International Academy of Family Lawyers
IAFL
European Chapter

IAFL Introduction to Family Law Conference

Milan, Italy

21st and 22nd March 2019

EDUCATION PROGRAMME MATERIALS PACK

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IAFL Introduction to International Family Law Conference
The modern international family:
Advising citizens anytime, anyplace, anywhere!

A conference for recently admitted IAFL Fellows
and Lawyers interested in discovering IAFL work

Thursday 21 and Friday 22 March 2019
Ramada Plaza Hotel, Milan

PROGRAMME

THURSDAY 21 MARCH

Registration Desk open from 1:00pm

Welcome Speech and Introductory Talk: (2:00-2:15pm)
William Massey, IAFL European Chapter President and Dr Adrienn Varai-Jeges (Hague Network judge and international family liaison judge for Hungary)

Session 1 (2:15-3:30pm): Family Law Reform: two things about divorce or financial provision that I would change in my jurisdiction
Chair: Carlo Rimini (Milan, Italy)
Panel: Julie Losson (Moscow/Paris), Alistair Myles (London), Francesca Mele (Milan), Maryla Rytter Wróblewski (Denmark)

Break (3:30-4:00pm)

Session 2 (4:00–5:15pm): The Modern Family – surrogacy, gay marriage and cohabitation rights
Chair: Suzanne Todd (London, England)
Panel: Konstantinos Rokas (Athens), Niamh Ni Ghairbia Garvey (Paris), Oksana Voynarovska (Kiev), Marie Berger (Geneva)

Welcome reception at the at the Milan Bar Association (6:30-7:30pm)

Pre-Paid Dinner with wine at Globe Restaurant (8:00pm)

FRIDAY 22 MARCH

Session 1 (9:45-11:00am): Permission to Remove Children Abroad
Chair: William Healing (London, England)
Speakers: Nicholas Anderson (London), Nina Wölfer (Potsdam), Grazia Cesaro (Milan)

Break (11:00-11:30am)

Presentation by IAFL European Chapter Young Lawyers Award Winner (11:30-11:45am)

Session 2 (11:45am-1:00pm): The Brand New EU Matrimonial Property Regulation: expert analysis
Speaker: Ian Sumner (Utrecht, Netherlands)

Lunch (1:00-2:15pm)

Session 3 (2:15-3:30pm): Dealing with difficult clients – top tips in those tricky situations
Chair: Cinzia Calabrese (Milan, Italy)
Speakers: Jennifer Wilkie (Edinburgh), James Riby (London), Chantal van Baalen (Amsterdam), Amparo Abaizar (Alicante)

Evening closing drinks at the Ramada Plaza Hotel (6:30-7:30pm)

Pre-Paid Dinner with wine at L'Isola del Tesoro (8:00pm)

SPEAKER PROFILES

NICHOLAS ANDERSON

1 King's Bench Walk

London, England

www.1kbw.co.uk

Nick is a barrister in the leading specialist family chambers, 1 King's Bench Walk in London. The chambers has almost 60 barristers, of whom 13 are QCs. 1 King's Bench Walk offers a specialist approach to all areas of family law, whether relating to children or financial issues.

Nick's practice covers all aspects of financial proceedings and disputes between parents relating to their children, including child abduction.

He regularly represents clients in both the financial and children aspects of their cases, representing both fathers and mothers.

Nick has been involved in leading cases which have shaped the law in the Court of Appeal and the Supreme Court and regularly appears in High Court financial and children proceedings.

Nick specialises in applications to relocate children (within the UK or abroad) and deals with financial proceedings from the family court to complex High Court proceedings involving third party interests and trusts. He has also been involved in several of the most important cases on the enforcement of orders made in other Member States under Brussels II bis and the 1996 Hague Convention.

Nick puts his client's needs first and gives robust advice. He has been described as "Very approachable and friendly outside the courtroom, yet robust and hard-hitting where needs be".

Nick frequently speaks at conferences and writes articles and papers on issues in relation to international law.

AMPARO ARBÁIZAR

Arbáizar Abogados

Alicante, Spain

www.arbaizarabogados.com

Amparo Arbáizar is the founding partner of Arbáizar Abogados. She is a Spanish lawyer (abogado) and a certified mediator. Amparo has been working as a lawyer in the field of international family matters and international successions for more than 15 years. Her field of expertise includes all aspects of family law, in particular, divorces and financial settlements, liquidation of matrimonial property regimes, arrangements for children, international child abduction cases, maintenance obligation enforcements, civil partnership matters, unmarried couples, same-sex marriages and surrogacy.

Amparo is a lecturer in international private law at the Faculty of Law of the University of Alicante (Spain) and a research fellow in EU family law and the law of successions at the Spanish 'Instituto Superior de Derecho y Economía' (ISDE) in Madrid.

Amparo holds an LL.M. degree in European and International Private Law from the University of Trier (Germany). Her mother tongue is Spanish and she is fluent in English and German.

Amparo has recently been accepted as a fellow member of the IAFL. She is member of the Asociación Española de Abogados de Familia (Spanish Association of Family Lawyers – AEAFA) and of Lawyers in Europe focusing on international parental child abduction (LEPCA).

Amparo has received various awards during her professional career, e.g. for being the most influential woman in family law 2018 (Acquisition International Magazine Certified), the family law firm of the year 2017 (Lawyer Monthly Legal) or for the best legal article on family matters in 2018 (AEAFA).

MARIE BERGER

BRS Avocats

Geneva, Switzerland

www.brsavocats.ch

After completing her legal studies in Geneva, which she complemented with an exchange program at the University of Panthéon-Assas in Paris, Marie Berger namely worked as a trainee clerk at the Geneva Superior Court of Justice before passing the bar exam in 2009. She has since been an associate lawyer with the Firm BRS Avocats (formerly BERGER, RECORDON & DE SAUGY), where she specializes in family law, focusing primarily on national and international divorces and child custody litigation, matrimonial estate, nuptial and prenuptial agreements, and same sex partnership.

She frequently works on cases involving international child abduction.

Regularly appointed as legal representative of minors by Geneva courts, she's also one of the on-call attorneys for the child protection association Juris Conseil Junior.

She is a member of the Geneva Bar Association, the Swiss lawyer's Federation, and the Human Rights Commission of the Geneva Bar Association.

CINZIA CALABRESE

Studio Legale avv. Cinzia Calabrese

Milan Italy

Born in Padova, lived in Pisa and Turin. Living and working in Milano
Graduated in 1985 at University of Milano, Faculty of Law, Degree in Law with honors.
From 1990 qualified lawyer registered at the "Ordine degli Avvocati di Milano" (Milan Bar Association)

Practice areas : adoption, child care/public law, child custody/residence/visitation/contact, Child support, Collaborative Law, Divorce, Domestic Abuse/violence/Protection Orders, Emergency Procedures/Injunctions, Enforcement: Child Custody, Enforcement : Child Support, Enforcement : Spousal Support, Hague Convention/Child Abduction, Mediation, Modification/variation : child Custody, Modification/Variation: Child Support; Same Sex partnerships, Spousal Support/Maintenance/Alimony.

President of AIAF Lombardia "Milena Pini", Italian Association of Family Lawyers;
Member of National Executive Committee and of National Board of Directors of Italian Association of Familiy Lawyers (www.aiaf-avvocati.it).
Member of Commettee for Equal Opportunities of Milan Bar Association until 2014.
Member of the Scientific Committee of the "Scuola di Alta Formazione in Diritto delle relazioni Familiari, delle Persone e dei Minori" AIAF – post graduate school for family lawyers
Member of IAFL – International Academy of Family Lawyers
Member of AIADC – Italian Association of Collaborative Professionals
Member of ICALI – International Child Adbuction Lawyers in Italy that is part of the network LEPCA (Lawyers in Europe on Parental Child Abduction)

Lecturer at training seminars for lawyers in preventing and combating domestic violence;

Participant on behalf of CNF- Consiglio Nazionale Forense (Italian National Bars Association) in the project "Travaw - Training on the law against violence against women" - financed with the support of the Rights, Equality and Citizenship Programme of the European Union (2014-2020) - as lecturer at training seminars for lawyers (Athens, June 2017 – Rome, novembre 2017 – Belfast 2018).

Participant on behalf of AIAF – Italian Association of Family Lawyers – partber in the project "Planning the future of cross-border families: a path through coordination – EUFam's". Supervised by University of Milan, the project regards European privat einternational family law and is co-funded by the European Commission DG Justice under the Call for proposals "Action grants to support judicial cooperation in civil and criminal matters<2 within the EU Justice Programme 2014-2020)

GRAZIA OFELIA CESARO

Head and founder
Cesaro Law Firm

Milan, Italy

http://www.studio-cesaro.it

Grazia Ofelia Cesaro was born in Milan on 22nd July 1963. She graduated summa cum laude with a degree in law from the University of Milan in 1988. In 1992 she completed a post-graduate diploma in clinical criminology at the Faculty of Medicine of the University of Milan. She was admitted to the Milan Bar in 1992 and she was admitted to practice before the Corte di Cassazione in 2006. She practices in national and international family law, children law, and civil law. She serves as guardian ad litem of minors in all the proceedings in which they may be involved. She serves as President of Camera Minorile di Milano; she is Head of the International Section of Unione Nazionale Camere Minorili. She is VicePresident of ICALI (International Child Abduction Lawyers – Italy), and she is also a member of the International Relations Committee (CRINT) and of the Human Rights Committee of the Milan Bar Association. She is a speaker at conferences, workshops and training courses. She authored several specialist publications.

NIAMH Ní GHAIRBHIA (GARVEY)

Mulon Associes

Paris, France

www.mulon-associes.com

After graduating from University College Dublin law school in Law and French law Niamh pursued a Master's degree in "droit privé et sciences criminelles" (private law and criminal science) at the Université Paul Cézanne Aix-Marseille III before returning to Ireland to pass the bar at the Right Honourable Society of Kings Inns where she obtained her qualification as a Barrister-at law.

Niamh was called to the Irish bar on the 14th July 2009 and practiced in personal injuries and criminal law before converting to the Paris bar under the Article 90 Directive n°91-1197 du 27 novembre 1991 organisant la profession d'avocat.

Niamh joined MULON ASSOCIES law firm in November 2012 and was called to the Paris bar in December 2012. Her principal areas of practice are family law, international family law and criminal law.

Niamh is a member of the criminal legal aid panel (défense d'urgence) since June 2014 and the children's legal aid panel (Antenne des Mineurs) since January 2019, for the defence of isolated foreign minors. She is also a member of the civil legal aid panel since February 2015 and volunteers for the SOS avocats helpline and at free legal aid centres (points d'accès au droit) in family law.

WILLIAM HEALING

Alexiou Fisher Philipps LPP

London, England

www.afplaw.co.uk

William is a dual French and English national, he is a bilingual speaker, and many of his cases have a Francophone angle. Most cases involve high net worth assets. He has practiced family law for over 20 years. Although many of his cases involve significant court disputes he seeks to settle out of court those cases which can be resolved early.

He is a widely acknowledged expert on European family law issues. Chambers 2017 (the independent guide to the legal profession) said “of all the solicitors in London he knows the most about European and cross border family law issues”.
William is a Fellow of the International Academy of Family Lawyers (and European Chapter secretary).

JULIE LOSSON

Partner and co-founder
Villard Cornec & Partners

Moscow, Russian Federation

www.villard-avocats.com

Registered on the list of foreign lawyers of the Ministry of Justice of the Russian Federation. Legal Advisor for the French Consulate in Moscow

- Medal of Merit from the Russian Federal Chamber of Lawyers for the protection of rights and freedoms of citizens (2015 - 1st level)
- Fellow of the International Academy of Family Lawyers. Member of the International Association of Lawyers
- Member of the Cercle Kondratieff
- Master in Private International Law and European Law (Université Paris I Sorbonne)
- Master of Law (Russian Law) (Université Paris X Nanterre)
- Master of Arts (Russian language) (Université Marc Bloch - Strasbourg)

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

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

Publications:
Author of the Russian Chapter in the 2018 International Comparative Legal Guide https://iclg.com/practice-areas/family-laws-and-regulations
“10 advises to a French citizen before entering into marriage with a Russian citizen”, Moscow, 2017
Writer for the "International Children Law Information Portal" of Jordan Publishing "French Supreme Court Restates Rules on Jurisdiction, Recognition and Enforcement of Foreign Decisions in Matrimonial Matters: A New Chance for Old Cases" Family Law Quarterly, 2010 Vol. 44, No. 1 (Spring 2010) p. 83–94. ABA

Languages: French, Russian, English

FRANCESCA MELE

Co-founder and Partner
Studio Mele Viganò

Milan, Italy

Francesca graduated in 1998 at Università degli Studi of Milan, in 2001 she qualified and admitted at the Milan Bar Association. She is fluent both in English and French.

Francesca is a highly experienced family lawyer able to advise on a wide range of issues which arise on the breakdown of a relationship as procedures of separation, divorce, nullity and annulment of marriage.

She has also a wide experience in disputes over children including dealing judicial declaration of paternity and denial of paternity, limitation of parental responsibility, protection orders and international child abduction.

In addition, her experience includes dealing with agreement between cohabitees and breakdown of cohabitation.

She has particular expertise in dealing with disputes having international nature and with complex financial cases involving business and corporate issues or concerning protection of family assets, patrimonial regime of the marriage, trust, family business and donations, often with international related elements.

She advises also over international law and European Union law, international conventions, issues related to jurisdiction and governing law, execution of foreign judgments, pre and post nuptial agreement on cross border disputes. Child abduction.

She is Witness Expert before English courts.

She advises on law of succession with tax and financial aspects related.

Francesca lectures on family law topics at external conferences and trainings.

Francesca is a trained and practising collaborative lawyer since 2010. She is a founder member of Italian Association of Collaborative Professionals – AIADC, a member of the International Association of Collaborative Professionals IACP and a member of Italian Family Lawyer Association – AIAF.

ALISTAIR MYLES

Partner
Levison Meltzer Pigott

London, England

www.levisonmeltzerpigott.co.uk

Alistair studied French and Spanish at Exeter University (including an ERASMUS year at the University of Oviedo) before studying law at BPP in London. He qualified in 2008.

Alistair practises in all areas of family law, in particular complex financial remedy cases often involving assets in different jurisdictions and complicated trust structures. Alistair has been involved in many of LMP's reported cases in recent years including US v SR in 2013, AC v DC & Others and AC v DC and others (no 2) in 2012 and J v J and Jones v Jones in 2010 and 2011 respectively.

Between 2015 and 2017 Alistair represented the wife in the English proceedings of MH, with reported judgments in Ireland and the CJEU on the correct interpretation of European law regarding issue and service of applications (reported as MH v MH Case C-173/16).

Alistair has extensive experience in all areas of private Children Act proceedings including leave to remove cases and frequently acts in proceedings involving financial provision for children.

According to Chambers & Partners 2019, "Commentators praise Alistair Myles for his "confident ability to look at detail and understand it forensically." He acts across a range of financial cases and private children work, while offering a particular specialism in complex, multi-jurisdictional divorce disputes."

JAMES RIBY

Partner
Charles Russell Speechlys LLP

London, England

www.charlesrussellspeechlys.com

James advises on all areas of family law, including cohabitation, pre- and post-nuptial agreements, separation agreements, divorce, financial consequences of separation and divorce, child maintenance and arrangements for children, and child abduction disputes.

James has particular experience and expertise in cases which have touched upon related issues of confidentiality and privacy law, insolvency and complex pension assets. He has also dealt in particular with complex cross-border jurisdiction disputes and claims against offshore trusts.

James is a fluent speaker of Italian and has a busy English-Italian practice.

James is also a trained Collaborative Lawyer and a trained Mediator.

Experience

- In an important case in the unfolding impact of the EU's Maintenance Regulation, James successfully obtained a stop to financial proceedings in England which allowed proceedings begun by his client in Spain to continue, whilst at the same time negotiating a child custody and visiting agreement which assisted both parties
- D v S [2008] EWHC 363 (Fam) (Abduction – Wrongful Removal – Acquiescence – Application of welfare principle)
- M v W [2010] EWHC 1155 (Fam) (Financial relief – Divorce – Trust assets - Extent to which trustees could be 'judicially encouraged' to realise and distribute capital)
- Kremen v Agrest and Fishman [2010] EWHC 2571 (Fam) (Financial relief; Avoidance of disposition orders; Financial provision; Sham transactions)
- G v G [2012] Fam Law 800 (Financial Remedies: Strike out)
- Trustee in Bankruptcy of James Moore (Mawer) v Moore [2017] EWHC 1242 (Ch)

Memberships

British Italian Law Association, Franco-British Lawyers Society, Honorary Legal Adviser at the Royal Courts of Justice Pro-Bono Advice Bureau, Resolution, Association of European Lawyers (AEL)

Education

BA (Hons) in History, First Class: University of Cambridge
Common Professional Examination, Commendation: City University Law School, London
Legal Practice Course, Distinction: College of Law, York
Joined Charles Russell in 2003 and qualified in 2005

CARLO RIMINI

Studio dell'avv. Rimini

Milan, Italy

www.studiorimini.it

Carlo Rimini was Born in 1966.

Since 1994 he is a member of the Milan Bar Association. In 2008 he has been admitted to the defend cases in front of the Italian Supreme Court.

He advises on a wide range of Family and Succession Law matters with a particular focus on international aspects of Family and Succession Law.

He is Full Professor of Private Law at the University of Milan, Department of International, Legal, Historical and Political Studies and he is also Professor of Family Law at the University of Pavia. He is professor of Family Law at the Law School (School of Specialization for the Legal Professions) jointly managed by the University of Pavia and the University Bocconi of Milan.

Since 2009 he is member of the Association of Journalists. He columnist for the daily newspaper "La Stampa" for which he writes articles in Family Law matters.

He is member of the International Academy of Family Lawyers (IAFL).

As a professor, he has published more than sixty papers and publications including three monograph books edited by two prominent Italian publisher.

He has taken part as lecturer in numerous national and international conferences and speech.

He is member of the scientific committee of the ICALI Association (International Child Abduction Lawyers in Italy). He is member of the Scientific Committee of the periodical "Familia" and member of the Reviewer Committee of the periodicals "Famiglia e diritto" "Rivista di diritto civile"; "Contratto e impresa".

KONSTANTINOS ROKAS

Konstantinos Rokas Law Office

Nea Smyrni, Greece

www.konstantinosrokas.gr

Konstantinos Rokas after his undergraduate studies in law at the University of Athens, he went on to obtain two LLM degrees from the University of Athens (in private international law and EC law) and the University of Paris II-Panthéon Assas (in international commercial law and private international law), finishing second in his class. He has defended his PhD on "Medically assisted reproduction in comparative private international law".

In the University Paris 1 Panthéon-Sorbonne under the supervision of Professor Etienne Pataut. He is admitted to the Athens Bar Association since 2004 and admitted to the Supreme Court of the Country, he is actually a Lecturer in Private International Law at the University of Nicosia in Cyprus.

PROF. DR IAN SUMNER

Voorts Juridische Diensten

The Netherlands

www.voorts.com

Professor of Family Law and Private International Law, Tilburg University, the Netherlands
Deputy Court Justice, District Court Overijssel, the Netherlands
Independent legal consultant, Dordrecht, the Netherlands

After graduating with a 1st class law degree from Christ's College Cambridge, Ian completed his PhD at Utrecht University in 2005 on the substantive and private international law aspects of registered partnership in Europe. He continued working at Utrecht University until 2012, ultimately as a senior university lecturer. In 2012 he established his own company, Voorts Legal Services, providing advice and teaching services to legal professional sin both national and international family law. After completing his Dutch law degree cum laude at Utrecht University he was appointed as a deputy district court in Overijssel where he currently hears youth care cases, as well as issues related to parental authority and contact. In 2017 he was appointed a full professor of private international law at the Tilburg University, and in 2018 his chair was extended with family law. He is currently also an associate fellow of IAFL and has extensive experience teaching professionals in law fields of family law both inside and outside Europe.

SUZANNE TODD

Partner
Withers LLP

London, England

www.withersworldwide.com

Suzanne joined Withers in 1997 and qualified into the Family team in 1999. She was made a Partner in 2007 and an Equity Partner in 2014.

Between 2011 and 2016 she was in charge of the firm's graduate recruitment trainee programme as well as heading up the Italian Special Interest Group and Chairing the Women's Networking Group.

Suzanne's practice encompasses all areas of dispute resolution in the Family law arena. She is also a trained and practising Collaborative Lawyer and Mediator.

Suzanne has an extremely strong reputation in the Family law world as one of the 'go to' family lawyers in London for Italian family law matters. She has lectured in the Supreme Court in Italy (in Italian!).

Her practice covers dealing with complex international financial cases often dealing with family businesses, inherited wealth and tax and trusts, to handling private law children disputes be this where a child lives or who they spend time with or an international relocation case. She is also adept at negotiating pre and post nuptial agreements.

Memberships and Awards
Since becoming an Emerging Leader of the IWF in 2011, Suzanne's career has flourished. She has been shortlisted for the following:

Women in the City Awards (2013) - Suzanne was shortlisted in the Women in the City Awards in the Professional Services Category.

Law Society Excellence Awards 2013 in the category of Legal Businesswoman of the Year.

The Lawyer Hot 100 (January 2014) - Suzanne was selected for The Lawyer's 'Hot 100' in 2014. This is an 'annual selection of the legal market's top innovators, leaders and rainmakers'. She was one of only three family lawyers profiled in the report.

Best Training Partner for LawCareer.Net: Suzanne was awarded Best Training Partner (for a large trainee intake) in the lawcareers.net awards in 2014 and 2015 (having been shortlisted in 2013 and again in 2016) having been Training Partner in the London office from 2011 – 2016 (responsible for all Graduate Recruitment and the pastoral care of trainees during their Training Contacts).

Spears Awards 2016: Suzanne is ranked by Spear's in both their top 50 family lawyers list and their top 500 directory. Suzanne is 'outstanding in field' and quoted 'Todd understands when it's time to extend or retract her claws to pursue her clients' interests'.

Suzanne is highly ranked in both Chambers and Chambers High Net Worth, the Legal 500 and the CityWealth Leaders List

In addition, she was awarded the CityWealth 'Gold Star' in the Powerwomen Awards in 2018 for Leadership in a Large Institution.

