition request before the UAE courts, the wife's international travel was restrained owing to the detention of her passport by the UAE authorities. In February 2017, the husband fled the UAE along with their daughter to Russia. In hindsight, the husband's opportunistic attempt stemmed from the fact that the wife would not return to Russia in light of the criminal charges filed against her by the foreign authorities.

In a case such as the one above, where multiple legal challenges intersect, and faced with a spectrum of possibilities, a novel approach, which addresses the central issues, was adopted. In Al Rowaad's submissions to the court against the extradition request by the foreign authority, it was established that such an extradition request was marred by lacunae, and that in light of such discovered facts, which were not provided by the authority, the request should be treated as invalid.

Invalid extradition and opportunistic child abduction

Whereas the criminal investigation in the home country of the wife continued, the client was restricted from travelling outside the UAE until such an investigation was concluded in her home country. The husband opportunistically abducted the child and fled to the wife's home country, as the wife could not follow him owing to the ongoing investigation against her in her home country.

Here, the critical arguments, which were advanced by Al Rowaad, added significance in the rejection of the extradition request. The Russian woman (our client) had already served her jail sentence in her home country for the alleged offence, for which the authority was trying to extradite her from the UAE to Russia. Accordingly, it was clear that her movement from Russia to the UAE was after she had served her sentence, and that her immigration and subsequent residency to the UAE were fully legal.

Article 399 of Federal Law No 3 of 1987 (the 'Penal Code') provides as follows:

> 'Detention or a fine shall be imposed upon any one who seizes, for himself or for another, a movable property, or obtains a document or signature thereon, cancellation or destruction thereof or amendment thereto by fraudulent means, or by assuming false name or capacity, where such an act leads to deception of a victim and leads him to surrender. The same punishment shall apply to any one who disposes of real estate or movable property knowing that such a property is not owned by him or that he has no right to dispose thereof, or if he disposes of a thing knowing that it has been previously disposed of or contracted upon, provided that such acts cause damage to a third party…
> … The attempt of an act shall be punished by detention for a period not exceeding two years or by a fine not exceeding twenty thousand Dirhams. However, when a recidivist is sentenced to a penalty of detention for a period of one or more years, a maximum period of two years' police surveillance may be awarded to him, provided that such surveillance not exceed the sentence inflicted upon him.'

Juxtaposing the alleged criminal offence for which the foreign authority moved the extradition request against our client, we were able to identify the ingredients of the alleged offence to satisfactorily reciprocate with the text of Article 399 of the Penal Code. The relevance of establishing reciprocity between the laws that govern the alleged offences in the two jurisdictions was critical to the defence submitted by Al Rowaad. It must be noted that crimes in the Penal Code fall under the following categories, namely:

1. contraventions (violations);
2. misdemeanours; and
3. felonies.

The aforesaid classification flows from the nature of the crime and the corresponding seriousness of the resultant punishment. Article 399 of the Penal Code can be classified as a misdemeanour.

In light of the alleged offence for which the foreign authority wanted to extradite the client, it was critical to ascertain whether such an extradition request complied with the extradition treaty between the UAE and Russia. A key point, which we discovered from the enquiry conducted into the treaty, was that a wanted person shall not be handed to the authorities of his country if the case he or she was wanted for had been dropped owing to a lapse in time. Accordingly, a reference to Federal Law no 35 of 1992 (the Criminal Procedure Law) was made to enquire whether the aforesaid offence was affected by the limitation laws. We realised that Article 20 of the Criminal Procedure Law puts a limitation of five years on misdemeanours. Thus, the foreign authority's extradition request against our client was barred by the limitation laws.

The legal challenges

In light of the foregoing, we were met with a challenge that the UAE is not a party to the Hague Convention, and therefore having the child returned to the mother would entail elaborate legal proceedings and would be significantly time-consuming. Accordingly, the following legal actions were advised.

Custody claim

A custody claim was advised as per Article 329 of the UAE Penal Code, which provides: 'Shall be sanctioned to the penalty provided for in the preceding article, either of the two parents or grandparents who abducts his minor child or his grandchild, by himself or through others even without deceit or coercion, from his guardian or the person entitled to take care of him by virtue of a judgment rendered by a judicial body.'

The aforesaid provision provides that parents or grandparents, who personally, or with the assistance of another person, kidnap their child/grandchild from the person who has the right of custody, shall be punished with imprisonment or a fine. Accordingly, a child abduction case can be filed against one of the parents. Now, in order to file an abduction case, the complainant must have a judgment from the UAE court awarding them custody regardless of the subsistence of the marriage. Thus, we advised our client to file a custody case in the UAE courts. Upon obtaining a custody judgment through the court's procedures, which took several months, our client was eligible to move to the local criminal court to file a case of abduction against the father.

Criminal complaint

According to Article 329 of the Penal Code, our client moved to the prosecution and submitted a criminal complaint of abduction against the father. The request was accepted by the prosecution as our client now had a valid custody order from the UAE courts, which was essential for our client to pursue a criminal complaint against the husband.

INTERPOL

Since the outcome of the child abduction could be a jail sentence of more than one year, the wife had the right to apply for a Red Notice through INTERPOL to have the husband extradited to the UAE in accordance with the UAE International Judicial Cooperation Laws.

The case received media attention and the following media reports were published in a leading daily in the UAE:

- Reported on 25 May 2017: www.khaleejtimes.com/news/crime/dubai-court-rejects-extradition-request-for-wanted-russian-woman.
- Reported on 13 November 2018: www.khaleejtimes.com/news/crime-and-courts/man-faces-jail-for-kidnapping-daughter-from-uae.

Permanent Bureau of the Hague Conference on Private International Law
The Hague

The Hague Conference on Private International Law 2018: highlights from the Permanent Bureau

Introduction to the HCCH

The Hague Conference on Private International Law (HCCH) is the World Organisation for Cross-border Co-operation in Civil and Commercial Matters, an intergovernmental organisation whose origin dates back to 1893. The HCCH currently comprises 83 members – 82 Member States and one Member Organisation (the European Union) – representing all major regions and legal systems of the world.

The purpose of the HCCH is the 'progressive unification of the rules of private international law' (Article 1 of the Statute). These rules act as 'road signs' in cross-border situations to 'show the way'; that is, they indicate which state's authorities are competent to decide matters arising in such situations and which state's law applies to the issues at stake. They also determine whether a foreign judgment may be recognised and enforced abroad. Finally, they may establish cooperation mechanisms between states with a view to overcoming the challenges of cross-border legal procedures. The scope of private international law is very broad and covers issues from child protection to commercial contracts and financial transactions, from service of process to the protection of adults. In the age of globalisation, cross-border 'private' relations are very common; thus, the importance of private international law can hardly be overestimated. More information about the HCCH can be found on its website at www.hcch.net.

The work of the HCCH offers solutions to these challenges by preparing, negotiating and eventually adopting multilateral treaties, known as the 'Hague Conventions'. Almost 40 such instruments have been adopted since 1951. The following Conventions would be of particular interest to IBA Family Law Committee members:

- Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions;
- Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;
- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
- Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters;
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;
- Convention of 25 October 1980 on International Access to Justice;
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;
- Convention of 13 January 2000 on the International Protection of Adults;
- Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; and
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

The Hague Conventions do not seek to harmonise domestic substantive law (eg, internal legislation governing child protection, commercial and financial transactions or civil procedure). States remain in control of their domestic law. The Permanent Bureau (Secretariat) of the HCCH provides a range of services to support the operation of Hague Conventions (ie, post-Convention services), often in cooperation with Contracting Parties. It also coordinates technical assistance for

states in implementing and applying the Hague Conventions. Technical assistance is often provided in partnership with other intergovernmental organisations and non-governmental organisations (eg, the United Nations International Children's Emergency Fund (UNICEF) and the World Bank Group).

2018 witnessed a number of celebrations, the most important of which was the 125th anniversary of the organisation. Furthermore, the past year has seen a number of legislative projects make good progress, as well as the successful organisation of several post-Convention activities. Some of the more significant highlights of 2018 are described below.

2018 – a year of celebrations

125th anniversary – HCCH

On Wednesday 12 September, His Majesty King Willem-Alexander of the Netherlands joined the HCCH for a commemorative ceremony to celebrate its 125th anniversary year at Diligentia Theatre in The Hague. As the first international organisation in The Hague, its creation in 1893 helped to establish The Hague as the International City for Peace and Justice.

The programme featured addresses by H E Mr Sander Dekker, Minister for Legal Protection of the Netherlands, Dr Christophe Bernasconi, Secretary General of the HCCH, H E Mrs Pauline Krikke, Mayor of The Hague, Professor Paul Vlas, Chair of the Standing Government Committee and Mr Andrew Walter, Chair of the Council on General Affairs and Policy (the 'Council') of the HCCH.

The speeches highlighted the history and importance of the work of the HCCH, as well as the benefits it brings to people and commercial operations around the world, and underlined the longstanding and strong relationships between the HCCH, the host state of the Netherlands and host city of The Hague.

The ceremony also featured the launch of a new video illustrating the work of the HCCH, musical performances and the unveiling of art commissioned for the event.

Celebrations of the 125th anniversary also took place in Hong Kong (SAR), China, from 18 to 20 April 2018, and in Buenos Aires, Argentina, from 13 to 15 August 2018, where regional offices are in place to support the Permanent Bureau in the Latin America and Asia Pacific regions.

25th anniversary of the Hague 1993 Intercountry Adoption Convention

2018 also marked the 25th anniversary of the approval of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The Convention, currently with 99 Contracting States, is one of the Hague Conference's most successful conventions.

In recognition of the anniversary, the Permanent Bureau published a new brochure on the Convention titled *25 Years of Protecting Children in Intercountry Adoption*. This brochure presents the fundamentals of the Convention in an easily accessible form for a general audience, and analyses the main achievements and remaining challenges of this Convention.

The Permanent Bureau also published a note in 2018 on the 'Habitual Residence and the Scope of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption'. The concept of habitual residence is key to determining when the Convention applies to adoptions. However, Contracting States have encountered challenges in some instances in determining the habitual residence of prospective adoptive parents and adoptable children. This article is designed to help educate the relevant judicial and administrative authorities or bodies in Contracting States in relation to determinations of habitual residence and the scope of the Convention. It also aims to promote the protection of children by raising public awareness as to what qualifies as an intercountry adoption under the Convention.