CHANTAL VAN BAALEN

LINK Lawyers

Amsterdam, The Netherlands

www.linkadvocaten.nl

Partner of LINK Lawyers in Amsterdam, a niche law firm specialising in the law of persons, family law and inheritance law. Has more than 15 years of experience in all aspects of family and matrimonial property law. Her practice focuses on international divorces, in which all aspects of divorce are addressed (parenting plans, child and spousal maintenance, settlement of the matrimonial property regime, and pensions). Has vast experience in litigation and mediation (also through new media). Member of the Dutch Bar Association, Member of the Association of Family Lawyers and Divorce Mediators and Member of the Dutch Mediators Federation.

DR ADRIENN VÁRAI-JEGES

Hungarian National Office for the Judiciary

Work Places

2015-	Administrative Tasks for the Hungarian National Office for the Judiciary
2006-	Judge of Central District Court of Pest
2005-2006	Legal Secretary at the Metropolitan Court
2001-2002	Legal Expert
1999-2000	Lawyer at Pál and Partners Law Office
1997-1999	Lawyer at Forgács and Partners Law Office

Education and Training

- 1993-1997: Diploma number XC.II.107, ELTE Law Eötvös Lóránd University Budapest
- 1999: Legal Special Examination
- 2000-2004: EU Expert at the University of West Hungary

Skills and Competences

Languages Spoken: Hungarian and English
Results: 1998 – Pleading Competition at Budapest: 1st Place
1998. National Pleading Competition: 2nd place

Membership

- Member of the “Procedure of proof Workgroup” 2014 Budapest
- Member of the “Child-friendly Justice Workgroup” 2013-present Budapest
- Member of the Committee of VOICE project Member of Judicial Advisors in European Union Law in Hungary Hungarian liaison judge at Hague Network in connection with international child abduction cases

Special Field

- international family law
- child hearing
- child friendly justice
- international child abduction

OKSANA VOYNAROVSKA

Partner
Vasil Kisil and Partners

Kiev, Ukraine

www.vkp.ua

Legal areas:
Dispute Resolution, Labour & Employment, Private Clients

Languages:
English, Polish, Russian, Ukrainian

Education:
Ivan Franko National University of Lviv, 2001
Admitted to Bar, Ukraine, 2003

Professional experience:
2013 – now Partner, head of Labour and Employment, and Private Clients practice groups, Vasil Kisil and Partners
2003 – 2012 – Attorney, senior attorney and counsel, Vasil Kisil and Partners

Professional Associations and Memberships:
- International Academy of Family Lawyers (IAFL)
- International Bar Association (IBA)
- TerraLex
- Ius Laboris – the largest global alliance of leading labour law firms
- Mediator accredited by the Centre for Effective Dispute Resolution (CEDR), London, UK
- Ukrainian Bar Association

Recognitions:
- The only Ukrainian woman in law listed in Labour& Employment by Women in Business Law 2015-2016 Expert Guide.
- According to the prestigious legal research guide Best Lawyers Oksana Voynarovska is listed among the best Ukrainian practitioners for Labour & Employment in 2009-2017.
- Chambers Europe 2013 - 2016 names Oksana "one of the prominent employment names in the market. She is praised as a knowledgeable and technically strong adviser."
- Ms. Voynarovska was nominated to appear in the 10th edition of the Guide to the World's Leading Labour and Employment Lawyers as one of the outstanding practitioners in this field.
- Oksana has been mentioned as a highly recommended Ukrainian practitioner in Labor and employee benefits by PLC Which Lawyer? 2008-2012.
- Globally recognized rating and reference source International Who's Who Legal CIS 2010-2011 publication recommends Oksana Voynarovska as one of the best Ukrainian Labour and Employment experts.
- International legal research Who's Who Legal 2009-2017 ranks Mrs. Voynarovska as a top Ukrainian Labour & Employment law expert.
- Oksana Voynarovska is ranked #1 in Labour & Employment among Ukrainian law practitioners according to the Ukrainian Law Firms. A Handbook for Foreign Clients 2008-2016.
- Listed in "Top 100 best Lawyers of Ukraine. Clients' Choice 2012-2015" by Yurydychna Gazeta (Legal newspaper) in Family law and Labour & Employment.
- Listed in "Ukrainian Women in Law 2016-2017" ranking by Yurydychna Gazeta.

LENKA VÁLKOVÁ, PHD

Attorney at Law and Legal Researcher

Lenka Válková graduated from the Faculty of Law at Masaryk University Brno, Czech Republic. The Representation of the European Commission and the Government of Czech Republic awarded her master thesis in the master thesis competition concerning topics of EU law. During her master studies, she participated in the Erasmus exchange programme at Università degli Studi di Siena, Italy and later also performed an internship at an international law firm in Bologna, Italy. After her graduation, she gained experience with an international law firm in Prague, Czech Republic, where she spent 3 years providing legal advice and court representation services to clients in the area of civil and commercial law. In 2015 she successfully entered the PhD programme in Public, International and European Law at Università degli Studi di Milano, Italy. She focused her research on private international law in civil, family and succession matters. At the same time she assisted with lecturing of Private International Law and Family International Law and participated in a project funded by the European Commission aiming at assessing application of the EU Regulations in family matters. Lenka Válková received scholarships from the Max Planck Institute in Luxembourg to conduct her PhD research (2017) and from the Hague Academy of International Law to participate private international law courses (2018). In 2018 she passed the Czech Bar Exam and thereafter is a qualified attorney at law. In February 2019 she earned her PhD in Private International Law from Università degli Studi di Milano.

JENNIFER WILKIE

Brodies LLP

Edinburgh, Scotland

www.brodies.com

Jennifer is a solicitor with Brodies LLP, the largest full-service law firm in Scotland and with the biggest family law team based across offices in Aberdeen, Edinburgh and Glasgow. Jennifer works mostly in Edinburgh, practising Scots Law.

Jennifer is accredited as family law specialist and as a mediator by the Law Society of Scotland. Jennifer is also a qualified collaborative family lawyer. Her practice focusses on resolving money and child related arrangements for married and cohabiting couples after separation. Jennifer was ranked as "Star Associate" by Chamber & Partners in 2019.

Jennifer has tutored in family law on the diploma in legal practice at Edinburgh University and has spoken at both national and international conferences on family law matters including on cross border jurisdiction for AIJA and for the American Bar Association Section of International Family Law. In 2018 Jennifer was appointed as Vice Co-Chair of the American Bar Association Section of International Family Law. Jennifer is also presently a Convenor of CALM (the organisation of family solicitor mediators in Scotland).

NINA WÖLFER

Jürgens Rechtsanwaltsgesellschaft mbH
Potsdam/Berlin, Germany

www.juergens-law.de

Nina Wölfer was admitted to the Bar in 2014. She is a certified family law attorney. Nina joined Jürgens Rechtsanwaltsgesellschaft mbH in 2014 and has since been advising numerous clients in matters pertaining to family law. Her practical experience provides clients with professional support in all issues of separation, divorce, child and spousal maintenance as well as custody and visitation. She represented clients in various Hague Cases (child abduction) all over Germany.

Nina is frequently publishing commentaries on court decisions and cases concerning family law in „Der Familien-Rechts-Berater“ and is co-author of the „Münchener Prozessformularbuch Familienrecht, Verlag C.H.Beck, 2017“.

She is also member of the legal staff of the Legal Ombudsman of the German Federal Bar.

Nina speaks German and English.

MARYLA RYTTER WROBLEWSKI

Partner, Attorney-at-law
Nyborg & Rørdam

Copenhagen, Denmark

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Maryla Wróblewski is one of this Denmark's greatest authorities within family and inheritance law. In her daily work she combines her extensive specialist knowledge and her strong counselling competencies with her ability to meet people at eye level and maintain her focus on practical solutions.

Maryla is an experienced negotiator both in and out of court, and she provides legal counsel in cases on estate planning, administration of the estates of deceased persons and divorces. Maryla is authorised by the District Court in Lyngby to help spouses with the division of property in case of divorce. Furthermore, she is authorised by the Danish Ministry of Justice as particularly qualified to provide legal counsel in cases on child abduction.

Maryla's considerable experience within family and inheritance law has made her a well-respected lawyer within the field, and in 2018 she has received personal recognition in Chambers Europe Rating, where especially her combination of strong legal competencies and eye for practical solutions places her as one of the top-two lawyers within private wealth law.

As a particular speciality within family and inheritance law Maryla has insight in the issues which face international families when planning their relationship with separate property and wills, or in case of divorce. Within this area Maryla conducts cases on a continuous basis involving many different countries in both Europe, Africa, USA, Asia and the Middle East.

Maryla has a strong professional and personal network in IAFL (International Academy of Family Lawyers, www.iafl.com). The Academy is a worldwide association of legal practitioners who are acknowledged as the best and most experienced in their respective countries. Accession in IAFL takes place upon recommendation. IAFL has three Danish members.

Maryla is the head of JUC's network on inheritance and matrimonial property law.

Sharing her knowledge is part of Maryla's everyday life, and she teaches both colleague attorneys and private individuals, e.g. private banking clients.

International Academy of Family Lawyers
European Chapter

THURSDAY SESSION 1

Family Law Reform: two things about divorce or financial provision that I would change in my jurisdiction

IAFL MILAN MARCH 2019

Family Law Reform: 2 things about divorce or financial provision that I would change in my jurisdiction

1. No fault divorce
2. Schedule 1: financial provision for children

Part 1: No fault divorce

The law

The current position in England and Wales is that a marriage or civil partnership can be dissolved on the basis that it has broken down irretrievably. This applies to heterosexual or same-sex marriages.

To establish that the marriage has broken down irretrievably the petitioner must prove one or more of the five facts set out in section 1(2) of the Matrimonial Causes Act 1973 as follows:

a. The respondent has committed adultery and the petitioner finds it intolerable to live with the respondent[1];
b. The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
c. The respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition;
d. The parties of the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition;
e. The parties to the marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition.

It is the duty of the court to inquire into the alleged facts so far as it reasonably can (s.1(3)); then s.1(4):

"If the court is satisfied on the evidence of any such fact […] then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall […] grant a decree of divorce."

The statistics

The Office of National Statistics publish annual divorce rates, the latest of which is for 2017[2].

[1] Must be adultery with a member of the opposite sex to apply (s.1(6) MCA 1973)

[2] https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/datasets/divorcesinenglandandwales

Interestingly, the number of divorce petitions has reduced considerably, from roughly 140,000 to 160,000 in the 1980s and 1990s, to a total of 101,669 in 2017. Much of this reduction is due to the decline of adultery petitions. The petitions break down between the respective grounds as follows:

	1997	**2007**	**2017**
Adultery	37,592 or 26%	23,055 or 18%	10,611 or 10%
Behaviour	65,047 or 45%	60,798 or 48%	47,135 or 46%
Desertion	912	451	472
2 years' sep	32,638 or 22%	31,185 or 24%	27,012 or 27%
5 years' sep	9,592 or 7%	12,179 or 10%	15,619 or 15%
Combination	130	222	488
Total	**145,912**	**127,890**	**101,669**

For completeness the 2017 figures for same sex divorces (and civil partnership dissolutions) are as follows:

	2017
Adultery	12
Behaviour	272
Desertion	3
2 years' sep	46
5 years' sep	4
Combination	1
Total	**338**

It will therefore be noted that the overwhelming majority of Petitions presented in England & Wales are on the basis of unreasonable behaviour.

<u>The problem in practice</u>

A party to a marriage comes to see you for the first time. They want to get divorced but there has been no adultery, period of separation or desertion. They want to do things amicably but to get started the petitioner has to produce typically 5 or 6 examples of behaviour that they consider to be unreasonable. Thus the proceedings are not begun from an amicable footing; once a case starts off in acrimonious circumstances we all know that it is difficult to row back from.

In most cases the respondent will be presented with some fairly anodyne unreasonable behaviour particulars (per the guidance in the *Family Law Protocol*[3] which states, "*petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court, and not to include any reference to children"*). In his or her acknowledgment to the petition the respondent will simply say words to the effect of, *"I deny the alleged behaviour but I am content for the divorce*

[3] Published by the Law Society

petition to proceed on this basis". As stated in the case I will go on to look at, the practice of producing a Petition which strikes a balance between being inoffensive but at the same time enough to satisfy a court has been described by the Court of Appeal as based on "*hypocrisy and lack of intellectual honesty*" and akin to the hotel divorce[4] of the old law.

However on other occasions a respondent may deny the allegations of unreasonable behaviour and deny that the marriage has irretrievably broken down. So to Mr and Mrs Owens.

Tini and Hugh Owens married in 1978 and had two children. They separated in 2015, by which time Mrs Owens was aged 65 and Mr Owens 77. Mrs Owens had sent her husband a draft petition in 2012 which was not pursued, and it was accepted that Mrs Owens had an affair between late 2012 and summer 2013.

Mrs Owens filed an unreasonable behaviour petition in May 2015 relying on the following:

1. The Respondent prioritised his work over home life and was often inflexible in making time available for the family, often missing family holidays and family events. This has caused the Petitioner much unhappiness and made her feel unloved.

2. During the latter years of the marriage the Respondent has not provided the Petitioner with love, attention or affection and was not supporting of her role as a homemaker and mother which has made the Petitioner feel unappreciated.

3. The Respondent suffers from mood swings which caused frequent arguments between the parties which were very distressing and hurtful for the Petitioner who has concluded that she can no longer continue to live with the Respondent.

4. The Respondent has been unpleasant and disparaging about the Petitioner both to her and to their family and friends. He speaks to her and about her in an unfortunate and critical and undermining manner. The Petitioner has felt upset and/or embarrassed by the Respondent's behaviour towards her as well as in front of family and friends.

5. As a result of the Respondent's behaviour towards her, the Petitioner and the Respondent have until recently lived separate lives under the same roof for many years and have not shared a bedroom for several years. On 10 February 2015 the Petitioner moved into rented accommodation and the parties have been living separate and apart from that date.

Mr Owens responded by indicating that he did intend to defend the case and he denied that the marriage had irretrievably broken down. Mrs Owens was given leave to provide further particulars to paragraphs 3 and 4 of her statement of case, which she did, adding 9 matters under paragraph 3 and 18 matters under paragraph 4.

The matter came before HHJ Tolson QC in the Central Family Court in London in the first instance, with a time estimate of 1 day. After hearing evidence, the Judge was rather scathing about Mrs Owens' petition, describing it as "hopeless", "anodyne" and "scraping the barrel". He concluded:

[4] See Owens v Owens [2017] EWCA Civ 182, paragraph 95

> "In reality I find that the allegations of alleged unreasonable behaviour in this petition – all of them – are at best flimsy. I would not have found unreasonable behaviour on the wife's pleaded case. As it is, having heard both parties give evidence, I am satisfied that the wife has exaggerated the context and seriousness of the allegations to a significant extent. They are all at most minor altercations of a kind to be expected in a marriage. Some are not even that"

Whilst recognising that his decision would leave Mr and Mrs Owens "*stymied in lives neither of them wished to lead*", he concluded:

> "I have not found this a difficult case to determine. I find no behaviour such that the wife cannot reasonably be expected to live with the husband. The fact that she does not live with the husband has other causes. The petition will be dismissed."

Mrs Owens subsequently appealed, which was heard by the Court of Appeal, Sir James Munby, the then President of the Family Division giving the lead judgment[5]. The Court of Appeal dismissed Mrs Owens' appeal on the basis that the first instance judge had correctly applied the law, and that the decision did not breach of Mrs Owens' rights under articles 8 and 12 of the ECHR.

That being said Sir James Munby was not entirely without sympathy for Mrs Owens. He reminded her that in 2020 she could petition again under 5 years' separation, observing that, *"Parliament has decreed that it is not a ground for divorce that you find yourself in a wretchedly unhappy marriage"*. That is the law that the court had to apply and he went on to quote from an extract of a 1906 case, Dodd v Dodd [1906] P 189:

> "That the present state of the English law of divorce and separation is not satisfactory can hardly be doubted. The law is full of inconsistencies, anomalies, and inequalities amounting to absurdities; and it does not produce desirable results in certain important respects."

Mrs Owens went on to appeal to the Supreme Court. The hearing was heard in May 2018 and the judgment handed down on 25 July 2018[6]. In his judgment Lord Wilson reminded us of the important requirement: It is not "unreasonable behaviour" that is required, but that "*the expectation of continued life together should be unreasonable*". As to Mrs Owen's appeal, Lord Wilson stated that it caused "uneasy feelings" (see paragraph 42) but on a legal analysis, Mrs Owens' appeal must be dismissed. Lord Wilson did suggest (paragraph 45), *"Parliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances"*.

Lady Hale did not quite agree. She found the case "*very troubling*" and thought that the first instance judge had fallen into error in three respects (paragraphs 48 to 50):

- His repeated reference to "unreasonable behaviour", given that blame is not required;

[5] Owens v Owens [2017] EWCA Civ 182, see https://www.judiciary.uk/wp-content/uploads/2017/03/owens-v-owens.pdf

[6] Owens v Owens [2018] UKSC 41, see https://www.supremecourt.uk/cases/docs/uksc-2017-0077-judgment.pdf

- The judge's apparent belief that the behaviour complained of had to be the cause of the breakdown of the marriage; and
- Lady Hale's view that the judge did not put enough emphasis on the cumulative effect of a number of small incidents of authoritarian/humiliating conduct over the course of a number of years.

Lady Hale's solution however would have been to allow the appeal and send the case back to be heard again. However neither party in their presentation to the court thought that a further contested hearing would be in the parties' interests and therefore Lady Hale agreed (reluctantly) that the appeal should be dismissed.

Solution: no fault divorce?

Per Lady Hale this should perhaps more accurately be described as "no blame" divorce. This was in fact introduced by the Family Law Act 1996 but proved unworkable, and was repealed.

Following the *Owens* case pressure was brought on the government from a number of angles to re-introduce no fault divorce. The Ministry of Justice held a consultation and the Justice Secretary, David Gauke, has recently confirmed that he will bring in legislation to remove the need for separated couples to wait a number of years or allocate blame, in order to obtain a divorce.

On the other hand, will it see divorce rates rise again? Time will tell.

Part 2: financial provision for children
The law

Schedule 1 to the Children Act 1989 provides for a parent of a child to apply to the court for financial provision for the benefit of a child. I feel it is ripe for some clarification/amendment, on various points that I go through below[7].

Schedule 1 is generally used by unmarried mothers seeking financial provision for a child from the child's father. The case of *PK v BC (Financial remedies: Schedule 1)*[8] found that there would have to be exceptional circumstances for the court to order a lump sum in Schedule 1 proceedings following a capital clean break in divorce proceedings.

A parent can apply under Schedule 1 for the following orders:

- Periodical payments (aka maintenance);
- Lump sums;
- Settlement of property; and/or
- Transfer of property.

[7] I am going to focus on the "bigger money" cases although that is not to say that what I suggest is changed does not apply to smaller cases either.
[8] [2012] 2 FLR 1426

The Court has to take into account all the circumstances of the case plus those listed at s.4(1) of Schedule 1 as follows:

a. The income, earning capacity, property and other financial resources which [each parent] has or is likely to have in the foreseeable future;
b. The financial needs, obligations and responsibilities which [each parent] has or is likely to have in the foreseeable future;
c. The financial needs of the child;
d. The income, earning capacity (if any), property and other financial resources of the child;
e. Any physical or mental disability of the child;
f. The manner in which the child was being, or was expected to be, educated or trained.

This list is different to the factors at Section 25 of the Matrimonial Causes Act 1973 which the court is required to look at when deciding a financial case on divorce. It does not, for example include the length of the relationship, nor conduct, but these can be considered when looking at "all the circumstances".

It is helpful to look at the judgment of Lord Justice Thorpe in the case of Re P (Child: Financial Provision)[9] and particularly paragraphs 45 to 47 (emphasis added):

> 45. Before coming to the details of the present case I would like to offer my opinion as to the method by which a judge should determine a case similar to this, in that one or both of the parents lie somewhere on the spectrum from affluent to fabulously rich. Such cases may be more likely to be litigated, partly because where the parents are of more modest means financial liabilities will be conclusively settled by the administrative process under the Child Support Acts, to which the judicial process is only supplementary, and second because the affluent and the very rich may be less deterred by the costs of litigation. The starting point for the judge should be to decide, at least generically, the home that the respondent must provide for the child. The value, the size, and the location of the home all bear upon the reasonable capital cost of furnishing and equipping it as well as upon future income needs, directly in the case of outgoings but also indirectly in the case of external expenditure such as travel, education, and perhaps even holidays. The home will ordinarily be transiently required during the child's minority or until further order. The appropriate legal mechanism is therefore a settlement of property order. Since the respondent is entitled to the reversion, which in certain circumstances may fall in before the child's majority, the respondent must have some right to veto an unsuitable investment.
>
> 46. Once that decision has been taken the amount of the lump sum should be easier to judge. For the choice of home introduces some useful boundaries. In most cases the lump sum meets the cost of furnishing and equipping the home and the cost of the family car.
>
> 47. Those issues settled the judge can proceed to determine what budget the mother reasonably requires to fund her expenditure in maintaining the home and its contents and in meeting her other expenditure external to the home, such as school fees, holidays, routine travel expenses, entertainments, presents, etc. In approaching this last decision, the judge is likely to be assailed by rival

[9] [2003] 2 FLR 865, CA https://www.familylawhub.co.uk/default.aspx?i=ce1007

> budgets that specialist family lawyers are adept at producing. Invariably the applicant's budget hovers somewhere between the generous and the extravagant. Invariably the respondent's budget expresses parsimony. These arts have been developed in Matrimonial Causes Act claims, particularly where the budget is advanced to found the calculation of the price of the clean break. But it is worth emphasising the trite point that, by contrast, an order for periodical payments is always variable and will generally have to be revisited to reflect both relevant changes of circumstance and also the factor of inflation. Therefore in my judgment the court should discourage undue bickering over budgets. What is required is a broad commonsense assessment. What the court first ordains may have a comparatively brief life before a review is claimed by one or other party.

So to summarise:

- Work out the appropriate housing for mother and child: value, size and location;
- Work out what lump sums are required e.g. a car, furnishing the property;
- Work out what the mother's reasonable budget is.