20th anniversary of the International Hague Network of Judges

From 24 to 26 October 2018, on the occasion of the 20th anniversary of the International Hague Network of Judges (IHNJ), Members of the IHNJ from over 30 jurisdictions, as well as experts from the central authority of the United States, Reunite, private practice and the Permanent Bureau (PB) of the HCCH, met at Florida International University, Miami, to discuss the IHNJ, direct judicial communications (DJC) in international family law matters and the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the '1980 Child Abduction Convention') from a judicial perspective. The discussions

also touched upon other Hague children's conventions; that is, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the '1996 Child Protection Convention') and the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the '2007 Child Support Convention'). The meeting was co-organised by the PB and the four Members of the IHNJ who are judges from the US.

The creation of the IHNJ specialising in family matters was first proposed at the 1998 De Ruwenberg Seminar for Judges on the international protection of children (the first judicial seminar ever organised by the PB). It was recommended that the relevant authorities (eg, court presidents or other officials as is appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national central authorities, other judges within their jurisdictions and judges in other Contracting States, in respect, at least initially, of issues relevant to the 1980 Child Abduction Convention. It was felt that the development of such a network would facilitate communications and cooperation between judges at the international level and would assist in ensuring the effective operation of the Convention. Twenty years later, it is recognised that there is a broad range of other international instruments, both regional and multilateral, in relation to which direct judicial communication may be useful. The IHNJ now consists of 133 Members representing 84 states.

Progress made on legislative projects

Third and Fourth meeting of the Experts' Group on Parentage/Surrogacy

The Experts' Group on Parentage/Surrogacy held its third meeting in February 2018 and its fourth meeting in September 2018, continuing its work in exploring the feasibility of establishing international rules in the area of legal parentage, including international surrogacy arrangements (ISAs).

During these two meetings, the Group recalled that the absence of uniform private international law (PIL) rules on legal parentage can lead to limping parentage across borders in a number of cases and can create significant problems for children and families. The Group further recalled that uniform PIL rules can assist states in resolving these conflicts and can introduce safeguards for the prevention of fraud involving public documents, while ensuring that the diverse substantive rules on legal parentage of states are respected. Any new instrument should aim to provide predictability, certainty and continuity of legal parentage in international situations for all persons involved, taking into account their fundamental rights, the UN Convention on the Rights of the Child and, in particular, the best interests of children. The Group agreed that any international instrument would need to be developed with a view to complementing the existing Hague family conventions and to attracting as many states as possible.

The Group confirmed that the three primary methods of establishing legal parentage across most states are:

1. by operation of law;
2. following an act of an individual; and
3. by decision of a state authority (usually judicial).

As legal parentage in the majority of cases is not established by a judicial decision, the Group discussed possible methods to facilitate the continuity of legal parentage when it arises by operation of law or following an act of an individual. Any method considered in a possible future instrument should be kept as simple as possible in order to be of added value for families and easy for states to implement.

As recommended by the Council, the Group's fifth meeting, to be held in early 2019, will focus on the feasibility of applying general PIL on legal parentage to ISAs and certain cases of assisted reproductive technology.

Fourth Meeting of the Experts' Group on cross-border recognition and enforcement of agreements in family disputes involving children

On 28 and 29 June 2018, the Experts' Group on cross-border recognition and enforcement of agreements in family disputes involving children held its fourth meeting at the offices of the PB. The meeting was attended by 16 experts and members of the PB under the chairmanship of Professor Paul Beaumont from the University of Aberdeen, Scotland.

As mandated by the 2016 Meeting of the Council, the Experts' Group focused initially on the development of a non-binding 'Practical Guide to Family Agreements' under the 1980 Child Abduction, 1996 Child Protection and 2007 Child Support Conventions to provide best practices on how an agreement made in the area of family law involving children can be recognised and enforced in a foreign state under these Hague Conventions. The work of the Experts' Group focused in particular on the shift of habitual residence of the child following a non-return agreement, which was discussed during the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention in October 2017.

The Experts' Group also discussed the way forward for the Project. While the Experts' Group agreed to recommend to the Council that the Project remain on the work programme of HCCH, the discussions highlighted the need for in-depth research on the practical issues and good practices associated with enabling cross-border family agreements to be made enforceable in different legal systems. The findings of the research would assist the Experts' Group in deciding whether it would uphold the recommendation it made to Council in 2017 in relation to the development of a new binding instrument.

Important post-Convention services: 2018 highlights

Sixth meeting of the Working Group on Article 13(1)(b) to develop a Guide to Good Practice

From 18 to 21 September 2018, the Working Group on the draft Guide to Good Practice on Article 13(1)(b) met at the offices of the PB in The Hague. This meeting was attended by 30 experts and members of the PB under the chairmanship of the Honourable Mrs Diana Bryant, AO, QC, former Chief Justice of the Family Court of Australia. The experts represented 16 states from both civil and common law jurisdictions.

The Working Group was established following a decision of the 2012 Council on General Affairs and Policy of the Hague Conference and was tasked to develop a Guide to Good Practice on the interpretation and application of Article 13(1)(b) of the 1980 Child Abduction Convention, in part to provide guidance that is specifically directed to judicial authorities.

Article 13(1)(b) of the 1980 Child Abduction Convention provides for the 'grave risk' exception to the return of a child who has been wrongfully removed or retained and is, among the limited exceptions to return under the Convention, the most frequent ground for a judicial refusal to return a child. The objective of the Guide is to promote the consistent interpretation and application of this provision in accordance with the objectives of the 1980 Child Abduction Convention.

A previous draft of the Guide to Good Practice had been discussed at the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, which took place in October 2017. The September 2018 meeting saw the members of the Working Group discuss a revised draft of the Guide, which has been circulated for comments to the Members of the organisation with a view to its finalisation and approval by the Council on General Affairs and Policy in March 2019.

HCCH-UNICEF regional workshops in Asia on the role of the Hague Conventions in cross-border protection of children

For the first time, the UNICEF Regional Office for South Asia (ROSA), the UNICEF Regional Office for East Asia and Pacific (EAPRO) and the HCCH co-organised two workshops in Asia. The first workshop was held in May 2018 in Nepal and covered South Asia; the second workshop was held in September 2018 in Thailand and covered East Asia and the Pacific. These workshops follow on from the first collaboration between UNICEF ROSA and the HCCH through webinars that took place in late 2017.

The aim of the workshops was to discuss the cross-border movement of children from Asia and mechanisms to support safe migration. These workshops were an excellent opportunity for different actors in the region to learn about the HCCH, as well as about how the Hague Conventions are instrumental in addressing cross-border child protection issues in Asia, in particular in the context of irregular migration (eg, trafficking, unaccompanied children). The importance of cooperation to prevent and address child trafficking, as well as to protect migrant children, was highlighted.

Member States and States Parties to the Hague Conventions in the region also shared their experiences, including the methods by which they implement the Hague Conventions and the benefits of becoming a Member of the HCCH.

Relaunch of the Judges' Newsletter on International Child Protection

Further to the Conclusions and Recommendations adopted in October 2017 at the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, the Permanent Bureau has resumed the publication of the Judges' Newsletter on International Child Protection, after an intermission of three years; the Judges' Newsletter is now edited in-house by the PB and published in electronic format only.

In 2018, two additional volumes of the Judges' Newsletter have been published with a special focus: 'The Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (10–17 October 2017)' (Volume XXI), and 'The Child's Voice – 15 Years Later' (Volume XXII). The next volume of the Judges' Newsletter (Volume XXIII) will be devoted to the 20th anniversary of the IHNJ on the occasion of which a Conference of Hague Convention Network Judges was convened in October 2018 at Florida International University (Miami, US). This 'anniversary' volume will gather, in particular, contributions from Members of the IHNJ who spoke at the Conference addressing diverse topics in relation to the operation of the 1980 Child Abduction Convention such as mediation, judicial case management, the issue of delays, judicial and administrative cooperation in child abduction cases or the voice of the child.

Relaunch of INCADAT

The International Child Abduction Database (INCADAT) (www.incadat.com) is the leading legal database on international child abduction law. It is a free and comprehensive tool for researching cases, case summaries and legal analysis of the application of the 1980 Hague Child Abduction Convention. The website also provides additional material relevant to this area of law. The database, which covers more than 1,300 cases, is regularly updated and is available in English, French and Spanish. INCADAT is used by judges, central authorities, legal practitioners, researchers and others interested in this international legal cooperation framework, which helps to protect children from the harmful effects of international child abduction in about 100 countries.

On 16 October 2017, during the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, Mr Christian Höhn, Head of the German Central Authority for the 1980 Child Abduction Convention, launched an improved online version of INCADAT. The improvements to INCADAT are designed to enhance the searchability of the full content of judicial decisions, including by keyword. The modern, fresh look of the website is more user-friendly and supports use on mobile devices. A brand new content management system streamlines the editorial workflow and helps to ensure the currency of the database. The technical refurbishment was made possible by the generous financial assistance provided by the German government and Miles & Stockbridge PC.

iSupport

2018 also witnessed a third successful European Union Action Grant Application for iSupport. This new project is called iSupport PM (Promotion and Maintenance), as it will aim at enlarging the number of participating states and provide for the continued operation of iSupport. The proposal was submitted with the support of 15 states and two organisations.

Coordinated by the PB of HCCH, iSupport is an electronic case management and secure communication system for the cross-border recovery of maintenance obligations under the 2007 Hague Child Support Convention and the EU 2009 Maintenance Regulation. It is provided for free (with the exception of maintenance costs) to central authorities designated for the benefit of these instruments and can also be used to service the UN New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, as well as bilateral treaties and agreements in this important area of child protection. iSupport will contribute to considerable savings in registered mail and translation costs. In addition to costs savings,

iSupport will aid in the standardisation of effective procedures that produce results and are accessible, prompt, efficient, cost-effective, responsive and fair, all for the benefit of children around the world.

iSupport has been used by Portugal since 2016. Five further states from Europe and Latin America are expected to join soon and start using iSupport.