As to the last point, Schedule 1 maintenance claims can include an element of carer's allowance for the applicant, that is to say an element of cost over and above the entirely child-focussed element of maintenance. However in *Re P*[10] Thorpe LJ said this (emphasis added):

> 48. In making this broad assessment how should the judge approach the mother's allowance, perhaps the most emotive element in the periodical payments assessment? The respondent will often accept with equanimity elements within the claim that are incapable of benefiting the applicant (for instance school fees or children's clothing) but payments which the respondent may see as more for the benefit of the applicant than the child are likely to be bitterly resisted. Thus there is an inevitable tension between the two propositions, both correct in law, first that the applicant has no personal entitlement, second that she is entitled to an allowance as the child's primary carer. Balancing this tension may be difficult in individual cases. In my judgment the mother's entitlement to an allowance as the primary carer (an expression which I stress) may be checked but not diminished by the absence of any direct claim in law.
>
> 49. Thus in my judgement the court must recognise the responsibility, and often the sacrifice, of the unmarried parent (generally the mother) who is to be the primary carer for the child, perhaps the exclusive carer if the absent parent disassociates from the child. In order to discharge this responsibility the carer must have control of a budget that reflects her position and the position of the father, both social and financial. On the one hand she should not be burdened with unnecessary financial anxiety or have to resort to parsimony when the other parent chooses to live lavishly. On the other hand whatever is provided is there to be spent at the expiration of the year for which it is provided. There can be no slack to enable the recipient to fund a pension or an endowment policy or otherwise to put money away for a rainy day. In some cases it may be appropriate for the court to expect the mother to keep relatively detailed accounts of her outgoings and expenditure in the first and then in succeeding years of receipt. Such evidence would obviously be highly relevant to the determination of any application for either upward or downward variation.

Thus the recipient of the maintenance should not be allowed from her maintenance to be able to save for the future, fund a pension or otherwise provide financially for herself after the cessation of the child's support as they reach adulthood.

[10] Ibid.

Also however note HHJ Horowitz QC sitting as a High Court judge in *PG v TW*[11] :

> 106. I respectfully suggest that the concept of a carer's allowance is past its utility. Mr Francis QC helpfully concedes he has no problem with carers allowance and pps [periodical payments] being, in his phrase, lumped together as a single amount. I agree and record only that my figure acknowledges and takes into account the mother's modest income and the need for back up child care and housekeeping to enable her to work without anxiety during the day, through inevitable childhood illnesses and school holidays.

So what awards have been made?

Name	**F wealth**	**Housing**	**Lump sums**	**Maintenance**
Re P [2003][12]	"fabulously rich"	£1m	£100k furnishings £55k car	£70,000 pa
F v G [2005][13]	£4-4.6m £500k pa	£900k		£60,000 pa
Re C [2007][14]	Circa £100m	£2m	£30k car	£72,500 pa
MT v OT [2008][15]	>£40m	£900-975k		£78,000pa for twins
H v C [2009][16]	£58-123m £400k pa pension	Already in trust	£15k décor £25k car £14k CSA costs	£45,000 pa pc
PG v TW (2012)	£6.5m Football income: £1.275m pa net £1m signing on fee £850k image rights	£300k for property in Africa	£15k fitting out £25k car	£57,850 pa
Re A (2013)[17]	Millionaire's defence	£3.5m	£770k debts £25k décor	£204,000 pa
G v S (2017)[18] (by consent)	Millionaire's defence	£2.1m	£50k décor £50k car	£160,000 pa

Changes

Having said all of the above, what changes would I make? A non-exhaustive list is as follows:

a. Budgets. The courts have recorded that you take a rounded view to budgets, rather than going through them line by line. The difficulty in practice is that very inflated budgets can from time

[11] PG v TW (No 2) (Child: Financial Provision) [2014] 1 FLR 923
[12] Ibid.
[13] [2005] 1 FLR 261
[14] [2007] 2 FLR 13
[15] [2008] 2 FLR 1311
[16] [2009] 2 FLR 1540
[17] Re A (A child) [2015] 2 FLR 625
[18] G v S (Children Act 1989: Schedule 1) [2017] 2 FLR 108

to time be produced, leading to an assumption that a judge should automatically reduce a budget by x%. Real world examples of a budget for a 3 month old baby living in London in a case that I did:

German lessons[19]	£8,000 pa
Golf lessons	£3,000 pa
Swimming, football, skiing, tennis	£10,200 pa
Computer	£3,000 pa
Mobile phone	£1,200 pa
Pocket money	£2,400 pa

In this case the total sum claimed for the child was £232,500 per annum plus the costs of the mother of £218,211, a total of £450,711 per annum.

My plea is for reasonableness, and a more focussed look at budgets. In addition, children's costs are of course going to change as they get older. The nappy bill of a 6 month year old will hopefully not still be there when they are 15. In my view this should be dealt with by the increased ability of the resident parent to work as the child gets older or, as a last resort, by a variation.

b. Which leads to the financial outlook of the resident parent when their child reaches the age of 18 or finishes tertiary education. As we have seen, they have been unable to save from the maintenance they receive. Presumably any significant income would prompt the payer to return to court on a variation. What do they do after raising their child for 18 to 21 years when the maintenance stops and the house reverts to the other parent?

   In *Re A* the mother's barrister posed this question in her appeal, *"To what extent can the element of carer's allowance take into account the future needs of the carer at the conclusion of the relevant child's dependency by reason of the benefit to the emotional welfare of the child in knowing that his/her parent is not going to be rendered "destitute"?"*

   Lady Justice Macur's short answer was "*None*" (paragraph 23).

   To my mind, in "big money" cases some provision, even at its most basic, should be made in certain circumstances for the resident parent once the child has flown the nest, even if that is just a comparatively inexpensive one-bedroom apartment. Whilst that would still be an enormous step-down, it is better than nothing. I do not seek to argue sharing or anything of the sort in a Schedule 1 case, rather avoiding destitution once the child has grown up.

   To my mind it would be better for a parent to receive £150k pa rather than £200k pa while the child is in its minority with the remaining £50k being put into a fund of some description for the recipient's future. Otherwise is the child going to have to bail their parent out? Could the carer's allowance apply both before and after a child's minority?

[19] The total tutors, lessons etc over and above school fees of £15,000 pa was £28,600pa

c. The Child Maintenance Service maximum income is £156k pa gross. The relevant child maintenance figures for this maximum income are £15,288 pa for one child, £20,384 for 2 children or £25,064 for 3 or more children. Per *Dickson v Rennie*[20] there has to be a CMS maximum assessment before the court can 'top up' a mother's income beyond this point. Without venturing into a whole new lecture, I think this should be changed. Sometimes wealthy fathers can find it very easy to hide their income from the CMS, all the while living an extravagant lifestyle. The restriction in *Dickson v Rennie* potentially embroils litigants in tortuous CMS litigation whereas a court would be far more effective in cutting through to the real issues.

d. The millionaires' defence? This is where a litigant comes to court and says words to the effect of, "I am so rich I can afford any order you make against me and so do not want to provide any financial disclosure". Whilst there have been differing opinions about this over the years, I think a litigant should be allowed to do so (with some information provided for e.g. enforcement if necessary), as did Macur LJ in *Re A*,

> This is not to say that "the millionaire's defence" survives intact. I accept the argument made that "the black letter of the law", whether referring to Schedule 1 (4) (a) and (b) and/or Part 9 of the Family Procedure Rules 2010 (where applicable), requires a party to provide information relating to assets and liabilities, and consequently endorse to that extent the judgment in PG v TW (No 2) above. However, I do not accept that this enables a court to disregard the "overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved", including so far as is practicable expedition, proportionate response and allocation of court resources and the saving of expense: see FPR 2010, r 1.1. The judicial exercise engaged in determining a Schedule 1 application in circumstances of significant wealth will be unlikely to call for a detailed examination of financial resources. In this respect I endorse the approach of Moor J in AH v PH above, and Bodey J in this case.

If a litigant can afford any order a court may conceivably make on a Schedule 1 claim, so much the better in spending hours of court time and thousands of the claimant's pounds on an unnecessary investigation of the payer's finances.

This is not often reflected in practice where lengthy questions are raised, or valuations sought of assets, that are completely irrelevant to the issues in the case.

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[20] [2015] 2 FLR 978

Two things about divorce or financial provisions that I would change in my jurisdiction

IAFL – Milan 21 March 2019

Francesca Mele
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1

Mutual altruism in humans:
co-operation and compensation

The philosopher Aristotle in the 4th century BC asserted that "man is a social animal" since human beings need to live in a group to ensure their own conservation and, for this reason, men have developed a predisposition to trust and mutual cooperation

There is an innate predisposition in mankind to justice, trust and cooperation. Scientific experiments show that children, even if very young and before they even start talking, have an innate sense of justice and fairness

Neuroscience demonstrates that Aristotele was right and that trust and cooperation can take place at multiple levels up to its maximum expression which is the so called "reciprocal altruism" which consists in the behaviour of a subject who renounces to part of his resources, his time, his energies and assumes a certain risk to provide a benefit to another person in the expectation that his gesture will be somehow compensated

2

2

The family in our Constitution: the family as a natural society

- Unlike animals, human beings add to the innate sense of mutual cooperation and trust a system of socially recognized values.
- Cooperation as a form of reciprocal altruism finds a privileged place within the family, a primary human community where
  - ✓ the value of choices that the couple makes in organizing life in common and in bringing up children
  - ✓ the value of efforts and renunciations made by each part
  - ✓ the division of roles within the family as an element necessary for the family itself to live harmoniously

must be recognized and valued

- Art. 29 of the Italian Constitution
- Art. 143 of the Civil Code

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My question

Choices made by the couple in view of the marriage and during their life in common give the spouse who took care of the family the trust to be entitled to a reward proportional to its commitment

In this perspective, the need to rebalance positions and economic conditions of the ex-spouses in respect of the efforts and renunciations made by each of them responds not only to a general sense of justice and fairness, but also ensures trust and respect in the institution of marriage

Nowadays how can we recover the sense of trust as well as a fair compensation in the specific area of divorce allowance?

4

4

Nowadays. The legal framework of divorce allowance in Italy: art. 5 Law 898/1970

Article 5 of Law 898/1970 (Italian divorce law) sets forth that, pronouncing the dissolution of the marriage, the court shall consider

- ✓the conditions of the spouses
- ✓the reasons behind the decision
- ✓the personal and economic contribution given by each to the family management and to the creation of the patrimony of each or of the common one
- ✓the incomes of both spouses

Once assessed all the aforementioned elements in relation to the duration of the marriage, the court can then condemn a spouse to pay a periodical maintenance allowance in favour of the other when the latter does not have adequate economic capacity or cannot objectively reach it.

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Jurisprudence from 1990 to 2017: the standard living of the couple and the nature of divorce allowance

- In the courts' decisions of the last 30 years, divorce allowance has been quantified on the basis of the standard of living enjoyed during the marriage
- The Court's argumentative procedure was biphasic: (i) to ascertain the standard of married life that was the parameter for the maximum quantification of the divorce allowance, (ii) to adjust the maximum quantification of the divorce allowance weighing all further parameters set forth by the law
- Since the standard of living is the expected parameter also for the quantification of the separation allowance (in Italy separation necessarily precedes divorce), divorce allowance has been often quantified to the same extent as the previous separation allowance
- Divorce allowance has been qualified as having a prevalent assistance nature

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The criticism of the orientation of jurisprudence

Quantification of divorce allowance, in the vast majority of cases, despite the assertion that the benchmark for its quantification was the standard of living, did not allow the weaker spouse to maintain such a standard and, on the contrary, forced the same to make significant contractions of his living conditions

Specular, ex-spouses obliged to pay allowances to partners who had not contributed to the family ménage were in any case tied to a life-time payment

Standard of living parameter, constricts the compensatory principle which, instead, is formally recognized by the constitutional framework

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Decision no. 11504 of 10 May 2017 of the Italian Supreme Court

- Decision no. 11504 of 10 May 2017 of the Supreme Court has constituted a proper interpretative shock: 30 years of jurisprudential application have been erased.
- The Court's argumentative procedure is still biphasic but (i) the only parameter that should have been assessed to understand whether the weaker spouse is entitled or not to a divorce allowance has to be identified in the economic independence of that spouse, (ii) if divorce allowance is due the Judge shall take into account all further parameters set forth by the law.
- Economic self-sufficiency relates exclusively to the weaker spouse as an individual, without any reference to the pre-existing matrimonial relationship. The standard of living parameter is definitively abandoned.
- To determine if an individual is economically self-sufficient, the Supreme Court identifies the following elements:
  - ownership of income of any kind (work or leases or financial returns)
  - property of savings or real estate
  - work capacity
  - the availability of a dwelling house
- Divorce allowance still has a prevalent assistance nature

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The criticism of the decision n. 11504 of 10 May 2017 of the Supreme Court

Divorce allowance is subject only to the evaluation of a mere economic self-sufficiency of the applicant and choices made by both spouses during the marriage are completely left aside

No consideration that agreed choices have always consequences, often irreversible, on the economic conditions of both spouses

The principle of equality of spouses within marriage is not valued

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Decision no. 18287 of 11 July 2018 of the Supreme Court in United Session

- Decision no. 18287 of 11 July 2018 of the Supreme Court in United Session resolved the jurisprudential debate that had arisen after the decision no. 11504/2017 of the Supreme Court
- The Court's argumentative procedure shall not be biphasic anymore and the Judge shall consider all, but only, parameters set forth by the law
- No reference to standard of living criterium nor to self-sufficiency criterium
- The Judge shall therefore:
  - ascertain the existence of a gap between the economic positions of the spouses. The gap must be significant
  - ascertain that the gap is consequence of agreed choices made by spouses, with the renunciation of professional and income expectations of one of them
- The principle of equal dignity and equality of spouses in a marriage must enhance the equalizing and compensatory nature of divorce allowance

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What else?

- The Supreme Court states that divorce allowance must not be related to the standard of living of the family nor to the economic self-sufficiency of the applicant, but adequate to the contribution provided in the realization of family life
- The Supreme Court acknowledges that the dissolution of the marriage affects the status of the parties, but does not erase the consequences of the agreed choices of the ex-spouses
- Divorce allowance has a compensatory and equalizing nature
- The effort of the Supreme Court is maximum but cannot exceed the literal figure of the norm that, in our system, still provides for a divorce allowance as a monthly payment with no time limits

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My answers
1. full disclosure

- Powers of the Judge while ascertaining the economic gap between spouses
- Instruments currently provided by Italian law are ineffective
- Praxis to decide only on the basis of tax returns of the parties
- Praxis of disclosure in some Italian Courts: the Court of Rome
- Full and effective disclosure is needed

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2. and wider discretion of the Judge

- The Judge should have the power to recognize to one of the spouses an amount equivalent to renunciations that that spouse has made during the marriage, ensuring that both spouses could be independent one from the other for the future
- Criteria for the determination of divorce allowance should respond to a prevalent compensatory need
- The Judge should consider professional and economic expectations eventually left behind by the weaker spouse, the duration of the marriage and the age of the applicant
- The Judge should have the possibility to condemn a payment in favour of the weaker spouse not only of a periodical allowance but also of a time limited periodical allowance, of a lump sum or of a share of patrimony in order to allow a clean break
- In the assessment of a possible compensation, the Judge shall take into account all choices made by the couple as well as their impact on the economic condition of the applicant:
  - marital regimes
  - donations during the marriage
  - separation agreements providing for an assignment of sums or assets

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IAFL – Milan 21 March 2019

Francesca Mele

studio legale

Mele Viganò

Milan – Italy

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International Academy of Family Lawyers
European Chapter

FRIDAY SESSION 1

Permission to remove children abroad

1KBW

Applications to relocate with children: a view from England and Wales

Nicholas Anderson, barrister

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Applications to remove children from England and Wales

Child Abduction Act 1984 s.1: a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the consent of all holders of parental responsibility or the permission of the court.

Children Act 1989 s.13: when making any order setting out with whom a child should live, the court may grant permission to remove a child from the UK

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The test applied by the court

The "welfare checklist". Children Act 1989 s.1(3):

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.

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Changes in the last ten years

In Payne v Payne [2001] the Court of Appeal set out the following discipline as a prelude to conclusion:

(a) Pose the question: is the mother's application genuine and realistic
(b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare

Since about 2010, the courts have moved away from this approach, which led to a focus on the psychological impact on the thwarted primary carer.

In *K v K* [2012] Black LJ said:

> *"the only authentic principle – that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration"*.

Anecdotally, and by reference to cases which are reported, the number of unsuccessful applications has increased since then.

Since the start of 2017, only three of the eight reported (appeal or first instance) relocation applications have been successful, and one of those was very unusual, involving 15 and 13 year old children with very strong views in favour of relocation.

The practical application of this test

- The focus is on the best interests of the child or children
- The parents' needs or interests are relevant only when they relate to the child or children
- There is often a two stage approach:
  - Do the proposals to relocate make practical sense; and
  - Is the move in the best interests of the children.
- The court is required to look at all the realistic options for the child or children.
- This has been called 'a global holistic evaluation'

The current approach to an application to relocate

- The focus must be on the children
- The argument that the mother will be unable to hide her disappointment at her well considered plan being rejected, which will impact on the children "should be treated very circumspectly"
- Although financial issues are relevant, both in favour of a move and as a reason not to remain, this is only part of the overall picture for the children
- The impact on the children of a profound change in their relationship with their left-behind father carries more weight
- The effect on the mother and her new family is a factor which the court can take into account
- The views of older children will be important but will not outweigh all other issues: often it depends on the reasons for the children's views and the consequences of the court reaching the opposite conclusion

Immigration issues

Immigration issues, and the right of the respondent parent to work in the country to which the children are to be taken can be an important factor.

Often it will be suggested to a left behind father that he can simply move, and continue to live near to his children. This may not be possible [outside Europe].

Some countries do not allow, or include crippling financial consequences of, the purchase of property by a foreign national; this can be important when considering arrangements for contact.

Uncertainties over the right of a mother to enter, and stay in, the USA were the basis of a successful appeal against a decision to return children under the Hague Convention in re W [2018]

Enforcement issues

Between Member States (exc Denmark) enforcement and recognition is automatic, subject to:

- the completion of an Annex III certificate, setting out rights of access
- Article 9 of Brussels II bis allowing a three month period of jurisdiction for the original Member State in relation to modifying a judgment on rights of access
- Article 23 of Brussels II bis

Between signatories of the 1996 Hague welfare convention, recognition and enforcement is not automatic but requires the order to be recognised under Chapter IV. Recognition may be refused in the circumstances set out in Art 23(2).

Outside Brussels II bis and signatories to the 1996 Hague welfare convention, the English courts often require a 'mirror order' and evidence from the other country as to how and whether the order will be enforced and/ or varied.

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Relocation applications under English law

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Applications to remove children from the UK permanently:
a view from England and Wales

Nicholas Anderson, barrister

Applications to remove children from England and Wales: an overview

When is permission required?

Child Abduction Act 1984 s.1: a person connected with a child under the age of sixteen commits a criminal offence if he takes or sends the child out of the United Kingdom without the consent of all holders of parental responsibility or the permission of the court.

Who has parental responsibility?

- The mother of a child always has PR
- A father has PR if he is either:
  - married to the child's mother
  - listed on the birth certificate for children born after 1.10.2003
- Same-sex partners will both have PR if they were married or civil partners at the time of the treatment
- For same-sex partners who are not married or civil partners, the second parent can get parental responsibility by application or by marrying the mother.

Children Act 1989 s.13: when making any order setting out with whom a child should live, the court may grant permission to remove a child from the UK.

Wardship

The test applied by the court when considering an application to remove a child from England & Wales on a permanent basis

The test is simply welfare: what is in the child's best interests.

The statutory guide to ascertaining what is in a child's best interests is the "welfare checklist" found in s.1(3) of the Children Act 1989.

> When a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration. In circumstances where the court is considering whether to make an order, and what order to make, the court shall have regard in particular to—
>
> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
>
> (b) his physical, emotional and educational needs;
>
> (c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.

The practical application of this test in relocation applications

These applications have been some of the most difficult issues facing judges. In the fifty years since *Poel v Poel* [1970] generations of judges have grappled with setting out principles which can apply in relocation cases.

There has been a real shift in the way that courts and lawyers have dealt with relocation applications in the last yen years or so.

In the 2001 case of *Payne v Payne* [2001] the Court of Appeal set out the following discipline as a prelude to dealing with a relocation application:

(a) Pose the question: is the mother's application genuine (meaning well motivated) and realistic
(b) If so there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare.

The Payne discipline, with a focus on the impact of the unhappy mother, led to a huge number of relocation applications being granted on not much more than a coherent plan and a genuine wish by a mother to relocate. The child was not at the centre of the court's consideration.

According to a 2005 survey conducted for Resolution (a family lawyers' professional body) "almost all relocation applications are brought by maternal primary carers and almost all of them (and 75% of the reported cases) have been granted eventually".

There was unhappiness in the profession: over 80% of participants to the Resolution survey responded that relocation "is too easily granted", and judicial mutterings about misuse of the *Payne* discipline. In *Re AR (A Child: Relocation)* [2010] EWHC 1346 Mostyn J refused leave to a mother to relocate to France and expressed the view:

> *"[11] The [Washington Declaration on International Family Relocation] supplies a more balanced and neutral approach to a relocation application, as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach. It requires the court in a real rather than synthetic way to take into account the impact on both the child and the left-behind parent of the disruption of the periodicity and quantum of the prevailing contact arrangement. The hitherto decisive factor for us – the psychological impact on the thwarted primary carer – is relegated to a seemingly minor position at the back end of para 4(viii)."*

It was not long before three important cases reset the balance.

- *K v K (Relocation: Shared Residence Arrangement)* [2011]
- *Re F (Relocation)* [2012]
- *Re F (a Child) (International Relocation Cases)* [2015]

K v K (Relocation: Shared Residence Arrangement) [2011] EWCA Civ 793, [2012] 2 FLR 880

> *the only principle to be applied when determining an application to remove a child permanently from the jurisdiction was that the welfare of the child was paramount and overbore all other considerations however powerful and reasonable they might be; that guidance given by the Court of Appeal as to factors to be weighed in search of the welfare paramountcy and which directed the exercise of the welfare discretion was valuable insofar as it helped judges to identify which factors were likely to be the most important and the weight which should generally be attached to them and promoted consistency in decision-making; but that (per Moore-Bick and Black LJJ), since the circumstances in which such decisions had to be made varied infinitely and the judge in each case had to be free to decide whatever was in the best interests of the child, such guidance should not be applied rigidly as if it contained principles from which no departure were permitted.*
>
> > *'… the only principle to be extracted from Payne v Payne is the paramountcy principle. All the rest, … is guidance as to factors to be weighed in search of the welfare paramountcy.'"*

Re F (Relocation) [2012] EWCA Civ 1364; [2013] 1 FLR 645

> *"There can be no presumptions in a case governed by s 1 of the Children Act 1989. From beginning to end the child's welfare is paramount, and the evaluation of where the child's best interests truly lie is to be determined having regard to the 'welfare checklist' in s 1(3)"*
> per Munby LJ

Re F (a Child) (International Relocation Cases) [2015] EWCA Civ 882.