The involvement of a wide community of users allows for the regular improvement of the software. This year, a new version was released, which includes several enhancements such as two-factor authentication and the separation of a country's case load by territorial or legal organisation.

Over the next few months, developments will concentrate on the encryption of data in the application, in order to meet stringent certification requirements, as well as on the improvement of user-friendliness. This will contribute to widening iSupport's appeal.

iSupport is closely associated to developments in international child support and will continue to be an important project going forward as the HCCH launches an expert group on international transfers of maintenance funds in the near future.

Modification in Spain of child arrangement orders based on the principle of the child's best interest

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Introduction

The 1989 Convention on the Rights of the Child introduced the principle that the rights of children and young people deserve double consideration. First, as holders of rights that are recognised by every human being and correspond to them by the mere fact of being so, in this respect they can no longer be considered passive objects of protection of the state and of the parents. Second, children and young people are entitled to special consideration, whose justification derives from their special vulnerability and their nature. The Convention on the Rights of the Child for the first time transforms their needs into rights, placing at the forefront their protection and defence, and not only legal, but also political and social rights. Article 3(1) is one of the key pillars of the Convention.

This indeterminate legal principle is used to agree on a measure based in the interest of the child and young people in the procedures that affect them, in this case family procedures. The principle of the best interest of the child acts as an arbitrator between the interests of each parent; among all possible measures the option that best preserves the best interests of the child should be agreed.

Legal framework

The Spanish legal system reflects the principle of the best interests of the child. However, until recently, it was not possible to determine how this interest of the child was to be understood, since there was no list of criteria in Spanish law that would serve to determine such interest.

A judgment of the Supreme Court of Spain dated 19 July 2013 provided as follows: 'the interest of the child is given priority, but neither article 92 of the Civil Code (hereinafter CC), nor article 9 of the Organic Law 1/1996, of January 15, of Legal Protection of children, defines or determines.'

However, as of August 2015, the concept of the child's interest has been developed in Organic Law 8/2015 of 22 July,[1] on the modification of the Child and Adolescent Protection Act. This interest is defined as follows:

- in the sense that the maintenance of family relationships will be preserved, the satisfaction of their basic needs, both material, physical and educational, as well as emotional and affective, will be protected;
- the irreversible effect of the passage of time on its development will be weighted; and
- the need for stability of the solutions is adopted, since the measure adopted in the

best interests of the child does not restrict or limit more rights than those covered. This is provided for in Article 2 (interest of the child) of the said reform.

Procedure to change a final judgment on child arrangement orders

The wording of article 90.3 CC[2] supports the jurisprudence position that gave prominence to the interest of the child in the analysis of issues related to protection, guardianship and custody, considering that the new needs of children will not have to be sustained by a 'substantial' change, but by a true change (judgments of TS No 346/2016 of 24 May, No 529/2017 of 27 September).

That is why the Supreme Court has not denied that shared guardianship and custody can be agreed upon due to changing circumstances, even having preceded the parents' agreement on the custody of children, but always for justified and serious reasons, motivated by the time elapsed since the agreement was carried out. This was decided in the judgment of 17 November 2015, No 1889/2014, which stated, based on the child's best interests, that the circumstances had changed because: (1) the child was two years old when the agreement was reached, and now he was ten years old; and (2) the parents themselves would have relaxed the initially agreed system during that time. This is also supported in the judgment of 26 June 2015, No 469/2014. What is valued is that at the time it was signed, it was a custody regime that was uncertain, as demonstrated by the evolution of the doctrine of this Chamber and of society itself. The Supreme Court stated that the situation of the girl cannot be set in stone from the moment of the agreement, without attending to changes that have taken place since then (see sentences of the Supreme Court No 162/2016 of 16 March and No 413/2017 of 27 June).

A very recent judgment of the Supreme Court, dated 10 October 2018, No 561/2018, provided that it had repeatedly stated in previous judgments that discussions on guardianship and custody of children must always consider the prevailing interest of the child. The best interests of the child, in the analysis of issues related to their protection, custody and right of access, consider that the new needs of children do not have to be sustained by a 'substantial' change.

The indicator of whether the change of guard is advisable or not lies in the best interests of the child. Therefore, the plaintiff who files the claim must demonstrate that the request is made on the basis of said interest. In order to arrive at the determination of what this interest is in a specific case, first of all it is necessary to evaluate what the interests at stake are, to provide the procedure with a structure and strict guarantees, and lastly, special emphasis must be placed on the formation of the multidisciplinary team that intervenes (judges, lawyers, psychologists, social workers). In addition, under Article 12 of the 1989 Convention on the Rights of the Child, the task of evaluation requires the participation of children and young people and, as the child matures, his or her opinions should have more and more weight in the evaluation of the best interest.

In family procedures, the guarantees that must be provided to the procedure are of various kinds. Thus, the right of the child to express his opinion is an element and at the same time it is a fundamental guarantee; the determination of the facts, which in turn implies going to professionals and people from the child's environment and other people who are in contact with the children and young people. In addition, this information must be checked before it is taken into account to evaluate the interest of the child in the specific case.

In the same way, it is important to avoid any delay in the procedure as much as possible, since this has a negative impact on childhood and the young because their perception of time is different, and this should also be reflected in the resources needed. The intervention of the psychosocial teams must also be fast and expeditious otherwise the whole procedure could be delayed.