> *[27] Selective or partial legal citation from Payne without any wider legal analysis is likely to be regarded as an error of law. In particular, a judgment that not only focuses solely on Payne, but also compounds that error by only referring to the four point 'discipline' set out by Thorpe LJ at paragraph [40] of his judgment in Payne is likely to be wholly wrong. There are no quick fixes to be had in these important and complicated cases; the paragraph [40] 'discipline' in Payne may, or may not, be of assistance to a judge on the facts of any particular case (whether there is a 'primary carer' or not) in marshalling his or her analysis of the evidence prior to the all important analysis of the child's welfare.*
>
> *[30] That approach is no more than a reiteration of good practice. Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary. That is neither a new approach nor is it an option. A welfare analysis is a requirement in any decision about a child's upbringing. The sophistication of that analysis will depend on the facts of the case. Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or 'left behind' parent) from being sidelined in a linear analysis. Not only is it necessary to consider both parents' proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse.*
> Per Ryder LJ
>
> *[46]. The word 'holistic' now appears regularly in judgments handed down at all levels of the Family Court. This burgeoning usage may arise from my own deployment of the word in a judgment in Re G (Care Proceedings: Welfare Evaluation) [2013] EWCA Civ 965; [2014] 1 FLR 670 where, at paragraph 50, I described the judicial task in evaluating the welfare determination at the conclusion of public law children proceedings as requiring:*

'a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare.'

[47] Having heard argument in this and other cases, I apprehend that there is a danger that this adjective, and its purpose within my judgment in Re G, may become elevated into a free-standing term of art in a way which is entirely at odds with my original meaning.

[48] In the judgment in Re G my purpose in using the word 'holistic' was simply to adopt a single word designed to encapsulate what seasoned family lawyers would call 'the old-fashioned welfare balancing exercise', in which each and every relevant factor relating to a child's welfare is weighed, one against the other, to determine which of a range of options best meets the requirement to afford paramount consideration to the welfare of the child. The overall balancing exercise is 'holistic' in that it requires the court to look at the factors relating to a child's welfare as a whole; as opposed to a 'linear' approach which only considers individual components in isolation.

[49] Reference to 'a global, holistic evaluation' in Re G was absolutely not intended to introduce a new approach into the law. On the contrary, such an evaluation was put forward as the accepted conventional approach to conducting a welfare analysis, as opposed to a new and unacceptable approach of 'linear' evaluation which was seen to have been gaining ground.
Per McFarlane LJ

These three cases refocussed relocation applications on the best interests of the child. In particular, the parents' needs or interests are relevant only when they relate to the child or children.

<u>The current approach of the English courts:</u>
Judges stress that each case is unique and that each case turns on the welfare and needs of the children involved.

Some general principles can be drawn from the recent approach of the courts. The courts will ask:

- Whether the proposals to relocate make practical sense (schools, healthcare, accommodation, financial support and contact proposals). If the applicant's case is not well thought out and is not supported by evidence it will likely fail, although the test is less rigorously applied in a case where the applicant is 'going home' rather than going to a new country;
- If the applicant's case, or the respondent's defence, is not put forward in good faith but is found to be underpinned by an unworthy motive, then that case, or defence, will fail;
- The court must consider the impact on the mother if the application is refused as well as the impact on the father if it is granted;
- The court must undertake a "global" or "holistic" exercise asking whether the move is in the best interests of the children.

The court is required to look at <u>all</u> the realistic options for the child or children in what has been called 'a global holistic evaluation': the search is on for the best, or at any rate the least worst of all the available and realistic options.

Matters which the courts do consider

Impact on the disappointed mother

The cases which suggest that the impact on the disappointed applicant is a decisive factor are consigned to history. According to Mostyn J in *S & V (Children - Leave to Remove)* [2018] EWFC 26:

> *In many of these cases the applicant places very great weight on the disappointment she (for it is usually she) will feel if her application is refused. In this case the mother says she is "absolutely desperate to go home to Kiev" and that she will be "devastated" and "profoundly affected" if her application is refused. [It is often said] "the prospect of her hiding her disappointment is remote". In my view this sort of argument should be treated very circumspectly. In Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam)*, I stated at para 12:*
>
> > *"The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocator is always "how would you react if leave were refused?" The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically."*

Financial matters

Financial issues are relevant. There is no requirement for an applicant to demonstrate a financial necessity to succeed in an application, particularly if she is moving 'home' or to a new job but the financial matters can be relevant to establishing whether the application is practically grounded (see *Re M (Children)* [2016] EWCA Civ 1059). Financial issues are often pleaded as the motivating factor for seeking to return 'home'.

The position of the mother's new husband

The impact on an applicant of her new husband or partner being required to move is a factor which can influence a decision. In *Re M (Children)* [2016] the judge found that the step-father would in any event go to Moscow and that the separation between mother and step-father which would result was not tactical but was a plan which had been in place for some time. If the mother is forced to remain in this country that plan, the judge found, would proceed forcing a *de facto* separation between her and the step-father. This would be contrary to the best interests of the children. In that case, the mother was able to find work in Moscow. Since the father was able to work, the mother should be in the same position

> *"if the mother as primary carer is able to pursue legitimate career objectives then, providing it is not inconsistent with the welfare of the girls, she should be entitled to pursue it."*

Views of the children

The ascertainable wishes and feelings of children must be taken into account. The older the children involved, the more likely that the court will have no option other than to accord great weight to them. In *S v S (Relocation)* [2017] EWHC 2345 (Fam) Peter Jackson J was faced with two teenaged boys who had very firmly made up their mind about their relocation to Switzerland, and had instructed a lawyer to represent them in court:

> *"There is another point to be made; these boys are old enough to instruct lawyers to ensure that their wishes and feelings are fully represented. At their age, those wishes and feelings are a very important element in their welfare. That is so even if the wishes and feelings are unwise. There is nothing in the law that says that the wishes and feelings of older children should be wise or reasonable. They may be*

foolish or immature but respecting children's points of view must, in the case of older children, accept to some extent the risk of them making mistakes. Unless the consequences of mistaken choices are profoundly harmful, the court cannot protect older children from every mistake that they may make. Here, in my view, a move to Switzerland may or may not turn out to have been a good choice but the wishes and feelings of these children have, in my view, made it the only viable choice. If it turns out to have been an unwise one, then the boys and their parents will have to live with it."

In another case *Re N-A (Children)* [2017] EWCA Civ 230, two boys of 15 and 12 were fully engaged in the process, including a meeting with the judge, who declined to follow their wish to move to Iran with their father. This was upheld by the Court of Appeal:

37. I would not criticise the judge for concluding that L and B had not fully understood what the move to Iran would entail. She was right to observe that they had only been there on holiday and entitled to take the view that they were looking at Iran through rose-tinted spectacles. Moving to live there permanently would build on what they knew already, but would inevitably be different in ways which the judge was entitled to consider the boys could not presently appreciate

Whilst these cases turn on the views of older children, it is a fundamental principle of procedure of English law that the court will ask whether a child should be heard and engaged.

In *D (A Child) (International Recognition)* [2016] EWCA Civ 12, the Court of Appeal refused to recognise and enforce a Romanian custody order because the views of the child (who was seven at the date of the final Romanian hearing) were not considered. The failure to consider whether and how to engage the child constituted a violation of a fundamental principle of procedure of English law and, as such, the order would not be recognised:

[46] That is rightly an acceptance that the rule of law in England and Wales includes the right of the child to participate in the process that is about him or her. That is the fundamental principle that is reflected in our legislation, our rules and practice directions and our jurisprudence. At its most basic level it involves asking at an early stage in family proceedings whether and how that child is going to be given the opportunity to be heard. The qualification in section 1(3)(a) CA 1989 like that in article 12(1) UNCRC 1989 relates to the weight to be put upon a child's wishes and feelings, not their participation.

[45] For young children who have not developed any sufficient communication skills it may not be possible or necessary to ascertain their wishes and feelings. Furthermore, there may on the facts of a particular case be very good welfare reasons to make a decision not to do so. That is quite separate from the question whether and how they are going to participate. Again, for some children in the private law context participation may be through their parents but it must not be assumed that that will be good enough. The question must be asked.

Impact of the courts' new approach

On an anecdotal basis, and supported by the reported cases, the English courts appear to be more reluctant to grant permission to relocate with children:

Case	Outcome
S & V (Children - Leave to Remove) [2018] EWFC 26	Relocation to Ukraine: **refused**
A v B [2018] EWHC 328 (Fam)	Relocation to Poland: **refused** (retrial ordered on appeal)
Re DO and BO [2017] EWHC 858 (Fam)	Temporary relocation to China: **refused**

S v S (Relocation) [2017] EWHC 2345 (Fam)	Relocation to Switzerland (teenagers with a strong positive view): **allowed**
Re A (Letter to a Young Person) [2017] EWFC 48	Relocation to 'a Scandinavian country' (application by 14 year old boy): **refused**
Re CB (International Relocation: Domestic Abuse: Child Arrangements) [2017] EWFC 39	Relocation to Portugal (violent relationship): **refused**
Re N-A (Children) [2017] EWCA Civ 230	Relocation to Iran (teenagers with a strong positive view): **refused**
M v F [2016] EWHC 3194 (Fam)	Relocation to USA: **allowed**
Re M (Children) [2016] EWCA Civ 1059	Relocation to Russia: **allowed**
K (A Child) [2016] EWCA Civ 931	Relocation to Ireland: **allowed**

Immigration issues

Issues relating to whether the left behind parent can move to, work in or visit the country. In *re W* [2018] EWCA Civ 664, a British mother the mother, was unable to obtain a visa to enter the USA. The father, who is Pakistani, would be unable to re-enter the USA *if* he was able to travel to the UK, because of his precarious immigration status in the USA.

On this basis, the court refused to order the return of the children to the USA on the basis that it would be intolerable for them to return without the mother.

Enforcement

Between Member States (exc Denmark) enforcement and recognition is automatic, subject to:

- the completion of an Annex III certificate, setting out rights of access
- Article 9 of Brussels II bis which allows for a three month period of jurisdiction for the original Member State in relation to modifying a judgment on rights of access

Under Article 23 of Brussels II bis a judgment relating to parental responsibility shall not be recognised:

> (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
> (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
> (c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;
(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;
(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Between signatories of the 1996 Hague welfare convention, recognition and enforcement is not automatic but requires the order to be recognised under Chapter IV. Recognition may be refused in the circumstances set out in Art 23(2).

(2) Recognition may however be refused –

(a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
(b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
(c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
(d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
(e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
(f) if the procedure provided in Article 33 has not been complied with.

Outside Brussels II bis and signatories to the 1996 Hague welfare convention, the English courts often require a 'mirror order' and evidence from the other country as to how and whether the order will be enforced and/ or varied.

The English courts also routinely require a relocating parent to offer financial guarantees to ensure that rights of access will be respected; this is very common in cases of temporary relocation.

PERMISSION TO REMOVE CHILDREN ABROAD

ITALY

Avv. Grazia Ofelia Cesaro
Milan, 21st March 2019

studiolegalecesaro

1

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- Article 316 of the Italian Civil Code states
- «The parents, **by mutual agreement**, decide the habitual residence of the child»
- The provision applies **to all children**, born inside and outslide of wedlock

2

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- Article 316 of the Italian Civil Code is applicable **if there is no separation / divorce**
- **If there is separation / divorce**, article 337-ter and article 337-quater of the Italian Civil Code apply instead
- Article 337-ter of the Italian Civil Code deals with **shared / joint custody** of the child when the parents are separated or divorced: the decision concerning the child's habitual residence, being a **fundamental one**, must be reached **by mutual agreement** between the parents
- Article 337-quater of the Italian Civil Code deals with **exclusive custody** awarded to only one parent if the couple is separated or divorced: the decision concerning the child's habitual residence, **even in this case, being a fundamental one**, must still be reached **by mutual agreement** between the parents, **if the Judge has not decided otherwise**

3

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- Articles 316, 337-ter and 337-quater of the Italian Civil Code define the choice of the habitual residence of the child as a fundamental one. Why?
- **It is the child's perspective, not the parents' perspective, that matters.**
- **The child is entitled to have a significant relation with both parents: the child's best interest must prevail.**
- Article 16 of the Italian Constitution: freedom of movement. The custodial parent could, in theory, be free to choose where to live with the child without caring for the other parent's consent. However, since the residence impacts on the child's life, and the child's best interest must prevail, **the freedom of movement in this case can be limited** (Court of Turin, Seventh Civil Section, 8.10.2014).

4

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- Moving the child's habitual residence, both within Italy (i.e., from Milan to Rome) or abroad is a decision that must be taken either:
- **By both parents, if they agree** (articles 316, 337-ter, 337-quater of the Italian Civil Code): it doesn't make a difference if they still live together, if they are separeted or if they are divorced;
- **By the Court, if they disagree** (articles 316, 337-ter, 337-quater of the Italian Civil Code): if one of the parents wants to relocate elsewhere with the child, and if the parents cannot reach an agreement, the parent must be authorised by the Court.

5

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- If the parent moves the child's habitual residence abroad without the other parent's consent, or without a Court decision containing a specific authorisation to do so
- → **Illicit removal** (see **1980 Hague Convention**, if applicable, and also criminal consequences: see **article 574-bis of the Italian Criminal Code**)

6

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Criteria for moving the child's residence abroad**
- 1) If there is the other parent's consent: no need to go to Court, the consent is *per se* a valid cause and the relocation is lawful
- 2) If there is no consent, the Court has to decide. Specific criteria are nowhere to be found in the Italian legislation: case-law is therefore important
- See Court of Milan, Ninth Civil Secition, decree 11.06.2014.

7

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Milan, Ninth Civil Section, decree 11.06.2014**
- Separation proceedings: the mother wants to move to Paris with the child, the father is opposed to the decision and does not agree.
- In authorising (or denying) the relocation, the Judge must apply article 337-ter of the Civil Code. **General principles (article 337-ter, first paragraph): the child has the right to maintain a balanced and significant relation with both parents, to receive from both parents care, upbringing and education, and also to preserve all the significant relations he/she has with the grandparents and the other relatives.**
- How can these principles by effectively applied?

8

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Milan, Ninth Civil Section, decree 11.06.2014**
- 1) The Court must analyse the **parent's reasons for moving abroad**: they must be **substantial and not be motivated by a mere hope or chance to obtain a more profitable occupation abroad**, and they must **not be linked solely to the adult's desire to change the «social environment». It is the child's habits and general safety that must be safeguarded.**

9

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Milan, Ninth Civil Section, decree 11.06.2014**
- 2) The Court must analyse the **possible times and modalities to be observed in order to ensure significant contacts and visitation rights for the non custodial parent** (or for the parent who has shared custody but does not live with the child). It is up to the custodial parent who wants to relocate abroad with the child to explain to the Court **how the rights of the other parent can be preserved even in the event of the relocation abroad**. Moreover, the non custodial parent should **not be forced to bear disproportionate costs and expenses, nor his/her lifestyle should be significantly affected in a negative way**.

10

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Milan, Ninth Civil Section, decree 11.06.2014**
- 3) The Court must determine whether the **choice to move abroad is genuine, or if it is instead dictated by the custodial parent's desire to damage the other parent's relation with the child.**
- 4) The Court must verify if the **relocation does not alter or damage the child's right to maintain his/her significant relations with other relatives and friends**, as they are seen as **necessary in building and preserving the child's social identity**.

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PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Milan, Ninth Civil Section, decree 11.06.2014**
- 5) The Court must also verify the **impact of the relocation on the child's psychology, considering his/her needs of environmental, relational, emotional and psychological stability**.

12

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Milan, Ninth Civil Section, decree 11.06.2014**
- 6) The Court must assess the **characteristics of the «new» family and social environment that will be the horizon of reference for the child once abroad** (different language, culture, social and school system). **Every possible effort is to be made in order to avoid that, as a consequence of the relocation, the child and the other parent could eventually become so distant as to perceive themselves as «strangers»**.

13

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Milan, Ninth Civil Section, decree 11.06.2014**
- 7) **The age of the child is another fundamental criterion to be balanced**. The younger the child is, the more complex it becomes for him/her to preserve a significant relation with the non custodial parent. The evaluation should also be a prognostic one, as the Judge is called to determine the possible future outcome of the relocation on the development of the relation.

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PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Milan, Ninth Civil Section, decree 11.06.2014**
- 8) Lastly, the Court must, once again, consider the age of the child as a relevant factor: **if the child is older, the Judge must give an enhanced weight to his/her will**, so that the child is effectively involved in the decision to move abroad or to remain.

15

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Cassation, First Civil Section, judgment no. 19694 (19.09.2014).**
- In the case of a parent's request to move abroad with the child, the Judge must evaluate **two conflicting sets of principles and rights (and two sets of interests), both of Consitutional importance.**
- On the one hand, **the parent's right to be free to move anywhere and even abroad, as an expression of his/her freedom of movement** recognised under article 16 of the Italian Constitution, **and also as a facet of his/her right to personal self-realisation** (articles 2 and 3 of the Italian Constitution). Also, **within the EU, the right of any EU-citizen to move abroad freely**.

16

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Cassation, First Civil Section, judgment no. 19694 (19.09.2014).**
- On the other hand, the need to defend **the child's best interest, wich also implies his/her right to preserve a significant relation with the other parent, and therefore his/her right to be free from disproportionate interventions by the State authorities (such as a Court order) that can negatively affect the child's right to respect for private and family life** (see negative and positive obligations under **article 8 of the ECHR**).

17

PERMISSION TO REMOVE CHILDREN ABROAD – ITALY

- **Court of Cassation, First Civil Section, judgment no. 19694 (19.09.2014).**
- The opportunity for the parent to find a better job, a more satisfying social environment and a stabler family life, if moving abroad with the child back to his/her native Country, surely are constitutionally relevant and protected rights.
- **However, according to the Court's reasoning in the decision of the case, those instances and rights must recede, as they can only be referred to the adult and not to the child.**
- The child's best interest (right to maintain his/her stable social and family environment, and the positive relation with the other parent when this is positive for the child) are prevailing reasons to deny the authorisation to move abroad.

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Permission to remove children abroad. Italy.

by Grazia Ofelia Cesaro[1]

Pursuant to article 316 of the Italian Civil Code the parents decide the habitual residence of their children. The decision on the habitual residence of the child is a fundamental one, therefore it must be taken together by both parents, by mutual agreement.

Article 316 of the Civil Code does not discriminate between children born inside or outside of wedlock: irrespective of the marital status of the parents, the provision apply to all minors.

It states a general principle and it is applicable if the parents are not separated or divorced. It is important to notice that a disagreement may occur on the issue of deciding the habitual residence of the minor: as important as such a decision may be, and although it may be said that such a disagreement surely is a huge one, it may still be the only issue that sees the parents disagree; in this case, provided the couple does not decide to separate or divorce, article 316 par. 3 of the Civil Code states that the Judge, after hearing both parents, may award the power to decide on the habitual residence of the child to the parent who is seen the most fit to pursue the child's best interests.

Article 316 of the Code, however, will not be the rule to apply to separated or divorced parents: in this case, articles 337-ter and 337-quater of the Italian Civil Code apply instead.

According to article 337-ter of the Italian Civil Code, which takes into consideration the case of separated / divorced parents sharing the custody of the child, the decision concerning the child's habitual residence – being a fundamental one – must be reached by mutual agreement between the parents. As such, there is no difference: separared/divorced parents who are awarded shared custody must conform to a rule which is basically the same that applies to parents who are not separated or divorced.

Article 337-quater of the Italian Civile Code still deals with parents that are either separated or divorced. However, in this case, the rule is meant to be applied in the case of exclusive custody, i.e. custody awarded to only one of the parents. The decision concerning the child's habitual residence is still a fundamental one, and must still be taken by mutual agreement between the couple. Only if there is a judicial decision giving one of the parents the power to decide the habitual residence of the child without agreeing it with the other parent, the rule of the "mutual agreement" will not apply.

Articles 316, 337-ter and 337-quater of the Italian Civil code all define the decision on the habitual residence of the child as a fundamental one. This is because the Italian legislator has decided to take into account the child's perspective, and not the parents' perspective: the child is entitled to have a significant relation with both of his/her parents, and his/her best interest must prevail.

[1] *Lawyer in Milan*

This is something that really must be highlighted, as one should never forget that article 16 of the Italian Constitution recognises and guarantees to all citizens an inalienable freedom of movement, both within Italy and abroad. Which could imply, in theory, that the custodial parent should be free to choose where to live with the child without caring for the other parent's consent. However, and this is really the turning point of the whole system, since the decision on the residence impacts deeply on the child's life, and the child's best interest must prevail, the freedom of movement of the parent can be limited (*see* Court of Turin, Seventh Civil Section, decision of 8.10.2014).

The decision to move the child's habitual residence – both within Italy or abroad – must be taken either:

- By both parents, if they agree (articles 316, 337-ter and 337-quater of the Italian Civil Code): it does not make any difference whether they are still together, or if they are separated or divorced
- By the Judge, if they disagree (articles 316, 337-ter and 337 quater of the Italian Civil Code): if the parents cannot reach an agreement, and if one of them wants to relocate elsewhere with the child, he/she must be authorised to do so by the Court.

If a parent moves the child's habitual residence abroad without the other parent's consent or without a Court order with such an authorisation, there is an illicit removal of the child, which could lead to the application of the proceedings outlined by the 1980 Hague Convention and which constitutes a criminal offence under Italian law (article 574-bis of the Italian Criminal Code).

It is important to understand which criteria apply in order to see the relocation abroad with a child as a lawful conduct.

1) If there is the other parent's consent, there will be no need to go to Court, as the consenti is *per se* a valid cause and the relocation is lawful.

2) If there is no consent, the Court must decide. However, specific criteria are nowhere to be found in the Italian legislation: they've been defined by the Judges, which makes case-law particularly relevant in this case.

A case decided by the Court of Milan, Ninth Civil Section (decree 11.06.2014) is routinely quoted by Italian legal scholars, as the Judges have clearly outlined all the criteria to be followed when authorising/denying the permission to relocate abroad with the child. It concerned the request, made by the mother to the Court, to move back to France from Italy, taking the couple's child with her (the request was denied).

The Court stated that, in authorising or denying the permission to relocate, the Judge must apply article 337-ter of the Civil Code and the general principles contained in its first paragraph: the child has the right to maintain a balanced and significant relation with both parents, to receive from both parents care, upbringing and education, and also to preserve all the significant relations he/she has with the grandparents and the other relatives.

As they are very general – even abstract – principles, the Court has elaborated a series of practical criteria to be verified in each actual case.

1) The Court must analyse the parent's reasons for moving abroad: they must be substantial and not determined solely by a mere chance or hope of obtaining a more profitable occupation abroad, nor the must only be linked to the adult's desire to change his/her "social environment".

2) The Court must analyse the possible times and modalities to be observed in order to ensure significant contacts and visitation rights for the non custodial parent. It is up to the custodial parent (or, in any case, to the parent who's asking to relocate abroad with the child) to provide the Court with a plausible explanation concerning how the rights of the other parent can be preserved even in the event of the relocation abroad. Moreover, the non custodial parent (or, in any case, the parent who will remain in Italy without the child) should never be forced to bear disproportionate costs and expenses, nor his/her lifestyle should be significantly affected in a negative way.

3) The Court must determine whether the choice to move abroad is genuine, or if it is instead dictated by the parent's desire to damage the other parent's relation with the child.

4) The Court must verify if the relocation does not alter or damage the child's right to maintain his/her significant relations with the other relatives and friends, as they are seen as necessary in building and preserving the child's social identity.

5) The Court must also verify the impact of the relocation on the child's psychology, considering his/her needs of environmental, relational, emotional and psychological stability.

6) The Court must assess the characteristics of the "new" family and social environment that will constitute the horizon of reference for the child, once abroad (i.e., different language, different culture, different social and school system). Every possible effort is to be made in order to avoid that, as a consequence of the relocation, the child and the other parent could eventually become so distant as to perceive themselves as "strangers".

7) The age of the child is another fundamental criterion to be balanced. The younger the child is, the more complex it becomes for him/her to preserve a significant relation with the other parent. The evaluation should also be a prognostic one, as the Judge is called to determine the possible future outcome of the relocation on the development of the relation.

8) Lastly, the Court must, once again, consider the age of the child as a relevant factor: if the child is older, the Judge must give an enhanced weight to his/her opinion, so that the child is effectively involved in the decision to move abroad or remain.

The Court of Cassation of Italy has decided a case on the issue of permitting the relocation of a parent abroad, with the child. In this case the permission was denied, too.

The decision (Court of Cassation, First Civil Section, judgment no. 19694, 10.09.2014) is important because it clearly deals with the core issue of the matter: the conflict between the rights of the parent who wants to move abroad, and the rights of child (and, possibly, with the rights of the other parent).

In the case of a parent's request to move abroad with the child – the Court of Cassation stated – the Judge must evaluate two conflicting sets of principles, rights and interests, both of constitutional importance.

On the one hand, the parent's right to move abroad, as an expression of his/her freedom of movement (article 16 of the Italian Constitution), and also as a facet of his/her right to personal self-realisation (articles 2 and 3 of the Italian Constitution). Also, within the EU, there is the right of every EU-citizen to move abroad freely (EU Treaties recognising this freedom have constitutional status within the Italian legal system, according to article 117 of the Constitution).

On the other hand, the child's best interest, which also implies his/her right to preserve a significant relation with the other parent, and therefore his/her right to be free from any disproportionate intervention of the State authorities (such as a judicial decision) that can negatively affect his/her right to the respect of private and family life (article 8 of the ECHR, with negative and positive duties for the State).

In the specific case decided by the Court of Cassation, the opportunity for the parent to find a better job, a more satisfying social environment and a stabler family life – when moving from Italy back to the native Country – were seen as constitutionally protected rights.

However, according to the Court's reasoning in the decision, those instances and rights are referred to the adult, but do not take into consideration the child's perspective. The child's right to maintain his/her stable social and family environment, and his/her positive relation with the other parent (when, as in the case, it was seen as positive for the evolution of the child), are prevailing reasons that can lead to deny the authorisation to move abroad.

Permission to remove children abroad

Nina Wölfer
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IAFL Milan March 2019

1

Legal Basis I

- Section 1626 para.1 German Civil Code (BGB)

  „The parents have the duty and the right to care for the minor child (parental custody). The parental custody includes the care for the person of the child (care for the person of the child) and the property of the child (care for the property of the child).“

- Section 1631 para 1 German Civil Code (BGB)

  The „right to determine the residence of the child“(Aufenthaltsbestimmungsrecht) is part of the „care for the person of the child“

2

Legal Basis II

- Married parents: joint parental responsibility
- Unmarried parents: Section 1626a para. 1 German Civil Code:

  „Where the parents, at the date of the birth of the child, are not married to one another, they have joint parental custody

  1. if they declare that they wish to take on parental custody jointly (declarations of parental custody),
  2. if they marry one another, or
  3. if the family court transfers joint parental custody to them.“

3

Planning to move abroad

- Consent from the other parent required – both if he/she wants to move within Germany and abroad
- Without consent: ask the family court for permission, i.e. for transfer of sole custody concerning the „right to determine the residence of the child“ (no special relocation proceedings) or only transfer of the decision to remove to the parent (without granting her/him the right to determine the residence for all future decisions)

4

Planning to move abroad

- When parents have different opinions and ideas of where the child shall live and grow, there is a conflict between

the wish of one parent to relocate

the wish of the other parent to keep the child without reduction of contact

- The family court has to decide which of the parents it deems more able to decide „in the best interest of the child“ (see section 1671 Nr. 1 German Civil Code (BGB))

5

Criteria for a court decision

Leading Decision („Mexico Decision“) BGH (German Federal Court of Justice) 28.04.2010 – XII ZB 81/09

The case: Mother (primary carer since separation) wanted to move to Mexico to her new partner who lived and worked there, father wanted to keep the child in Germany

- The constitutional right of general freedom of action allows the parent who wishes to relocate to do so, i.e. the court cannot force this parent to remain in Germany even if this might be in the best interest of the child
- There is a conflict between the parents concerning the constitutional right of “care and upbringing of children”, which is granted to both parents

6

Criteria for a court decision

Pro:

- „Child-centred“ reason for moving to the country (for example country of origin, close bond to family living there, child speaks the language etc.)
- Length of the stay: Expat or permanent?
- School/day care for the child
- Close bond between child and parent who wants to move: Is he/she the primary carer?
- Contact agreement with the left behind parent – how shall contact be granted?
- New job/career can only be a reason if this brings some benefit for the child an is therefore in his/her best interest

7

Criteria for a court decision

Con:

- Close bond to the left behind parent – is he/she primary carer or do the parents share custody/ live joint residency
- Danger of losing contact to the remaining parent and his relatives in case of moving abroad
- Close bonds to friends and family in Germany
- School, sports, social environment
- Wish of the child to stay in Germany

8

Criteria for a court decision

- The older the child, the more important his/her desire and opinion become
- German family courts tend to ask for an expert opinion (often psychologist) before making their final decision when it comes to moving to another country, which means it takes months before the final decision is made

9

Enforcement I

- Foreign decision in Germany:
  Artts. 21ff. Brussels IIbis or Art. 23 Hague Convention 1996 or Section 108, 109, 110 German Family Procedure Code (FamFG)
  all referring to Section 86 following German Family Procedure Code (FamFG):
  - fine
  - no force against a child when it comes to access, but force against a child, if the child is to be handed over to the other parent
  - youth authorities have to be present

10

Enforcement II

- German decision abroad
- Art. 39 Brussels IIbis - Certificate concerning judgments in matrimonial matters and certificate concerning judgments on parental responsibility:
- Annex II Brussels IIbis – it is the clerk of the court who issues the certificate

11

Conclusion

- The court has to consider whether it is better for the child to move with parent A to country X or to remain with parent B in Germany
- The closer the relationship between the child and both parents (especially the left-behind parent) is, the more difficult it becomes to relocate
- It is very difficult to oppose the wish of the main carer to relocate, especially if the child is small

12

FRIDAY: Presentation by IAFL European Chapter Young Lawyers Award Winner

The Commmission proposal to review the Brussels II Revised regulation

Rule on Choice-of-Court Agreements in the light of the proposals to review the Brussels II*a* Regulation

Mgr. Lenka Válková

Art. 12 of the Brussels II*a* Regulation provides for a rule on the prorogation of jurisdiction concerning parental responsibility. The aim of the provision is not only to ensure legal certainty and predictability, but also to allow consolidation of proceedings and to reduce the costs, which may be caused by simultaneous proceedings in different Member States.[1] The prorogation of jurisdiction does not represent an exclusive ground of jurisdiction, which would produce the negative effect of depriving the jurisdiction of all other Member States court under the Brussels II*a* Regulation.[2] The discretionary power of the Member State court when evaluating the best interest of the child suggests non-exclusivity,[3] flexibility, and non-binding effect[4] on the prorogued Member State court.

Rule on choice-of-court agreements in parental responsibility matters was for the first time introduced in Art. 3(2) of the Brussels II Convention[5], inspired by Art. 10(1) of the 1996 Hague Convention on parental responsibility and protection of children.[6] In contrast to the Brussels II Convention and the Brussels II Regulation,[7] Art. 12(3) of the Brussels II*a* Regulation guarantees the non-discriminatory treatment of both marital children and children born out of the marriage.[8] In 2016 the Commission presented the Proposal, which suggested minor

[1] E. PATAUT, E. GALLANT, *Article 12*, in U. MAGNUS, P. MANKOWSKI,(eds), Brussels IIbis Regulation: 2017, European Commentaries on Private International Law, Otto Schmidt, Sellier European Law Publishers, 2017, p. 151; C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in C. HONORATI (ed), Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction: A Handbook on the Application of Brussels II-*a* Regulation in National Courts, Giappichelli, 2017, p. 186.

[2] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 187, 195. See also General Approach, where once the parties have accepted the jurisdiction expressly in the course of the proceedings, such jurisdiction shall be exclusive.

[3] E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 153.

[4] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 194.

[5] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters - Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221, 16 July 1998, ("Brussels II Convention").

[6] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996.

[7] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30 June 2000.

[8] ECJ, Case C-656/13, *L v. M*, 12 November 2014, ECLI:EU:C:2014:2364, par. 50.

modifications regarding the text of Art. 12 of the Brussels II*a* Regulation,[9] taking into the consideration interpretation provided by the ECJ.[10] However, in December 2018, the Council of the EU has reached General Approach concerning the Commission Proposal, where the rule on choice-of-court seems to be significantly changed.[11]

In the first place, it is necessary to pay attention to a new wording of Art. 10a of General Approach, which modifies the structure of Art. 12 of the Brussels II*a* Regulation and abolishes the distinction between "two types" of choice-of-court. Art. 12(1) of the Brussels II*a* Regulation allows concentration of parental responsibility proceedings with divorce, separation, or marriage annulment proceedings and Art. 12(3) lays down the rule on the prorogation of jurisdiction in proceedings other than those referred to in paragraph 1. It was discussed whether the latter paragraph should enable concentration of the proceedings other than the proceedings concerning divorce, separation, or marriage annulment,[12] or, if this provision permits seizing a Member State court in the autonomous proceedings.[13] According to ECJ in case C-656/13, only the interpretation, allowing the application of Art. 12(3) of the Brussels II*a* Regulation even where no other proceedings are pending before the court chosen, guarantees that the objectives pursued by the Brussels II*a* Regulation are respected.[14] Art. 10(3) of the Commission's Proposal eliminates any doubts in this regards by removing the wording in the text "*proceedings other than those referred to in paragraph 1*". Even more, as indicated above, the text of new Art. 10a of the General Approach unifies two rules on choice-of-court by providing that the courts of a Member State shall have jurisdiction where (i) the child has a substantial connection with that Member State, (ii) the parties and any other holder of parental responsibility have agreed (accepted) upon the jurisdiction; and (iii) exercise of jurisdiction is in the best interests of the child. According to General Approach, the possibility of concentration of jurisdiction in divorce, separation, or marriage annulment upon fulfilment of specific requirements, as

[9] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM/2016/0411 final, 30 June 2016 ("Commission's Proposal").
[10] See for example, ECJ, Case C-436/13, *E. v. B.*, 1 October 2014, ECLI:EU:C:2014:2246 as to the limitation of time concerning the effects of the agreement according to Article 12(3) of the Brussels IIa Regulation; Case C-656/13, *L v. M* as to autonomous proceedings according to Article 12(3) of the Brussels IIa Regulation.
[11] The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018 ("General Approach").
[12] On this strict interpretation see B. ANCEL, H. MUIR WATT, *L'intérêt supérieur de l'enfant dans le concert des jurisdictions: Le Règlement de Bruxelles II Bis*, Revue critique de droit international privé, (2005), p. 588, where this provision should serve as an extension of other proceedings which based jurisdiction on Article 7 of the Brussels II*a* Regulation (residual basis). Other interpretations would lead to the threat of operation of Article 15 of the Brussels II*a* Regulation.
[13] On the interpretation supporting extensive interpretation see E. GALLANT, *Responsabilité parentale et protection des enfants en droit international*, Defrenois, 2004, p. 132.
[14] ECJ, Case C-656/13, *L v. M*, par. 45, 47, 50.

provided in Art. 12(1) of the Brussels IIa Regulation, remains still possible in virtue of new Recital.[15] In other words, pending divorce, separation, or marriage annulment proceedings would not represent a special type of jurisdiction agreement, but each of the jurisdictional grounds listed in Art. 3 of the Brussels II*a* Regulation may be perceived as a substitution for the condition of the substantial connection.[16] However, due to a sharp critique of Art. 3 of the Brussels II*a* Regulation, which opens the door for abusive procedural tactics,[17] such substantial connection may still leave an inevitable question. Moreover, although new Art. 10a(1)(a) of General Approach maintains *status quo* as to the non-exhaustive list of substantial connections, it encompasses expressly another factor which could be newly taken into consideration: former habitual residence of the child.

In the second place, attention must be drawn to subjects to the agreement. Art. 12(1) of the Brussels II*a* Regulation requires an agreement between the spouses (where at least one of the spouses must have parental responsibility in relation to the child), which are parties to divorce, separation, or marriage annulment proceedings according to Art. 3 of the Brussels II*a*

[15] See new Recital in the General Approach, which should be added: "*Under specific conditions laid down by this Regulation, jurisdiction in matters of parental responsibility might also be established in a Member State where proceedings for divorce, legal separation or marriage annulment are pending between the parents, or in another Member State with which the child has a substantial connection and which the parties have either agreed upon in advance, at the latest at the time the court is seised, or accepted expressly in the course of those proceedings, where the law of that Member State so provides, even if the child is not habitually resident in that Member State, provided that the exercise of such jurisdiction is in the best interests of the child*." The concentration of jurisdiction is convenient mainly in the Member States, where it is common that the court deciding over divorce, legal separation, or marriage annulment of the spouses has jurisdiction to decide over the parental responsibility too, for example, in Slovakia. According to the Slovak law, matters relating to divorce, maintenance, and parental responsibility must be decided in unique proceedings (Article 24, par. 1 of the Act No 36/2005 Coll. on Family law and Article 100 of Act No 161/2015 on Civil Procedure). By virtue of EU legal instruments in family matters prevailing over the national law rules, the Slovak courts are often obliged to exclude certain matters (parental responsibility, maintenance etc.) from a single hearing although separation of proceedings from unique family proceedings is in not known to Slovak law. The case law demonstrates that the national courts still face with the problems regarding the "division" of the proceedings in divorce and parental responsibility. See for example *Krajský súd Bratislava*, 30 September 2011, 5 Co 414/2011.

[16] On the similar conclusion already as to Article 12(1) of the Brussels IIa Regulation see E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 155.

[17] See *Agata Rapisarda v Ivan Colladon* [2014] EWFC 35. This English case concerned 180 cases of fraudulent forum shopping. A party in each case utilised the same address in the UK owned by an Italian company in order to obtain jurisdiction for divorce in England. All the divorces were declared void. See also *CC v NC* [2014] EWHC 703 (Fam); *Wai FoonTan v Weng Kean Choy* [2014] EWCA Civ 251; *W Husband v W Wife* [2010] EWHC 1843 (Fam); *E v E* [2015] EWHC 3742 (Fam); *EA v AP* [2013] EWHC 2344 (Fam). On the forum shopping in family matters see: ECJ, Case C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, 16 July 2009, ECLI:EU:C:2009:474, par. 57; M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, Oxford University Press, 2010, pp. 149; J. MEEUSEN, *System shopping in European private international law in family matters*, in J. MEEUSEN, M. PERTEGAS, G. STRAETMANS, F. SWENNEN (eds), International Family Law for the European Union, Intersentia, 2007, pp. 239; N. DENTHLOFF, *Arguments for the Unification and Harmonisation of Family Law in Europe*, in K. BOELE-WOELKI, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia, 2003, p. 51. On the possibility of *forum shopping* which should be resolved by the new regulation see: See A. BORRÁS, *From Brussels II to Brussels II bis and Further*, in K. BOELE-WOELKI, C. GONZÁLEZ BEILFUSS (eds), Brussels II bis: Its Impact and Application in the Member States European Family Law Series No 14, Intersentia, 2007, p 8.

Regulation. Where one of the holders of the parental responsibility is not subject to the proceedings according to Art. 3, the provision requires an additional agreement also with a holder of the parental responsibility.[18] Contrarily, Art. 12(3) of the Brussels II*a* Regulation provides that the jurisdiction of the Member State courts must be accepted expressly or otherwise by all the parties to the proceedings. Who is party to the proceedings should be determined by the national law.[19] General Approach introduces a mix of these two paragraphs regarding subjects to such agreement: the parties, as well as any other holder of parental responsibility, must agree (or accept) upon the jurisdiction. In consequence, such parties may be spouses of the proceedings according to Art. 3 of the Brussels II*a* Regulation, or parties different to spouses in other proceedings, who would be determined by the national law.

The most significant doubts in the context of Art. 12 of the Brussels II*a* Regulation concern the question regarding (i) time of seising a Member State court, *i.e.*, whether the parties are able to agree on a Member State court prior to the institution of proceedings or after the commencement of the proceedings;[20] and (ii) acceptance made "otherwise in an unequivocal manner", *i.e.,* if it covers tacit acceptance and submission by appearance.[21] Art. 10 of the Commission Proposal

[18] However, certain linguistic versions suggest that is necessary either the agreement between the spouses or the agreement between the holders of parental responsibility (Spanish and German versions). On the other hand, other linguistic versions provide for the wording "and", where both agreements are required (English, French, and Italian versions). The Proposal for a Recast of the Brussels II*a* Regulation, as well as other subsequent proposals of the European Parliament, do not offer any answer - the linguistic versions are still different (compare English, French, and Italian version with German and Spanish versions).

[19] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 191. See also ECJ, Case C-565/16, *Alessandro Saponaro and Kalliopi-Chloi Xylina*, 19 April 2018, ECLI:EU:C:2018:265, par. 26. The ECJ, referring to the Opinion of Advocate General Tanchev, decided that a prosecutor who, according to the national law, has the capacity of a party to the proceedings commenced by the parents, is a party to the proceedings within the meaning of Article 12(3)(b) of the Brussels IIa Regulation, since the "*EU legislature thus took care to use a term that encompassed all the parties to the proceedings, within the meaning of national law*".

[20] Article 12 of the Brussels IIa Regulation provides that the parties need to agree on a Member State court at the time the court is seized. According to Article 16 of the Brussels IIa Regulation, a Member State court shall be deemed to be seized at the time when the document instituting the proceedings is lodged with the court. The English case, *I (A Child),* [2009] UKSC 10, [35], has demonstrated the difficulties with the interpretation of the English version (as well as with the Italian, Spanish and French versions) of the wording "at the time is seized", in particular if it can be interpreted as that the jurisdiction of the courts has been accepted at any time after the proceedings had begun. It was concluded that: *"…the diversity of views expressed by this court indicates that the interpretation is not acte clair and may have to be the subject of a reference to the European Court of Justice in another case. But I would favour an interpretation which catered both for a binding acceptance before the proceedings began and for an unequivocal acceptance once they had begun*."