Notes

1 BOE-A-2015-8222, de 23 de julio de 2015.

2 Spanish Civil Code: s 90.3. The measures that the judge adopts in the absence of agreement or those agreed by the spouses may be judicially modified by the spouses or by a new agreement approved by the judge, when new needs of the children appear or there is a change in the circumstances of the spouses.

Australian family law in a state of flux

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When the Family Court of Australia was first set up with the enactment of the revolutionary Family Law Act 1975 (Cth), who knew that subsequently there would be a series of apparently never-ending criticisms and enquiries, with complaints by those who felt disaffected by the impact of the law and the Court?

Who also knew that in those halcyon days in the golden sun there would be heard the constant refrain from judges and lawyers about a lack of resources; that is, money being devoted to the Courts and to Legal Aid?

In the intervening period of course the prominence and permanence of domestic violence have come to the fore as topics of agitation. Women's rights groups have agitated for greater protection for women and children. Men's rights groups have agitated for such things as equal shared parental responsibility and the right of the child to have a meaningful relationship with both parents.

Populist right-wing politician Senator Pauline Hanson was elected to power on a platform of abolishing the Family Court. Subsequently, the federal government has proposed exactly that. International colleagues may be surprised that there isn't just one court in Australia that deals with family law. The Federal Circuit Court of Australia undertakes the bulk of family law work in Australia. The Family Court of Australia deals with more complex children and property matters and appeals. Matters in Western Australia are dealt with by the Family Court of Western Australia, which has a unique Commonwealth/state jurisdiction covering different aspects of family law that are not available in other states.

A government bill before Federal Parliament proposes to restructure the family courts so that the Family Court of Australia is, in effect, abolished. The Family Court of Australia will be Division A and the Federal Circuit Court will be Division B of the new Federal and Family Circuit Court. Instead of three judges as it is at present, appeals will be heard by one judge sitting alone in the Federal Court (a Court that deals primarily in commercial disputes).

The peak lawyers group in Australia, the Law Council of Australia, is opposed to the changes – so are the opposition and some cross-bench members in the Australian Senate.

There has been intense and – to some observers – unseemly jockeying by politicians as to how the Senate would deal with the bill. The relevant Senate committee is controlled by government members, which are sought to truncate submission times to the bill so that the bill might be passed before Parliament is dissolved, likely by April. By contrast, the Senate as a whole (which is not controlled by the government) has sought to delay the hearings of the bill until a comprehensive review of family law has been undertaken by the Australian Law Reform Commission. If the Senate's approach is to be continued, then it is unlikely that the bill will be passed, because by the time it is debated in the Senate it will be too late as Parliament will already have been dissolved.

The opposition has stated that it is opposed to the bill.

The Attorney-General is on record as saying that although the bill proposes a restructure, he will not appoint any further judges to the Family Court.

As of late November, even though the bill has been introduced to the Senate and not yet debated there, the government has also introduced the bill to the Lower House, the House of Representatives, a move attacked by an opposition frontbencher.

The polarised position of government and opposition played out at the National Family Law Conference held in Brisbane in October. Opposition MP Graham Perrett recently made the following comments (which demonstrate how far apart the government and opposition are about these proposals):

> 'Remembering that this Attorney-General had not consulted the stakeholders prior to the introduction of the bills, you would think he would have been at pains [at the National Family Law Conference] to explain to the attendees while it was necessary to make the changes he has proposed – in effect, to argue his case for change in front of a conference full

of lawyers. Instead, Attorney-General Porter used his address to criticise the professionals who spend their lives supporting, advocating for or making decisions about the most vulnerable families in Australia.

One telling insight into his address was what Attorney-General Porter said in discussing a matter that was considered complex:

> "When I initially asked the question 'How do we measure complexity?', frankly I was expecting a detailed multifactor analysis weighted to produce measures of complexity based on a long list of salient criteria (of which estimated trial length would be just one)."

Essentially, what Attorney-General Porter expected was a spreadsheet that would neatly dissect the lives of those using the court system... Attorney-General Porter arrogantly concluded his speech at the National Family Law Conference by saying:

> "... I am not going to resile from that process of reform."

The problem is that Attorney-General Porter has not undertaken any process of reform other than introducing a bill that proposes radical changes to the family law system. We should wait for the proper process to occur. The Senate inquiry shouldbe allowed to complete its hearing and report. The [Australian Law Reform, Commission] review should be completed and the report considered before radical reform like that which is proposed as undertaken.'

In the midst of such polarisation, the government separately appointed the Australian Law Reform Commission to undertake a review of the whole family law system. This has been a mammoth effort on the part of the Commission, with a full-time commissioner appointed, ably assisted by several part-time commissioners. Commissioners and researchers have travelled across the country gathering oral and written submissions, publishing a discussion paper and being required to produce a report in April next year.

Regrettably, the Commissioner, Professor Helen Rhoades, has had to cease her herculean efforts owing to illness and instead she has been replaced as Commissioner by the Chair of the Commission, Justice Sarah Denington.