[21] The ECJ has tackled the issue in several judgments. It can be deduced from the ECJ case-law that: a) The acceptance cannot be limited to the "time when the document instituting the proceedings is lodged with the court" by virtue of Article 16 of Brussels II*a* Regulation, but it covers party's conduct that took place later, see ECJ, Case C-656/13, *L v. M*, par. 19, 21, 28; Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev, par. 60; b) By analogy it is possible to make a reference to Article 24 of the Brussels I Regulation (Article 26 of the Brussels I*bis* Regulation) determining the tacit prorogation see case C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*, 21 October 2015, ECLI:EU:C:2015:710, par. 42; c) The agreement of the party may be regarded as implicit in the absence of opposition after the date on which the court was seized, whereby opposition precludes the acceptance of the prorogation of jurisdiction, see case C-565/16, *Alessandro Saponaro*, par. 32.

reacts to this doubt by providing that the jurisdiction of Member State court must be accepted "*at the latest the court is seized, or, where the law of that Member State so provides, during those proceedings*". In a case, where the jurisdiction is accepted during the proceedings, the agreement must be recorded in court in accordance with its national law.[22] The question is whether the wording "to be recorded" implies tacit prorogation where entering into proceedings without contesting jurisdiction may be merely recorded in any form in accordance with the law of the seized Member State court, or if a specific agreement by the parties registered in front of the Member State court would be necessary. General Approach even more, clarifies this problem by specifying that (i) the agreement should be made at the latest at the time the court is seised; or (ii) *express* acceptance of the jurisdiction is required in the course of those proceedings, which must be expressed in writing, dated and signed or included in the court record in accordance with national law and procedure, whereby all the parties must be informed of their right not to accept the jurisdiction. It appears that the General Approach rejects any possibility of assuming jurisdiction on the basis of submission by entering an appearance. Conversely, paragraph 1a enjoys a legal presumption of implicit agreement in case of absence of the opposition of a person who became a party to the proceedings after the court was seized as already interpreted by the ECJ in case C-565/16, *Alessandro Saponaro*.[23]

However, a problem regarding *ex ante* agreement for parental responsibility may still arise, where the parties may agree on the jurisdiction of a court, which will have jurisdiction for divorce, separation, or marriage annulment according to Art. 3 of the Brussels II*a* Regulation. Although this agreement may benefit the parties who wish to concentrate the proceedings relating to divorce, separation, or marriage annulment with the proceedings relating parental responsibility, due to the absence of a rule on choice-of-court relative to divorce, separation, or

[22] See C. HONORATI, *La proposta di revisione del regolamento Bruxelles IIbis: più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, Rivista di diritto internazionale privato e processuale, (2017), p. 255, where according to the author the procedural conduct of the party, which neither explicitly accepts the jurisdiction or contests the jurisdiction, but requests parental responsibility in the petition filed upon the court in the divorce proceedings, cannot be in virtue of this new wording in the Commission's Proposal understood as implicit acceptation.
[23] ECJ, Case C-565/16, *Alessandro Saponaro*, par. 32

marriage annulment,[24] it creates impossibility to predict which court will assume jurisdiction. It may, even more, encourage a "rush to court".[25]

Lastly, particularly one amendment in the General Approach must be highlighted as to protection of the weaker parties. Article 12 of the Brussels II*a* Regulation does not contain any rule on the substantive validity of the choice-of-court agreement. However, it must be borne in mind that Article 12 of the Brussels II*a* Regulation does not produce the negative effect of depriving the jurisdiction of other Member States courts.[26] This has two consequences. First, the previous agreement which would be concluded in mistake, fraud, or duress does not preclude the weaker party from seizing a Member State of the place of habitual residence of the child. Second, such a seized Member State court does not examine the substantive validity of the jurisdiction agreement, since the agreement is not effective for any other Member State court other than the designated one. Therefore, the substantive validity may be assessed only

[24] There was a large number of discussions concerning the introduction of the rule on the choice-of-court agreement in divorce, legal separation, and marriage annulment into the Brussels II*a* Regulation; a number of studies, reports, impact assessments and projects concerned this issue. See for example: Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters, Draft Final Report to the European Commission DG Justice, Freedom and Security, European Policy Evaluation Consortium, 2006; Commission Staff Working Document. Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Impact Assessment, SEC(2006) 949, 17 July 2006; EU Commission, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report: evaluation – Study. Study conducted by Deloitte, 2015, available at: https://publications.europa.eu/en/publication-detail/-/publication/463a5c10-9149-11e8-8bc1-01aa75ed71a1/language-en/format-PDF/source-73782761; Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016; Project 'Planning the future of cross-border families: a path through coordination' (EUFam's), co-funded by the Directorate-General for Justice and Consumers of the European Commission (JUST/2014/JCOO/AG/CIVI/7729) available at: http://www.eufams.unimi.it/project/; Project 'Cross-Border Proceedings in Family Law Matters before National Courts and CJEU', funded by the European Commission's Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722) available at: http://www.asser.nl/projects-legal-*a*dvice/cross-border-proceedings-in-family-law-matters-before-national-courts-*a*nd-cjeu/. Article 3a of the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006)0399 final, 17 July 2006 contained a new rule on the choice-of-court agreement in divorce or legal separation. The never-accepted, proposed rule on the choice-of-court agreements in divorce or legal separation did not meet with unconditional approval. T. M. DE BOER, *What we should not expect from a recast of the Brussels IIbis Regulation*, in Nederlands Internationaal Privaatrecht (2015), p. 11. In 2016, the Commission processed the various options in order to improve the current rules laid down in the Brussels II*a* Regulation. Commission compared the options and found out that "*the existing rules have proven to work to a large extent satisfactorily, and the drawbacks of the other options make them currently not feasible or desirable*." See Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 23.

[25] On the same considerations see F. C. Villata, L. Válková, EUFam's Model Choice-of-Court and Choice-of-Law Clauses, available at: http://www.eufams.unimi.it/2017/12/27/model-clauses/, p. 42-45.

[26] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, *op. cit.*, p. 187, 194, 195.

by the seized designated Member State court (i) only in the light of the considerations connected with the requirements laid down in Article 12 of the Brussels II*a* Regulation[27] - such a conclusion would lead to the impossibility of examining substantive validity which seems even more essential element in family matters with a weaker party; (ii) conflict-of-laws rules (of the designated Member State court) in virtue of the new rule on substantive validity introduced into Article 25 of the Brussels I-*bis* Regulation;[28] or (iii) by the *lex fori*, which always means the law of the designated Member State court. Although the General Approach newly suggests exclusivity of the agreement in the situation where all parties have already accepted the jurisdiction expressly in the course of the proceedings, it practically does not introduce an amendment. It is possible to imagine that the Member State court A is first seized and the second seized Member State court B establishes its jurisdiction on the basis of the (exclusive) agreement of the parties under Article 10a(1)(b)(ii) of the General Approach in the course of its proceedings (for example, where the *lis pendens* would not be known to the Member State court B). In such a case, the decision as to the jurisdiction of the Member State B would be binding on the Member State court A and the Member State court A would not be entitled to examine substantive validity of the acceptance of the parties in the course of the proceedings in front of the Member State court B.[29] Although none of the proposals have contained any rule on substantive validity, one significant modification in the General Approach strengthen the position of the weaker party: a court must newly ascertain, that the previous agreement or acceptance in the course of the proceedings was based on an informed and free choice of the parties and was not a result of one party taking advantage of the predicament or weak position of the other party in the light of Art. 10a(1)(b) and new Recital of the General Approach.[30]

The General Approach as to Art. 10a determining choice-of-court must be in generally evaluated positively - it makes an effort to clarify most of the problems which may arise during the application of this provision and which still seem to be unclear. However, it is regrettable that it was not proposed to tackle the issue on the rule on choice-of-court agreements relative

[27] As stated by the ECJ in the context of the Brussels Convention. See ECJ, Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, 16 March 1999, ECLI:EU:C:1999:142, par. 49.
[28] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 December 2012 ("Brussels I*bis* Regulation).
[29] ECJ, Case C-456/11, *Gothaer Allgemeine Versicherung AG et al v Sampskip*, 15 November 2012, EU:C:2012:719.
[30] A new Recital should be added: "*Before exercising its jurisdiction based on a choice of court agreement or acceptance the court should examine whether this agreement or acceptance was based on an informed and free choice of the parties concerned and not a result of one party taking advantage of the predicament or weak position of the other party. The acceptance of the jurisdiction in the course of the proceedings should be recorded by the court in accordance with national law and procedure*.".

to divorce, separation, or marriage annulment in the proposals, which may still create a problem also in the context of the *ex ante* choice-of-court agreements relative to parental responsibility.

Rule on Choice-of-Court Agreements in the light of the proposals to review the Brussels II*a* Regulation

Mgr. Lenka Válková

Art. 12 of the Brussels II*a* Regulation provides for a rule on the prorogation of jurisdiction concerning parental responsibility. The aim of the provision is not only to ensure legal certainty and predictability, but also to allow consolidation of proceedings and to reduce the costs, which may be caused by simultaneous proceedings in different Member States.[1] The prorogation of jurisdiction does not represent an exclusive ground of jurisdiction, which would produce the negative effect of depriving the jurisdiction of all other Member States court under the Brussels II*a* Regulation.[2] The discretionary power of the Member State court when evaluating the best interest of the child suggests non-exclusivity,[3] flexibility, and non-binding effect[4] on the prorogued Member State court.

Rule on choice-of-court agreements in parental responsibility matters was for the first time introduced in Art. 3(2) of the Brussels II Convention[5], inspired by Art. 10(1) of the 1996 Hague Convention on parental responsibility and protection of children.[6] In contrast to the Brussels II Convention and the Brussels II Regulation,[7] Art. 12(3) of the Brussels II*a* Regulation guarantees the non-discriminatory treatment of both marital children and children born out of the marriage.[8] In 2016 the Commission presented the Proposal, which suggested minor

[1] E. PATAUT, E. GALLANT, *Article 12*, in U. MAGNUS, P. MANKOWSKI,(eds), Brussels IIbis Regulation: 2017, European Commentaries on Private International Law, Otto Schmidt, Sellier European Law Publishers, 2017, p. 151; C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in C. HONORATI (ed), Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction: A Handbook on the Application of Brussels II-*a* Regulation in National Courts, Giappichelli, 2017, p. 186.

[2] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 187, 195. See also General Approach, where once the parties have accepted the jurisdiction expressly in the course of the proceedings, such jurisdiction shall be exclusive.

[3] E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 153.

[4] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 194.

[5] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters - Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221, 16 July 1998, ("Brussels II Convention").

[6] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996.

[7] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30 June 2000.

[8] ECJ, Case C-656/13, *L v. M*, 12 November 2014, ECLI:EU:C:2014:2364, par. 50.

modifications regarding the text of Art. 12 of the Brussels II*a* Regulation,[9] taking into the consideration interpretation provided by the ECJ.[10] However, in December 2018, the Council of the EU has reached General Approach concerning the Commission Proposal, where the rule on choice-of-court seems to be significantly changed.[11]

In the first place, it is necessary to pay attention to a new wording of Art. 10a of General Approach, which modifies the structure of Art. 12 of the Brussels II*a* Regulation and abolishes the distinction between "two types" of choice-of-court. Art. 12(1) of the Brussels II*a* Regulation allows concentration of parental responsibility proceedings with divorce, separation, or marriage annulment proceedings and Art. 12(3) lays down the rule on the prorogation of jurisdiction in proceedings other than those referred to in paragraph 1. It was discussed whether the latter paragraph should enable concentration of the proceedings other than the proceedings concerning divorce, separation, or marriage annulment,[12] or, if this provision permits seizing a Member State court in the autonomous proceedings.[13] According to ECJ in case C-656/13, only the interpretation, allowing the application of Art. 12(3) of the Brussels II*a* Regulation even where no other proceedings are pending before the court chosen, guarantees that the objectives pursued by the Brussels II*a* Regulation are respected.[14] Art. 10(3) of the Commission's Proposal eliminates any doubts in this regards by removing the wording in the text "*proceedings other than those referred to in paragraph 1*". Even more, as indicated above, the text of new Art. 10a of the General Approach unifies two rules on choice-of-court by providing that the courts of a Member State shall have jurisdiction where (i) the child has a substantial connection with that Member State, (ii) the parties and any other holder of parental responsibility have agreed (accepted) upon the jurisdiction; and (iii) exercise of jurisdiction is in the best interests of the child. According to General Approach, the possibility of concentration of jurisdiction in divorce, separation, or marriage annulment upon fulfilment of specific requirements, as

[9] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM/2016/0411 final, 30 June 2016 ("Commission's Proposal").
[10] See for example, ECJ, Case C-436/13, *E. v. B.*, 1 October 2014, ECLI:EU:C:2014:2246 as to the limitation of time concerning the effects of the agreement according to Article 12(3) of the Brussels IIa Regulation; Case C-656/13, *L v. M* as to autonomous proceedings according to Article 12(3) of the Brussels IIa Regulation.
[11] The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018 ("General Approach").
[12] On this strict interpretation see B. ANCEL, H. MUIR WATT, *L'intérêt supérieur de l'enfant dans le concert des jurisdictions: Le Règlement de Bruxelles II Bis*, Revue critique de droit international privé, (2005), p. 588, where this provision should serve as an extension of other proceedings which based jurisdiction on Article 7 of the Brussels II*a* Regulation (residual basis). Other interpretations would lead to the threat of operation of Article 15 of the Brussels II*a* Regulation.
[13] On the interpretation supporting extensive interpretation see E. GALLANT, *Responsabilité parentale et protection des enfants en droit international*, Defrenois, 2004, p. 132.
[14] ECJ, Case C-656/13, *L v. M*, par. 45, 47, 50.

provided in Art. 12(1) of the Brussels IIa Regulation, remains still possible in virtue of new Recital.[15] In other words, pending divorce, separation, or marriage annulment proceedings would not represent a special type of jurisdiction agreement, but each of the jurisdictional grounds listed in Art. 3 of the Brussels II*a* Regulation may be perceived as a substitution for the condition of the substantial connection.[16] However, due to a sharp critique of Art. 3 of the Brussels II*a* Regulation, which opens the door for abusive procedural tactics,[17] such substantial connection may still leave an inevitable question. Moreover, although new Art. 10a(1)(a) of General Approach maintains *status quo* as to the non-exhaustive list of substantial connections, it encompasses expressly another factor which could be newly taken into consideration: former habitual residence of the child.

In the second place, attention must be drawn to subjects to the agreement. Art. 12(1) of the Brussels II*a* Regulation requires an agreement between the spouses (where at least one of the spouses must have parental responsibility in relation to the child), which are parties to divorce, separation, or marriage annulment proceedings according to Art. 3 of the Brussels II*a*

[15] See new Recital in the General Approach, which should be added: "*Under specific conditions laid down by this Regulation, jurisdiction in matters of parental responsibility might also be established in a Member State where proceedings for divorce, legal separation or marriage annulment are pending between the parents, or in another Member State with which the child has a substantial connection and which the parties have either agreed upon in advance, at the latest at the time the court is seised, or accepted expressly in the course of those proceedings, where the law of that Member State so provides, even if the child is not habitually resident in that Member State, provided that the exercise of such jurisdiction is in the best interests of the child*." The concentration of jurisdiction is convenient mainly in the Member States, where it is common that the court deciding over divorce, legal separation, or marriage annulment of the spouses has jurisdiction to decide over the parental responsibility too, for example, in Slovakia. According to the Slovak law, matters relating to divorce, maintenance, and parental responsibility must be decided in unique proceedings (Article 24, par. 1 of the Act No 36/2005 Coll. on Family law and Article 100 of Act No 161/2015 on Civil Procedure). By virtue of EU legal instruments in family matters prevailing over the national law rules, the Slovak courts are often obliged to exclude certain matters (parental responsibility, maintenance etc.) from a single hearing although separation of proceedings from unique family proceedings is in not known to Slovak law. The case law demonstrates that the national courts still face with the problems regarding the "division" of the proceedings in divorce and parental responsibility. See for example *Krajský súd Bratislava*, 30 September 2011, 5 Co 414/2011.

[16] On the similar conclusion already as to Article 12(1) of the Brussels IIa Regulation see E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 155.

[17] See *Agata Rapisarda v Ivan Colladon* [2014] EWFC 35. This English case concerned 180 cases of fraudulent forum shopping. A party in each case utilised the same address in the UK owned by an Italian company in order to obtain jurisdiction for divorce in England. All the divorces were declared void. See also *CC v NC* [2014] EWHC 703 (Fam); *Wai FoonTan v Weng Kean Choy* [2014] EWCA Civ 251; *W Husband v W Wife* [2010] EWHC 1843 (Fam); *E v E* [2015] EWHC 3742 (Fam); *EA v AP* [2013] EWHC 2344 (Fam). On the forum shopping in family matters see: ECJ, Case C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, 16 July 2009, ECLI:EU:C:2009:474, par. 57; M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, Oxford University Press, 2010, pp. 149; J. MEEUSEN, *System shopping in European private international law in family matters*, in J. MEEUSEN, M. PERTEGAS, G. STRAETMANS, F. SWENNEN (eds), International Family Law for the European Union, Intersentia, 2007, pp. 239; N. DENTHLOFF, *Arguments for the Unification and Harmonisation of Family Law in Europe*, in K. BOELE-WOELKI, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia, 2003, p. 51. On the possibility of *forum shopping* which should be resolved by the new regulation see: See A. BORRÁS, *From Brussels II to Brussels II bis and Further*, in K. BOELE-WOELKI, C. GONZÁLEZ BEILFUSS (eds), Brussels II bis: Its Impact and Application in the Member States European Family Law Series No 14, Intersentia, 2007, p 8.

Regulation. Where one of the holders of the parental responsibility is not subject to the proceedings according to Art. 3, the provision requires an additional agreement also with a holder of the parental responsibility.[18] Contrarily, Art. 12(3) of the Brussels II*a* Regulation provides that the jurisdiction of the Member State courts must be accepted expressly or otherwise by all the parties to the proceedings. Who is party to the proceedings should be determined by the national law.[19] General Approach introduces a mix of these two paragraphs regarding subjects to such agreement: the parties, as well as any other holder of parental responsibility, must agree (or accept) upon the jurisdiction. In consequence, such parties may be spouses of the proceedings according to Art. 3 of the Brussels II*a* Regulation, or parties different to spouses in other proceedings, who would be determined by the national law.

The most significant doubts in the context of Art. 12 of the Brussels II*a* Regulation concern the question regarding (i) time of seising a Member State court, *i.e.*, whether the parties are able to agree on a Member State court prior to the institution of proceedings or after the commencement of the proceedings;[20] and (ii) acceptance made "otherwise in an unequivocal manner", *i.e.,* if it covers tacit acceptance and submission by appearance.[21] Art. 10 of the Commission Proposal

[18] However, certain linguistic versions suggest that is necessary either the agreement between the spouses or the agreement between the holders of parental responsibility (Spanish and German versions). On the other hand, other linguistic versions provide for the wording "and", where both agreements are required (English, French, and Italian versions). The Proposal for a Recast of the Brussels II*a* Regulation, as well as other subsequent proposals of the European Parliament, do not offer any answer - the linguistic versions are still different (compare English, French, and Italian version with German and Spanish versions).

[19] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, *op. cit.*, p. 191. See also ECJ, Case C-565/16, *Alessandro Saponaro and Kalliopi-Chloi Xylina*, 19 April 2018, ECLI:EU:C:2018:265, par. 26. The ECJ, referring to the Opinion of Advocate General Tanchev, decided that a prosecutor who, according to the national law, has the capacity of a party to the proceedings commenced by the parents, is a party to the proceedings within the meaning of Article 12(3)(b) of the Brussels IIa Regulation, since the "*EU legislature thus took care to use a term that encompassed all the parties to the proceedings, within the meaning of national law*".

[20] Article 12 of the Brussels IIa Regulation provides that the parties need to agree on a Member State court at the time the court is seized. According to Article 16 of the Brussels IIa Regulation, a Member State court shall be deemed to be seized at the time when the document instituting the proceedings is lodged with the court. The English case, *I (A Child),* [2009] UKSC 10, [35], has demonstrated the difficulties with the interpretation of the English version (as well as with the Italian, Spanish and French versions) of the wording "at the time is seized", in particular if it can be interpreted as that the jurisdiction of the courts has been accepted at any time after the proceedings had begun. It was concluded that: *"…the diversity of views expressed by this court indicates that the interpretation is not acte clair and may have to be the subject of a reference to the European Court of Justice in another case. But I would favour an interpretation which catered both for a binding acceptance before the proceedings began and for an unequivocal acceptance once they had begun*."

[21] The ECJ has tackled the issue in several judgments. It can be deduced from the ECJ case-law that: a) The acceptance cannot be limited to the "time when the document instituting the proceedings is lodged with the court" by virtue of Article 16 of Brussels II*a* Regulation, but it covers party's conduct that took place later, see ECJ, Case C-656/13, *L v. M*, par. 19, 21, 28; Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev, par. 60; b) By analogy it is possible to make a reference to Article 24 of the Brussels I Regulation (Article 26 of the Brussels I*bis* Regulation) determining the tacit prorogation see case C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*, 21 October 2015, ECLI:EU:C:2015:710, par. 42; c) The agreement of the party may be regarded as implicit in the absence of opposition after the date on which the court was seized, whereby opposition precludes the acceptance of the prorogation of jurisdiction, see case C-565/16, *Alessandro Saponaro*, par. 32.

reacts to this doubt by providing that the jurisdiction of Member State court must be accepted "*at the latest the court is seized, or, where the law of that Member State so provides, during those proceedings*". In a case, where the jurisdiction is accepted during the proceedings, the agreement must be recorded in court in accordance with its national law.[22] The question is whether the wording "to be recorded" implies tacit prorogation where entering into proceedings without contesting jurisdiction may be merely recorded in any form in accordance with the law of the seized Member State court, or if a specific agreement by the parties registered in front of the Member State court would be necessary. General Approach even more, clarifies this problem by specifying that (i) the agreement should be made at the latest at the time the court is seised; or (ii) *express* acceptance of the jurisdiction is required in the course of those proceedings, which must be expressed in writing, dated and signed or included in the court record in accordance with national law and procedure, whereby all the parties must be informed of their right not to accept the jurisdiction. It appears that the General Approach rejects any possibility of assuming jurisdiction on the basis of submission by entering an appearance. Conversely, paragraph 1a enjoys a legal presumption of implicit agreement in case of absence of the opposition of a person who became a party to the proceedings after the court was seized as already interpreted by the ECJ in case C-565/16, *Alessandro Saponaro.*[23]

However, a problem regarding *ex ante* agreement for parental responsibility may still arise, where the parties may agree on the jurisdiction of a court, which will have jurisdiction for divorce, separation, or marriage annulment according to Art. 3 of the Brussels II*a* Regulation. Although this agreement may benefit the parties who wish to concentrate the proceedings relating to divorce, separation, or marriage annulment with the proceedings relating parental responsibility, due to the absence of a rule on choice-of-court relative to divorce, separation, or

[22] See C. HONORATI, *La proposta di revisione del regolamento Bruxelles IIbis: più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, Rivista di diritto internazionale privato e processuale, (2017), p. 255, where according to the author the procedural conduct of the party, which neither explicitly accepts the jurisdiction or contests the jurisdiction, but requests parental responsibility in the petition filed upon the court in the divorce proceedings, cannot be in virtue of this new wording in the Commission's Proposal understood as implicit acceptation.
[23] ECJ, Case C-565/16, *Alessandro Saponaro*, par. 32

marriage annulment,[24] it creates impossibility to predict which court will assume jurisdiction. It may, even more, encourage a "rush to court".[25]

Lastly, particularly one amendment in the General Approach must be highlighted as to protection of the weaker parties. Article 12 of the Brussels II*a* Regulation does not contain any rule on the substantive validity of the choice-of-court agreement. However, it must be borne in mind that Article 12 of the Brussels II*a* Regulation does not produce the negative effect of depriving the jurisdiction of other Member States courts.[26] This has two consequences. First, the previous agreement which would be concluded in mistake, fraud, or duress does not preclude the weaker party from seizing a Member State of the place of habitual residence of the child. Second, such a seized Member State court does not examine the substantive validity of the jurisdiction agreement, since the agreement is not effective for any other Member State court other than the designated one. Therefore, the substantive validity may be assessed only

[24] There was a large number of discussions concerning the introduction of the rule on the choice-of-court agreement in divorce, legal separation, and marriage annulment into the Brussels II*a* Regulation; a number of studies, reports, impact assessments and projects concerned this issue. See for example: Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters, Draft Final Report to the European Commission DG Justice, Freedom and Security, European Policy Evaluation Consortium, 2006; Commission Staff Working Document. Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Impact Assessment, SEC(2006) 949, 17 July 2006; EU Commission, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report: evaluation – Study. Study conducted by Deloitte, 2015, available at: https://publications.europa.eu/en/publication-detail/-/publication/463a5c10-9149-11e8-8bc1-01aa75ed71a1/language-en/format-PDF/source-73782761; Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016; Project 'Planning the future of cross-border families: a path through coordination' (EUFam's), co-funded by the Directorate-General for Justice and Consumers of the European Commission (JUST/2014/JCOO/AG/CIVI/7729) available at: http://www.eufams.unimi.it/project/; Project 'Cross-Border Proceedings in Family Law Matters before National Courts and CJEU', funded by the European Commission's Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722) available at: http://www.asser.nl/projects-legal-*a*dvice/cross-border-proceedings-in-family-law-matters-before-national-courts-*a*nd-cjeu/. Article 3a of the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006)0399 final, 17 July 2006 contained a new rule on the choice-of-court agreement in divorce or legal separation. The never-accepted, proposed rule on the choice-of-court agreements in divorce or legal separation did not meet with unconditional approval. T. M. DE BOER, *What we should not expect from a recast of the Brussels IIbis Regulation*, in Nederlands Internationaal Privaatrecht (2015), p. 11. In 2016, the Commission processed the various options in order to improve the current rules laid down in the Brussels II*a* Regulation. Commission compared the options and found out that "*the existing rules have proven to work to a large extent satisfactorily, and the drawbacks of the other options make them currently not feasible or desirable*." See Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 23.