The government's position is that, irrespective of the Australian Law Reform Commission (ALRC) review and report process, reform of the two courts is essential, critical and urgent. The opposition's approach is that to reform the courts in that manner before the ALRC report is released is to put the cart before the horse.

An old Chinese curse is 'May you live in interesting times'. Currently in Australia we are living in those interesting times. It is hard to predict given the current febrile political environment and without knowing the ALRC's recommendations, what form the regulation of family law will take by the end of 2019. All I can say is it is likely to be considerably different – whatever that means.

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Report of Justice Rajesh Bindal Committee

On 18 May 2017, the Ministry of Women and Child Development constituted a 13-member high-level Committee to examine issues relating to inter-country parental child removal and suggested a model legislation to safeguard the interest of parents and children both within India and beyond its territorial borders. A concept note on the proposition was put forward by the Committee for eliciting public views, comments and suggestions at an international level. Thereafter, interactions by video conferencing and direct meetings took place at New Delhi and Bangalore with left-behind parents located domestically and internationally, besides seeking the opinions of stakeholders, institutions and foreign missions with viewpoints to express.

The Committee examined international instruments, domestic laws and a large

volume of legal and other literature to delve into the position of inter-country parental child removal issues existing in other nations in order to draw up a comparative perspective. The unique joint family support structure of the Indian societal network had a special relevance to the equivalence of foster care advocated in foreign nations. The perspective of domestic violence faced by Indian spouses in foreign jurisdictions upon return with removed children is a legally complex issue, which needs a sympathetic remedial resolution and is a major issue in the enactment of any proposed legislation.

The Committee was faced with unique propositions put forth before it with regard to difficulties, both domestic and international, faced by affected parents if a removed child was sought to be returned to its country of habitual residence by a domestic court. Issues faced abroad pertained to legal protection from spousal violence, maintenance, immunity from criminal prosecution, litigation costs, custody and visitation rights, besides insecurity and alienation stemming from unfriendly legal procedures resulting from harsh penal laws on child abduction in an international arena.

The Committee focused on mediation methods that could find a place in peaceful settlement and burial of the hatchet when warring parents sought to resolve their differences in the larger interests of their progeny. International instruments, particularly Japanese structures and the Hague Guide to Good Practice with its deliberations, provided useful food for thought. Consequently, a strong mediation mechanism was proposed as an alternative to belligerent court battles.

India is afforded the protection of the United Nations Convention on the Rights of the Child (UNCRC) by acceding to it on 11 December 1992, and thereafter it drastically amended the Juvenile Justice (Care and Protection of Children) Act 2000 in a refurbished 2015 version, which gives force to the legislative intent of putting the 'best interest of the child' under the umbrella of the vast beneficial parameters of the UNCRC. The general principles of care and protection of children had a special value for the Committee to consider and had to be moulded and blended with conflicting parental interests, lobbied by internationally located spouses who contributed their unique, heart-rending experiences.

Setting out the parameters and giving legal colour to wrongful removal or retention of children, within the four corners of India or beyond its territorial borders, has for the first time found definition in Indian child law jurisprudence. To date, the illegal removal, retention or holding custody by one parent to the exclusion of the other does not find recognition as a legal wrong and thus securing a lawful remedy for return was undetermined. Thus, in the ultimate draft Protection of Children (Inter-Country Removal and Retention) Bill 2018, the proposed legislation put forth by the Committee has for the first time defined wrongful removal or retention of children as an act committed breaching rights of custody actually exercised before such violation occurred by a natural parent, by reason of a judicial order, operation of law or an agreement. In the proposed Bill, the complete process of an operational machinery for the implementation of child rights in an interparental dispute resolution scheme then follows.

The issue of setting up a central authority, as is visualised under the Hague Convention, posed a major challenge. In the ultimate draft Protection of Children (Inter-Country Removal and Retention) Bill 2018, the Committee recommended the constitution of a four-member 'Inter-Country Parental Child Removal Disputes Resolution Authority' proposed to be headed by a Chief Justice of a High Court and three other members from the Ministries of Women and Child Development, Foreign Affairs and Home Affairs. This authority is tasked with adjudicating applications pertaining to the wrongful removal or retention of children and taking appropriate measures for discovering their whereabouts, preventing harm, securing return and performing other related functions to be discharged through powers as vested in a Civil Court. The procedure for making such an application, obtaining interim orders and possible exceptions, arrangements with other countries and rights of access have been provided for in the proposed Bill and are to be decided within a timeframe of one year for the expeditious disposal of applications. The unique feature of providing exceptions for the return of children encapsulates key features such as the best interest of the child, grave risk or psychological harm, domestic violence, mental or physical cruelty or harassment, besides the age of majority,

wishes of the child or any other reasons to be recorded by the authority. The multi-member authority would have jurisdiction to ensure, through diplomatic channels or otherwise, proper education, well-being and security to children returned from India to their country of habitual residence.

The pivotal leadership role played by Mr Justice Rajesh Bindal as Chair of the Committee, in motivating tireless efforts, eliciting international perspectives, sourcing legal and other literature, seeking the valuable thoughts of experts and inspiring new perspectives gave an extended lease to the laudable task of the Committee. Despite his time-consuming judicial duties and multifarious administrative responsibilities, he conscientiously devoted extra energies by burning the midnight oil to open new arenas and examine the minutest details, which had not even occurred to the present author with his over three decades of experience professionally and academically in the horizons of this challenging area of child law. No stone was left unturned by Justice Bindal in this monumental exercise. His diligent, painstaking and meticulous efforts were indeed commendable.

Ms Justice Mukta Gupta, with her mature and far-reaching perceptions, lent extremely significant propositions, which introduced new perspectives. Mrs Justice Anita Chaudhry with her vast judicial experience of handling family-law-related matters opened up new vistas, which were of immense significance. Mr Justice R K Garg with his role-building stellar performance as Chair of the Punjab State NRI Commission provided the Committee with practical perspectives suitable to Indian parents facing child removal dilemmas. The brilliant coordination, mapping, consolidation and effective working of the Committee could not have been achieved but for the pivotal role played by Member Secretary Meenaxee Raj. We, the taught, all began with our teacher Dr Balram K Gupta, Director Judicial Academy, who as a role model, with his judicial blend of his vast academic forays, professional pursuits and devotion to teaching, gave us the insights of *parens patriae* jurisdiction, which was the lighthouse in a sea of unchartered waters. The Committee set course, sailed, traversed its chartered path and has now docked its report with the authorities, who will ponder and deliberate over the herculean exercise conducted for the benefit of the most precious commodity of our society, our offspring, and is dedicated to our nation, which has the highest global population of children. We are at a crossroads and we now need a law to rein in this unbridled dilemma, whereby contending parents will find a legal umbrella to their human problems. The report of the Committee, dated 21 April 2018, contains all the Committee's findings for meaningful consideration.

The author, a practising lawyer and an alumni of the School of Oriental and African Studies, London, had the privilege of assisting the Committee as a co-opted member.

Book launch of *The Removed Child and the Law in India* followed by a panel discussion

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Book launch of *The Removed Child and the Law in India* followed by a panel discussion on interparental child removal, domestic violence and the voice of the child

India International Centre, New Delhi, 7 November 2018

(L-R: Dr Kavita Sharma, Professor Marilyn Freeman, MaryKay L Carlson, Anil Malhotra, His Excellency, Ambassador of Spain José R Barañano, Soli Sorabjee, Ranjit Malhotra, Philippe Ducornet and Molshree Sharma)

The book titled *The Removed Child and the Law in India*, authored by Anil Malhotra and Ranjit Malhotra, Advocates, Malhotra & Malhotra Associates, was released at the India International Centre in the gracious presence of His Excellency the Ambassador of Spain José R Barañano, Judge, Supreme Court; Soli J Sorabjee, Senior Advocate, Supreme Court of India; MaryKay L Carlson, Deputy Chief of the Mission, from the American Embassy at New Delhi; Dr Kavita Sharma, President, South-Asian University; Professor Marilyn Freeman, Principal Research Fellow, Westminster Law School, London; Philippe Ducornet, Head of Consular and Visa Section, Embassy of France, New Delhi; and Molshree Sharma, attorney at law.

The book launch was followed by an interactive panel discussion seminar on 'Interparental Child Removal, Domestic Violence and the Voice of the Child' where career diplomats and legal luminaries examined the issues arising out of domestic violence, which were a major cause in concerns for India not signing the Hague Convention on child removal, and its impact on the voice of the removed child.

Kavita Sharma gave a welcome address and remembrance of Ambassador J C Sharma in whose warm memory the event is commemorated every year.

The panel discussion was chaired by His Excellency the Ambassador of Spain José R Barañano, presided over by Soli Sorabjee. The discussion, moderated by Anil Malhotra at the well-attended gathering, saw four panellists react and respond to questions pertaining to domestic violence as being covered under the umbrella of grave risk or harm, which was suggested as an exception to the return of children to foreign jurisdictions once they were brought to India. The voice of the child found a meaningful expression for discussion.

Professor Marilyn Freeman PhD, Principal Research Fellow, Westminster Law School, London, described how domestic violence issues are treated as an exception to the return of removed children. She emphasised the development of a child-centric thought process and the increasing trend to give weight to the views of the child.

Mary Kay L Carlson, Deputy Chief of the Mission, from the American Embassy at New Delhi, explained the resources for victims of domestic violence in the United States and dwelt upon how India will benefit from joining the Hague Convention on child abduction as well as progress seen in recent months on child custody issues in India.

Philippe Ducornet, Head of Consular and Visa Section, Embassy of France, New Delhi, talked of the consequences of cross-border child removal and ways to resolve these conflicts through mediation.

Molshree Sharma, an attorney from Chicago, focused on experiences of successfully arguing the domestic violence exception as a ground to decline the return of a child. Grave risk of harm and opinion expressed by a child was emphasised.

His Excellency the Ambassador of Spain, José R Barañano, in his observations, felt that the welfare of the removed child, his voice and his views were paramount considerations and should be kept in mind in any legislative enactment or decision-making process.

Ranjit Malhotra, in suggestions and remedies for a way forward, talked of a middle path for India in keeping intact safeguards while signing the Hague Convention.

Soli Sorabjee advocated that India should sign the Convention with necessary safeguards.

The discussion was moderated by **Anil Malhotra**.