[25] On the same considerations see F. C. Villata, L. Válková, EUFam's Model Choice-of-Court and Choice-of-Law Clauses, available at: http://www.eufams.unimi.it/2017/12/27/model-clauses/, p. 42-45.

[26] C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, *op. cit.*, p. 187, 194, 195.

by the seized designated Member State court (i) only in the light of the considerations connected with the requirements laid down in Article 12 of the Brussels II*a* Regulation[27] - such a conclusion would lead to the impossibility of examining substantive validity which seems even more essential element in family matters with a weaker party; (ii) conflict-of-laws rules (of the designated Member State court) in virtue of the new rule on substantive validity introduced into Article 25 of the Brussels I-*bis* Regulation;[28] or (iii) by the *lex fori*, which always means the law of the designated Member State court. Although the General Approach newly suggests exclusivity of the agreement in the situation where all parties have already accepted the jurisdiction expressly in the course of the proceedings, it practically does not introduce an amendment. It is possible to imagine that the Member State court A is first seized and the second seized Member State court B establishes its jurisdiction on the basis of the (exclusive) agreement of the parties under Article 10a(1)(b)(ii) of the General Approach in the course of its proceedings (for example, where the *lis pendens* would not be known to the Member State court B). In such a case, the decision as to the jurisdiction of the Member State B would be binding on the Member State court A and the Member State court A would not be entitled to examine substantive validity of the acceptance of the parties in the course of the proceedings in front of the Member State court B.[29] Although none of the proposals have contained any rule on substantive validity, one significant modification in the General Approach strengthen the position of the weaker party: a court must newly ascertain, that the previous agreement or acceptance in the course of the proceedings was based on an informed and free choice of the parties and was not a result of one party taking advantage of the predicament or weak position of the other party in the light of Art. 10a(1)(b) and new Recital of the General Approach.[30]

The General Approach as to Art. 10a determining choice-of-court must be in generally evaluated positively - it makes an effort to clarify most of the problems which may arise during the application of this provision and which still seem to be unclear. However, it is regrettable that it was not proposed to tackle the issue on the rule on choice-of-court agreements relative

[27] As stated by the ECJ in the context of the Brussels Convention. See ECJ, Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, 16 March 1999, ECLI:EU:C:1999:142, par. 49.
[28] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 December 2012 ("Brussels I*bis* Regulation).
[29] ECJ, Case C-456/11, *Gothaer Allgemeine Versicherung AG et al v Sampskip*, 15 November 2012, EU:C:2012:719.
[30] A new Recital should be added: "*Before exercising its jurisdiction based on a choice of court agreement or acceptance the court should examine whether this agreement or acceptance was based on an informed and free choice of the parties concerned and not a result of one party taking advantage of the predicament or weak position of the other party. The acceptance of the jurisdiction in the course of the proceedings should be recorded by the court in accordance with national law and procedure*.".

to divorce, separation, or marriage annulment in the proposals, which may still create a problem also in the context of the *ex ante* choice-of-court agreements relative to parental responsibility.

International Academy of Family Lawyers
European Chapter

FRIDAY SESSION 2

The Brand New EU Matrimonial Property Regulation: Expert Analysis

European Matrimonial Property Regulation

Prof. Dr Ian Sumner
21-22 March 2019, IAFL, Milan

1

Two new instruments

Two Regulations:

- Matrimonial Property Reg. (No. 2016/1103)
- Registered Property Reg. (No. 2016/1104)

Both instruments applicable from 29 January 2019 in:

- Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Germany, Greece, Finland, France, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain and Sweden

2

3

Scope

- **Substantive scope**
  - Article 1 and 3(1)(a): matrimonial property regimes
- **Geographical scope**
  - Jurisdiction: preamble: universal
  - Applicable Law: Article 20: universal
  - Recognition/enforcement: Article 36: from Reg. MS
- **Temporal scope**
  - Article 69 and 70: difference between entry into force and application
  - Article 69(1): jurisdiction procedures on/after 29.01.2019
  - Article 69(3): applicable law rules for:
    - (a) marriages concluded after 29.01.2019 or
    - (b) choice of law clauses made after 29.01.2019

4

SECTION I

Jurisdiction

5

Jurisdiction

- Connection with other cases:
  - Article 4 (*succession*) and
  - Article 5 (*divorce*)
- Other procedures: Article 6
- Choice of court:
  - Explicit: Article 7
  - Implicit: Article 8
- Residual jurisdiction: Article 9 - 11

6

Case Study


Wife (Dutch nationality)
Husband (German nationality)

Couple lives in Germany. Marriage breaks down and the wife returns to the Netherlands. She has now lived in the Netherlands for 7 months.

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Case Study


Wife (Dutch nationality)
Husband (Polish nationality)

Couple lives in Poland. Marriage breaks down and the wife returns to the Netherlands. She has now lived in the Netherlands for 7 months.

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SECTION II

Applicable Law

9

Case study


Husband and wife are Turkish nationals living in the Netherlands. They were married in 2012. In 2019 they decide to get divorced.

Does the Dutch court have jurisdiction to entertain the proceedings regarding divorce and property divisions?

Can the parties make a choice of law?

10

Choice of law clauses

- Which law can be chosen
- At which moment can one choose?
- Scope of the choice?
- Retroactive application? – art. 22(2) & (3)
- Validity:
  - Formal (art. 23), and
  - Substantive (art. 24)

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Objective rules

- **Basic principles**
  - One court, one applicable law for procedure – but in practice?
  - Unity, one law applicable to all property (Art. 21)
  - Parrty autonomy – choice of law is possible (Art. 22)
  - Nauwste Obj. Law based on closest connection (Art. 26)
- **Hierarchy**
  - Choice of law: Art. 22
  - 1st common habitual residence: Art. 26(1)(a)
  - Common nationality: art. 26(1)(b)
  - Closest connection: art. 26(1)(c)

Exception: art. 26(3) (adaptation of art. 26(1)(a))

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II

(Non-legislative acts)

REGULATIONS

COUNCIL REGULATION (EU) 2016/1103

of 24 June 2016

implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and nforcement of decisions in matters of matrimonial property regimes

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(3) thereof,

Having regard to Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships ([1]),

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament ([2]),

Acting in accordance with a special legislative procedure,

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

(2) In accordance with point (c) of Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), such measures may include measures aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) A programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters ([3]), common to the Commission and to the Council, was adopted on 30 November 2000. That programme identifies measures relating to the harmonisation of conflict-of-law rules as measures facilitating the mutual recognition of decisions and provides for the drawing-up of an instrument in matters of matrimonial property regimes.

([1]) OJ L 159, 16.6.2016, p. 16.
([2]) Opinion of 23 June 2016 (not yet published in the Official Journal).
([3]) OJ C 12, 15.1.2001, p. 1.

(5) The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new programme called 'The Hague programme: strengthening freedom, security and justice in the European Union' ([1]). In this programme the Council asked the Commission to present a Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition. The programme also stressed the need to adopt an instrument in this area.

(6) On 17 July 2006 the Commission adopted the Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition. This Green Paper launched wide consultations on all aspects of the difficulties faced by couples in Europe when it comes to the liquidation of their common property and the legal remedies available.

(7) At its meeting in Brussels on 10 and 11 December 2009 the European Council adopted a new multiannual programme called 'The Stockholm programme — An open and secure Europe serving and protecting citizens' ([2]). In that programme the European Council considered that mutual recognition should be extended to fields that are not yet covered but are essential to everyday life, for example matrimonial property rights, while taking into consideration Member States' legal systems, including public policy (*ordre public*), and national traditions in this area.

(8) In the 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights', adopted on 27 October 2010, the Commission announced that it would adopt a proposal for legislation to eliminate the obstacles to the free movement of persons, in particular the difficulties experienced by couples in managing or dividing their property.

(9) On 16 March 2011, the Commission adopted a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.

(10) At its meeting of 3 December 2015, the Council concluded that no unanimity could be reached for the adoption of the proposals for the regulations on matrimonial property regimes and the property consequences of registered partnerships and that therefore the objectives of cooperation in this area could not be attained within a reasonable period by the Union as a whole.

(11) From December 2015 to February 2016, Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden addressed requests to the Commission indicating that they wished to establish enhanced cooperation between themselves in the area of the property regimes of international couples and, specifically, of the jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, and asking the Commission to submit a proposal to the Council to that effect. By letter to the Commission in March 2016, Cyprus indicated its wish to participate in the establishment of the enhanced cooperation; Cyprus reiterated this wish during the work of the Council.

(12) On 9 June 2016, the Council adopted Decision (EU) 2016/954 authorising such enhanced cooperation.

(13) According to Article 328(1) TFEU, when enhanced cooperation is being established, it is to be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It is also to be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions. The Commission and the Member States participating in enhanced cooperation should ensure that they promote participation by as many Member States as possible. This Regulation should be binding in its entirety and directly applicable only in the Member States which participate in enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, by virtue of Decision (EU) 2016/954, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU.

([1]) OJ C 53, 3.3.2005, p. 1.
([2]) OJ C 115, 4.5.2010, p. 1.

(14) In accordance with Article 81 TFEU, this Regulation should apply in the context of matrimonial property regimes having cross-border implications.

(15) To provide married couples with legal certainty as to their property and offer them a degree of predictability, all the rules applicable to matrimonial property regimes should be covered in a single instrument.

(16) In order to achieve those objectives, this Regulation should bring together provisions on jurisdiction, applicable law, recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements.

(17) This Regulation does not define 'marriage', which is defined by the national laws of the Member States.

(18) The scope of this Regulation should include all civil-law aspects of matrimonial property regimes, both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses. For the purposes of this Regulation, the term 'matrimonial property regime' should be interpreted autonomously and should encompass not only rules from which the spouses may not derogate but also any optional rules to which the spouses may agree in accordance with the applicable law, as well as any default rules of the applicable law. It includes not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any property relationships, between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof.

(19) For reasons of clarity, a number of questions which could be seen as having a link with matters of matrimonial property regime should be explicitly excluded from the scope of this Regulation.

(20) Accordingly, this Regulation should not apply to questions of general legal capacity of the spouses; however, this exclusion should not cover the specific powers and rights of either or both spouses with regard to property, either as between themselves or as regards third parties, as these powers and rights should fall under the scope of this Regulation.

(21) This Regulation should not apply to other preliminary questions such as the existence, validity or recognition of a marriage, which continue to be covered by the national law of the Member States, including their rules of private international law.

(22) As maintenance obligations between spouses are governed by Council Regulation (EC) No 4/2009 ([1]), they should be excluded from the scope of this Regulation, as should issues relating to the succession to the estate of a deceased spouse, since they are covered by Regulation (EU) No 650/2012 of the European Parliament and of the Council ([2]).

(23) Issues of entitlements to transfer or adjustment between spouses of rights to retirement or disability pension, whatever their nature, accrued during marriage and which have not generated pension income during the marriage are matters that should be excluded from the scope of this Regulation, taking into account the specific systems existing in the Member States. However, this exclusion should be strictly interpreted. Hence, this Regulation should govern in particular the issue of classification of pension assets, the amounts that have already been paid to one spouse during the marriage, and the possible compensation that would be granted in case of a pension subscribed with common assets.

(24) This Regulation should allow for the creation or the transfer resulting from the matrimonial property regime of a right in immoveable or moveable property as provided for in the law applicable to the matrimonial property regime. It should, however, not affect the limited number ('*numerus clausus*') of rights *in rem* known in the national law of some Member States. A Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law.

([1]) Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10.1.2009, p. 1).

([2]) Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27.7.2012, p. 107).

(25) However, in order to allow the spouses to enjoy in another Member State the rights which have been created or transferred to them as a result of the matrimonial property regime, this Regulation should provide for the adaptation of an unknown right *in rem* to the closest equivalent right under the law of that other Member State. In the context of such an adaptation, account should be taken of the aims and the interests pursued by the specific right *in rem* and the effects attached to it. For the purposes of determining the closest equivalent national right, the authorities or competent persons of the State whose law is applied to the matrimonial property regime may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law.

(26) The adaptation of unknown rights *in rem* as explicitly provided for by this Regulation should not preclude other forms of adaptation in the context of the application of this Regulation.

(27) The requirements for the recording in a register of a right in immoveable or moveable property should be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept (for immoveable property, the *lex rei sitae*) which determines under what legal conditions, and how, the recording must be carried out and which authorities, such as land registers or notaries, are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information. In particular, the authorities may check that the right of a spouse to a property mentioned in the document presented for registration is a right which is recorded as such in the register or which is otherwise demonstrated in accordance with the law of the Member State in which the register is kept. In order to avoid duplication of documents, the registration authorities should accept such documents, drawn up in another Member State by the competent authorities the circulation of which is provided for by this Regulation. This should not preclude the authorities involved in the registration from asking the person applying for registration to provide such additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept, for instance information or documents relating to the payment of revenue. The competent authority may indicate to the person applying for registration how the missing information or documents can be provided.

(28) The effects of the recording of a right in a register should also be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept which determines whether the recording is, for instance, declaratory or constitutive in effect. Thus, where, for example, the acquisition of a right in immoveable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State.

(29) This Regulation should respect the different systems for dealing with matters of the matrimonial property regime applied in the Member States. For the purposes of this Regulation, the term 'court' should therefore be given a broad meaning so as to cover not only courts in the strict sense of the word, exercising judicial functions, but also for example notaries in some Member States who, in certain matters of matrimonial property regime, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given matrimonial property regime by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation. Conversely, the term 'court' should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of matrimonial property regime, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.

(30) This Regulation should allow all notaries who are competent in matters of matrimonial property regime in the Member States to exercise such competence. Whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in this Regulation should depend on whether or not they are covered by the term 'court' for the purposes of this Regulation.

(31) Acts issued by notaries in matters of matrimonial property regime in the Member States should circulate in accordance with this Regulation. When notaries exercise judicial functions they should be bound by the rules of jurisdiction set out in this Regulation, and the decisions they give should circulate in accordance with the provisions of this Regulation on recognition, enforceability and enforcement of decisions. When notaries do not exercise judicial functions they should not be bound by those rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions of this Regulation on authentic instruments.

(32) To reflect the increasing mobility of couples during their married life and facilitate the proper administration of justice, the rules on jurisdiction set out in in this Regulation should enable citizens to have their various related procedures handled by the courts of the same Member State. To that end, this Regulation should seek to concentrate the jurisdiction on matrimonial property regime in the Member State whose courts are called upon to handle the succession of a spouse in accordance with Regulation (EU) No 650/2012, or the divorce, legal separation or marriage annulment in accordance with Council Regulation (EC) No 2201/2003 ([1]).

(33) This Regulation should provide that, where proceedings on the succession of a spouse are pending before the court of a Member State seised under Regulation (EU) No 650/2012, the courts of that State should have jurisdiction to rule on matters of matrimonial property regimes arising in connection with that succession case.

(34) Similarly, matters of matrimonial property regimes arising in connection with proceedings pending before the court of a Member State seised for divorce, legal separation or marriage annulment under Regulation (EC) No 2201/2003, should be dealt with by the courts of that Member State unless the jurisdiction to rule on the divorce, legal separation or marriage annulment may only be based on specific grounds of jurisdiction. In such cases, the concentration of jurisdiction should not be allowed without the spouses' agreement.

(35) Where matters of matrimonial property regime are not linked to proceedings pending before the court of a Member State on the succession of a spouse or on divorce, legal separation or marriage annulment, this Regulation should provide for a scale of connecting factors for the purposes of determining jurisdiction, starting with the habitual residence of the spouses at the time the court is seised. These connecting factors are set in view of the increasing mobility of citizens and in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised.

(36) In order to increase legal certainty, predictability and the autonomy of the parties, this Regulation should, under certain circumstances, enable the parties to conclude a choice of court agreement in favour of the courts of the Member State of the applicable law or of the courts of the Member State of the conclusion of the marriage.

(37) For the purposes of this Regulation and in order to cover all possible situations, the Member State of the conclusion of the marriage should be the Member State before whose authorities the marriage is concluded.

(38) The courts of a Member State may hold that, under their private international law, the marriage in question cannot be recognised for the purposes of matrimonial property regime proceedings. In such a case, it may exceptionally be necessary to decline jurisdiction under this Regulation. The courts shall act swiftly and the party concerned should have the possibility to submit the case in any other Member State that has a connecting factor granting jurisdiction, irrespective of the order of the jurisdiction grounds, while at the same time respecting the parties' autonomy. Any court seised after a declining of jurisdiction other than the courts of the Member State of the conclusion of the marriage, may also exceptionally need to decline jurisdiction under the same conditions. The combination of the various jurisdiction rules should, however, ensure that parties have all possibilities to seise the courts of a Member State which will accept jurisdiction for the purposes of giving effect to their matrimonial property regime.

(39) This Regulation should not prevent the parties from settling the matrimonial property regime case amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the matrimonial property regime is not the law of that Member State.

(40) In order to ensure that the courts of all Member States may, on the same grounds, exercise jurisdiction in relation to the matrimonial property regimes of spouses, this Regulation should set out in an exhaustive way the grounds on which such subsidiary jurisdiction may be exercised.

([1]) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, 23.12.2003, p. 1).

(41) In order to remedy, in particular, situations of denial of justice, this Regulation should provide for a *forum necessitatis* allowing a court of a Member State, on an exceptional basis, to rule on a matrimonial property regime which is closely connected with a third state. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third state in question, for example because of civil war, or when a spouse cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on *forum necessitatis* should, however, be exercised only if the case has a sufficient connection with the Member State of the court seised.

(42) In the interests of the harmonious functioning of justice, the giving of irreconcilable decisions in different Member States should be avoided. To that end, this Regulation should provide for general procedural rules similar to those of other Union instruments in the area of judicial cooperation in civil matters. One such procedural rule is a *lis pendens* rule, which will come into play if the same matrimonial property regime case is brought before different courts in different Member States. That rule will then determine which court should proceed to deal with the matrimonial property regime case.

(43) In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable spouses to know in advance which law will apply to their matrimonial property regime. Harmonised conflict-of-law rules should therefore be introduced in order to avoid contradictory results. The main rule should ensure that the matrimonial property regime is governed by a predictable law with which it is closely connected. For reasons of legal certainty and in order to avoid the fragmentation of the matrimonial property regime, the law applicable to a matrimonial property regime should govern that regime as a whole, that is to say, all the property covered by that regime, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third state.

(44) The law determined by this Regulation should apply even if it is not the law of a Member State.

(45) To facilitate to spouses the management of their property, this Regulation should authorise them to choose the law applicable to their matrimonial property regime, regardless of the nature or location of the property, among the laws with which they have close links because of habitual residence or their nationality. This choice may be made at any moment, before the marriage, at the time of conclusion of the marriage or during the course of the marriage.

(46) To ensure the legal certainty of transactions and to prevent any change of the law applicable to the matrimonial property regime being made without the spouses being notified, no change of law applicable to the matrimonial property regime should be made except at the express request of the parties. Such a change by the spouses should not have retrospective effect unless they expressly so stipulate. Whatever the case, it may not infringe the rights of third parties.

(47) Rules on the material and formal validity of an agreement on the choice of applicable law should be set up so that the informed choice of the spouses is facilitated and their consent is respected with a view to ensuring legal certainty as well as better access to justice. As far as formal validity is concerned, certain safeguards should be introduced to ensure that spouses are aware of the implications of their choice. The agreement on the choice of applicable law should at least be expressed in writing, dated and signed by both parties. However, if the law of the Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal rules, those rules should be complied with. If, at the time the agreement is concluded, the spouses are habitually resident in different Member States which lay down different formal rules, compliance with the formal rules of one of these States should suffice. If, at the time the agreement is concluded, only one of the spouses is habitually resident in a Member State which lays down additional formal rules, those rules should be complied with.

(48) A matrimonial property agreement is a type of disposition on matrimonial property the admissibility and acceptance of which vary among the Member States. In order to make it easier for matrimonial property rights acquired as a result of a matrimonial property agreement to be accepted in the Member States, rules on the formal validity of a matrimonial property agreement should be defined. At least the agreement should be expressed in writing, dated and signed by both parties. However, the agreement should also fulfil additional formal validity requirements set out in the law applicable to the matrimonial property regime as determined by this Regulation and in the law of the Member State in which the spouses have their habitual residence. This Regulation should also determine which law is to govern the material validity of such an agreement.

(49) Where no applicable law is chosen, and with a view to reconciling predictability and legal certainty with consideration of the life actually lived by the couple, this Regulation should introduce harmonised conflict-of-law rules to determine the law applicable to all the spouses' property on the basis of a scale of connecting factors. The first common habitual residence of the spouses shortly after marriage should constitute the first criterion, ahead of the law of the spouses' common nationality at the time of their marriage. If neither of these criteria apply, or failing a first common habitual residence in cases where the spouses have dual common nationalities at the time of the conclusion of the marriage, the third criterion should be the law of the State with which the spouses have the closest links. In applying the latter criterion all the circumstances should be taken into account and it should be made clear that these links are to be considered as they were at the time the marriage was entered into.

(50) Where this Regulation refers to nationality as a connecting factor, the question of how to consider a person having multiple nationalities is a preliminary question which falls outside the scope of this Regulation and should be left to national law, including, where applicable, international Conventions, in full observance of the general principles of the Union. This consideration should have no effect on the validity of a choice of law made in accordance with this Regulation.

(51) With regard to the determination of the law applicable to the matrimonial property regime in the absence of a choice of law and a matrimonial property agreement, the judicial authority of a Member State, at the request of either of the spouses, should, in exceptional cases — where the spouses have moved to the State of their habitual residence for a long duration — be able to arrive at the conclusion that the law of that State may apply if the spouses have relied on it. Whatever the case, it may not infringe the rights of third parties.

(52) The law determined as the law applicable to the matrimonial property regime should govern the matrimonial property regime from the classification of property of one or both spouses into different categories during the marriage and after its dissolution, to the liquidation of the property. It should include the effects of the matrimonial property regime on a legal relationship between a spouse and third parties. However, the law applicable to matrimonial property regime may be invoked by a spouse against a third party to govern such effects only when the legal relations between the spouse and the third party arose at a time where the third party knew or should have known of that law.

(53) Considerations of public interest, such as the protection of a Member State's political, social or economic organisation, should justify giving the courts and other competent authorities of the Member States the possibility, in exceptional cases, of applying exceptions based on overriding mandatory provisions. Accordingly, the concept of 'overriding mandatory provisions' should cover rules of an imperative nature such as rules for the protection of the family home. However, this exception to the application of the law applicable to the matrimonial property regime requires a strict interpretation in order to remain compatible with the general objective of this Regulation.

(54) Considerations of public interest should also allow courts and other competent authorities dealing with matters of matrimonial property regime in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union ('Charter'), and in particular Article 21 thereof on the principle of non-discrimination.

(55) Since there are States in which two or more systems of law or sets of rules concerning matters governed by this Regulation coexist, there should be a provision governing the extent to which this Regulation applies in the different territorial units of those States.

(56) In the light of its general objective, which is the mutual recognition of decisions given in the Member States in matters of matrimonial property regime, this Regulation should lay down rules relating to the recognition, enforceability and enforcement of decisions similar to those of other Union instruments in the area of judicial cooperation in civil matters.

(57) In order to take into account the different systems for dealing with matters of matrimonial property regimes in the Member States, this Regulation should guarantee the acceptance and enforceability in all Member States of authentic instruments in matters of matrimonial property regime.

(58) Authentic instruments should have the same evidentiary effects in another Member State as they have in the Member State of origin, or the most comparable effects. When determining the evidentiary effects of a given authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin. The evidentiary effects which a given authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin.

(59) The 'authenticity' of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State.

(60) The term 'the legal acts or legal relationships recorded in an authentic instrument' should be interpreted as referring to the contents as to substance recorded in the authentic instrument. A party wishing to challenge the legal acts or legal relationships recorded in an authentic instrument should do so before the courts having jurisdiction under this Regulation, which should decide on the challenge in accordance with the law applicable to the matrimonial property regime.

(61) If a question relating to the legal acts or legal relationships recorded in an authentic instrument is raised as an incidental question in proceedings before a court of a Member State, that court should have jurisdiction over that question.

(62) An authentic instrument which is being challenged should not produce any evidentiary effects in a Member State other than the Member State of origin as long as the challenge is pending. If the challenge concerns only a specific matter relating to the legal acts or legal relationships recorded in the authentic instrument, the authentic instrument in question should not produce any evidentiary effects in a Member State other than the Member State of origin with regard to the matter being challenged as long as the challenge is pending. An authentic instrument which has been declared invalid as a result of a challenge should cease to produce any evidentiary effects.

(63) Should an authority, in application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

(64) The recognition and enforcement of a decision on matrimonial property regime under this Regulation should not in any way imply the recognition of the marriage underlying the matrimonial property regime which gave rise to the decision.

(65) The relationship between this Regulation and the bilateral or multilateral conventions on matrimonial property regime to which the Member States are party should be specified.

(66) This Regulation should not preclude Member States which are parties to the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden containing international law provisions on marriage, adoption and guardianship, as revised in 2006; to the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration, as revised in June 2012; and to the Convention of 11 October 1977 between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments in civil matters, from

continuing to apply certain provisions of these Conventions in so far as they provide for simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of matrimonial property regime.

(67) In order to facilitate the application of this Regulation, provision should be made for an obligation requiring Member States to communicate certain information regarding their legislation and procedures relating to matrimonial property regimes within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC ([1]). In order to allow for the timely publication in the *Official Journal of the European Union* of all information of relevance for the practical application of this Regulation, the Member States should also communicate such information to the Commission before this Regulation starts to apply.

(68) Equally, to facilitate the application of this Regulation and to allow for the use of modern communication technologies, standard forms should be prescribed for the attestations to be provided in connection with the application for a declaration of enforceability of a decision, authentic instrument or court settlement.

(69) In calculating the periods and time limits provided for in this Regulation, Regulation (EEC, Euratom) No 1182/71 of the Council ([2]) should apply.

(70) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission with regard to the establishment and subsequent amendment of the attestations and forms pertaining to the declaration of enforceability of decisions, court settlements and authentic instruments. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council ([3]).

(71) The advisory procedure should be used for the adoption of implementing acts establishing and subsequently amending the attestations and forms provided for in this Regulation.

(72) The objectives of this Regulation, namely the free movement of persons in the Union, the opportunity for spouses to arrange their property relations in respect of themselves and others during their life as a couple and when liquidating their property, and greater predictability and legal certainty, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale and effects of this Regulation, be better achieved at Union level, where appropriate by means of enhanced cooperation between Member States. In accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union, the Union has therefore competence to act. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(73) This Regulation respects fundamental rights and observes the principles recognised in the Charter, in particular Articles 7, 9, 17, 21 and 47 concerning, respectively, respect for private and family life, the right to marry and to found a family according to national laws, property rights, the principle of non-discrimination and the right to an effective remedy and to a fair trial. This Regulation should be applied by the courts and other competent authorities of the Member States in compliance with those rights and principles.

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Regulation shall apply to matrimonial property regimes.

It shall not apply to revenue, customs or administrative matters.

([1]) Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25).
([2]) Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p. 1).
([3]) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

2. The following shall be excluded from the scope of this Regulation:

(a) the legal capacity of spouses;

(b) the existence, validity or recognition of a marriage;

(c) maintenance obligations;

(d) the succession to the estate of a deceased spouse;

(e) social security;

(f) the entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage;

(g) the nature of rights *in rem* relating to a property; and

(h) any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

Article 2

Competence in matters of matrimonial property regimes within the Member States

This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of matrimonial property regimes.

Article 3

Definitions

1. For the purposes of this Regulation:

(a) 'matrimonial property regime' means a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution;

(b) 'matrimonial property agreement' means any agreement between spouses or future spouses by which they organise their matrimonial property regime;

(c) 'authentic instrument' means a document in a matter of a matrimonial property regime which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

(i) relates to the signature and the content of the authentic instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;

(d) 'decision' means any decision in a matter of a matrimonial property regime given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court;

(e) 'court settlement' means a settlement in a matter of matrimonial property regime which has been approved by a court, or concluded before a court in the course of proceedings;

(f) 'Member State of origin' means the Member State in which the decision has been given, the authentic instrument drawn up, or the court settlement approved or concluded;

(g) 'Member State of enforcement' means the Member State in which recognition and/or enforcement of the decision, the authentic instrument, or the court settlement is requested.

2. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes which exercise judicial functions or act by delegation of power by a judicial authority or under its control, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard, and provided that their decisions under the law of the Member State in which they operate:

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect as a decision of a judicial authority on the same matter.

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 64.

CHAPTER II

JURISDICTION

Article 4

Jurisdiction in the event of the death of one of the spouses

Where a court of a Member State is seised in matters of the succession of a spouse pursuant to Regulation (EU) No 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case.

Article 5

Jurisdiction in cases of divorce, legal separation or marriage annulment

1. Without prejudice to paragraph 2, where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201/2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.

2. Jurisdiction in matters of matrimonial property regimes under paragraph 1 shall be subject to the spouses' agreement where the court that is seised to rule on the application for divorce, legal separation or marriage annulment:

(a) is the court of a Member State in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003;

(b) is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003;

(c) is seised pursuant to Article 5 of Regulation (EC) No 2201/2003 in cases of conversion of legal separation into divorce; or

(d) is seised pursuant to Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction.

3. If the agreement referred to in paragraph 2 of this Article is concluded before the court is seised to rule on matters of matrimonial property regimes, the agreement shall comply with Article 7(2).

Article 6

Jurisdiction in other cases

Where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State:

(a) in whose territory the spouses are habitually resident at the time the court is seised; or failing that

(b) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that

(c) in whose territory the respondent is habitually resident at the time the court is seised; or failing that

(d) of the spouses' common nationality at the time the court is seised.

Article 7

Choice of court

1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, or point (a) or (b) of Article 26(1), or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime.

2. The agreement referred to in paragraph 1 shall be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

Article 8

Jurisdiction based on the appearance of the defendant

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State whose law is applicable pursuant to Article 22 or point (a) or (b) of Article 26(1), and before which a defendant enters an appearance, shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or in cases covered by Article 4 or 5(1).

2. Before assuming jurisdiction pursuant to paragraph 1, the court shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

Article 9

Alternative jurisdiction

1. By way of exception, if a court of the Member State that has jurisdiction pursuant to Article 4, 6, 7 or 8 holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction. If the court decides to decline jurisdiction, it shall do so without undue delay.

2. Where a court having jurisdiction pursuant to Article 4 or 6 declines jurisdiction and where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7, jurisdiction to rule on the matrimonial property regime shall lie with the courts of that Member State.

In other cases, jurisdiction to rule on the matrimonial property regime shall lie with the courts of any other Member State pursuant to Article 6 or 8, or the courts of the Member State of the conclusion of the marriage.

3. This Article shall not apply when the parties have obtained a divorce, legal separation or marriage annulment which is capable of being recognised in the Member State of the forum.

Article 10

Subsidiary jurisdiction

Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7 or 8, or when all the courts pursuant to Article 9 have declined jurisdiction and no court has jurisdiction pursuant to Article 9(2), the courts of a Member State shall have jurisdiction in so far as immoveable property of one or both spouses are located in the territory of that Member State, but in that event the court seised shall have jurisdiction to rule only in respect of the immoveable property in question.

Article 11

Forum necessitatis

Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7, 8 or 10, or when all the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to Article 9(2) or Article 10, the courts of a Member State may, on an exceptional basis, rule on a matrimonial property regime case if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seised.

Article 12

Counterclaims

The court in which proceedings are pending pursuant to Article 4, 5, 6, 7, 8, 9 (2), 10 or 11 shall also have jurisdiction to rule on a counterclaim if it falls within the scope of this Regulation.

Article 13

Limitation of proceedings

1. Where the estate of the deceased whose succession falls under Regulation (EU) No 650/2012 comprises assets located in a third state, the court seised to rule on the matrimonial property regime may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third state.

2. Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised.

Article 14

Seising a court

For the purpose of this Chapter, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;

(b) if the document has to be served before being lodged with the court, at a time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court; or

(c) if the proceedings are opened on the court's own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.

Article 15

Examination as to jurisdiction

Where a court of a Member State is seised of a matter of matrimonial property regime over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 16

Examination as to admissibility

1. Where a defendant habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court having jurisdiction pursuant to this Regulation shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in time to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council ([1]) shall apply instead of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where Regulation (EC) No 1393/2007 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

([1]) Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ L 324, 10.12.2007, p. 79).

Article 17

Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In the cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 18

Related actions

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the actions referred to in paragraph 1 are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

Article 19

Provisional, including protective, measures

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

APPLICABLE LAW

Article 20

Universal application

The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State.

Article 21

Unity of the applicable law

The law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located.

Article 22

Choice of the applicable law

1. The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following:

(a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

(b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

2. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.

3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law.

Article 23

Formal validity of the agreement on a choice of applicable law

1. The agreement referred to in Article 22 shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

3. If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

4. If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

Article 24

Consent and material validity

1. The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid.

2. Nevertheless, a spouse may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 25

Formal validity of a matrimonial property agreement

1. The matrimonial property agreement shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

3. If the law applicable to the matrimonial property regime imposes additional formal requirements, those requirements shall apply.

Article 26

Applicable law in the absence of choice by the parties

1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State:

(a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that

(b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that

(c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

2. If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph 1 shall apply.

3. By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:

(a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and

(b) both spouses had relied on the law of that other State in arranging or planning their property relations.

The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1.

This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

Article 27

Scope of the applicable law

The law applicable to the matrimonial property regime pursuant to this Regulation shall govern, inter alia:

(a) the classification of property of either or both spouses into different categories during and after marriage;

(b) the transfer of property from one category to the other one;

(c) the responsibility of one spouse for liabilities and debts of the other spouse;

(d) the powers, rights and obligations of either or both spouses with regard to property;

(e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property;

(f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and

(g) the material validity of a matrimonial property agreement.

Article 28

Effects in respect of third parties

1. Notwithstanding point (f) of Article 27, the law applicable to the matrimonial property regime between the spouses may not be invoked by a spouse against a third party in a dispute between the third party and either or both of the spouses unless the third party knew or, in the exercise of due diligence, should have known of that law.

2. The third party is deemed to possess the knowledge of the law applicable to the matrimonial property regime, if:

(a) that law is the law of:

  (i) the State whose law is applicable to the transaction between a spouse and the third party;

  (ii) the State where the contracting spouse and the third party have their habitual residence; or,

  (iii) in cases involving immoveable property, the State in which the property is situated;

  or

(b) either spouse had complied with the applicable requirements for disclosure or registration of the matrimonial property regime specified by the law of:

  (i) the State whose law is applicable to the transaction between a spouse and the third party;

(ii) the State where the contracting spouse and the third party have their habitual residence; or

(iii) in cases involving immoveable property, the State in which the property is situated.

3. Where the law applicable to the matrimonial property regime between the spouses cannot be invoked by a spouse against a third party by virtue of paragraph 1, the effects of the matrimonial property regime in respect of the third party shall be governed:

(a) by the law of the State whose law is applicable to the transaction between a spouse and the third party; or

(b) in cases involving immoveable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.

Article 29

Adaptation of rights *in rem*

Where a person invokes a right *in rem* to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

Article 30

Overriding mandatory provisions

1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the matrimonial property regime pursuant to this Regulation.

Article 31

Public policy (*ordre public*)

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 32

Exclusion of renvoi

The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.

Article 33

States with more than one legal system — territorial conflicts of laws

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules:

(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the spouses, be construed as referring to the law of the territorial unit in which the spouses have their habitual residence;

(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the spouses, be construed as referring to the law of the territorial unit with which the spouses have the closest connection;

(c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located.

Article 34

States with more than one legal system — inter-personal conflicts of laws

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of matrimonial property regimes, any reference to the law of such a State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouses have the closest connection shall apply.

Article 35

Non-application of this Regulation to internal conflicts of laws

A Member State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes shall not be required to apply this Regulation to conflicts of laws arising between such units only.

CHAPTER IV

RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS

Article 36

Recognition

1. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedures provided for in Articles 44 to 57, apply for the decision to be recognised.

3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.

Article 37

Grounds of non-recognition

A decision shall not be recognised:

(a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;

(c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;

(d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 38

Fundamental rights

Article 37 of this Regulation shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in Article 21 thereof on the principle of non-discrimination.

Article 39

Prohibition of review of jurisdiction of the court of origin

1. The jurisdiction of the court of the Member State of origin may not be reviewed.

2. The public policy (*ordre public*) criterion referred to in Article 37 shall not apply to the rules on jurisdiction set out in Articles 4 to 11.

Article 40

No review as to substance

Under no circumstances may a decision given in a Member State be reviewed as to its substance.

Article 41

Staying of recognition proceedings

A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the decision has been lodged in the Member State of origin.

Article 42

Enforceability

Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in Articles 44 to 57.

Article 43

Determination of domicile

To determine whether, for the purposes of the procedure provided for in Articles 44 to 57, a party is domiciled in the Member State of enforcement, the court seised shall apply the internal law of that Member State.

Article 44

Jurisdiction of local courts

1. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement communicated by that Member State to the Commission in accordance with Article 64.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 45

Procedure

1. The application procedure shall be governed by the law of the Member State of enforcement.

2. The applicant shall not be required to have a postal address or an authorised representative in the Member State of enforcement.

3. The application shall be accompanied by the following documents:

(a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;

(b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 67(2), without prejudice to Article 46.

Article 46

Non-production of the attestation

1. If the attestation referred to in point (b) of Article 45(3) is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation or transliteration of the documents shall be produced. The translation shall be done by a person qualified to do translations in one of the Member States.

Article 47

Declaration of enforceability

The decision shall be declared enforceable immediately on completion of the formalities set out in Article 45 without any review under Article 37. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 48

Notice of the decision on the application for a declaration of enforceability

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party.

Article 49

Appeal against the decision on the application for a declaration of enforceability

1. The decision on the application for a declaration of enforceability may be appealed by either party.

2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 64.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 16 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

Article 50

Procedure to contest the decision given on appeal

The decision given on the appeal may be contested only by the procedure communicated by the Member State concerned to the Commission in accordance with Article 64.

Article 51

Refusal or revocation of a declaration of enforceability

The court with which an appeal is lodged under Article 49 or Article 50 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Article 37. It shall give its decision without delay.

Article 52

Staying of proceedings

The court with which an appeal is lodged under Article 49 or Article 50 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.

Article 53

Provisional, including protective, measures

1. When a decision must be recognised in accordance with this Chapter, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 46 being required.

2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 49(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 54

Partial enforceability

1. Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a decision.

Article 55

Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.

Article 56

No security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition, enforceability or enforcement of a decision given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement in the Member State of enforcement.

Article 57

No charge, duty or fee

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.

CHAPTER V

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 58

Acceptance of authentic instruments

1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 67(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.

2. Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State for as long as the challenge is pending before the competent court.

3. Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged for as long as the challenge is pending before the competent court.

4. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of matrimonial property regimes, that court shall have jurisdiction over that question.

Article 59

Enforceability of authentic instruments

1. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 44 to 57.

2. For the purposes of point (b) of Article 45(3), the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 67(2).

3. The court with which an appeal is lodged under Article 49 or Article 50 shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

Article 60

Enforceability of court settlements

1. Court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 44 to 57.

2. For the purposes of point (b) of Article 45(3), the court which approved the settlement or before which it was concluded shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 67(2).

3. The court with which an appeal is lodged under Article 49 or 50 shall refuse or revoke a declaration of enforceability only if enforcement of the court settlement is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

CHAPTER VI

GENERAL AND FINAL PROVISIONS

Article 61

Legalisation and other similar formalities

No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.

Article 62

Relations with existing international conventions

1. This Regulation shall not affect the application of the bilateral or multilateral conventions to which one or more Member States are party at the time of adoption of this Regulation or of a decision pursuant to the second or third subparagraph of Article 331(1) TFEU and which concern matters covered by this Regulation, without prejudice to the obligations of the Member States under Article 351 TFEU.

2. Notwithstanding paragraph 1, this Regulation shall, as between Member States, take precedence over conventions concluded between them in so far as such conventions concern matters governed by this Regulation.

3. This Regulation shall not preclude the application of the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden containing international private law provisions on marriage, adoption and guardianship, as revised in 2006; of the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration, as revised in June 2012; and of the Convention of 11 October 1977 between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgements in civil matters, by the Member States which are parties thereto, in so far as they provide for simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of matrimonial property regime.

Article 63

Information made available to the public

The Member States shall, with a view to making the information available to the public within the framework of the European Judicial Network in civil and commercial matters, provide the Commission with a short summary of their national legislation and procedures relating to matrimonial property regimes, including information on the type of authority which has competence in matters of matrimonial property regimes and on the effects in respect of third parties referred to in Article 28.

The Member States shall keep the information permanently updated.

Article 64

Information on contact details and procedures

1. By 29 April 2018, the Member States shall communicate to the Commission:

(a) the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance with Article 44(1) and with appeals against decisions on such applications in accordance with Article 49(2);

(b) the procedures to contest the decision given on appeal referred to in Article 50.

The Member States shall apprise the Commission of any subsequent changes to that information.

2. The Commission shall publish the information communicated in accordance with paragraph 1 in the *Official Journal of the European Union*, with the exception of the addresses and other contact details of the courts and authorities referred to in point (a) of paragraph 1.

3. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through any appropriate means, in particular through the European Judicial Network in civil and commercial matters.

Article 65

Establishment and subsequent amendment of the list containing the information referred to in Article 3(2)

1. The Commission shall, on the basis of the notifications by the Member States, establish the list of the other authorities and legal professionals referred to in Article 3(2).

2. The Member States shall notify the Commission of any subsequent changes to the information contained in that list. The Commission shall amend the list accordingly.

3. The Commission shall publish the list and any subsequent amendments in the *Official Journal of the European Union*.

4. The Commission shall make all information notified in accordance with paragraphs 1 and 2 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.

Article 66

Establishment and subsequent amendment of the attestations and forms referred to in point (b) of Article 45(3) and Articles 58, 59 and 60

The Commission shall adopt implementing acts establishing and subsequently amending the attestations and forms referred to in point (b) of Article 45(3) and Articles 58, 59 and 60. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 67(2).

Article 67

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

Article 68

Review clause

1. By 29 January 2027, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. Where necessary, the report shall be accompanied by proposals to amend this Regulation.

2. By 29 January 2024, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of Articles 9 and 38 of this Regulation. This report shall evaluate in particular the extent to which these Articles have ensured access to justice.

3. For the purposes of the reports referred to in paragraphs 1 and 2, Member States shall communicate to the Commission relevant information on the application of this Regulation by their courts.

Article 69

Transitional provisions

1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019 subject to paragraphs 2 and 3.

2. If the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given after that date shall be recognised and enforced in accordance with Chapter IV as long as the rules of jurisdiction applied comply with those set out in Chapter II.

3. Chapter III shall apply only to spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019.

Article 70

Entry into force

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. This Regulation shall apply in the Member States which participate in enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, as authorised by Decision (EU) 2016/954.

It shall apply from 29 January 2019, except for Articles 63 and 64 which shall apply from 29 April 2018, and Articles 65, 66 and 67, which shall apply from 29 July 2016. For those Member States which participate in enhanced cooperation by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU, this Regulation shall apply as from the date indicated in the decision concerned.

This Regulation shall be binding in its entirety and directly applicable in the participating Member States in accordance with the Treaties.

Done at Luxembourg, 24 June 2016.

For the Council
The President
A.G. KOENDERS

International Academy of Family Lawyers
European Chapter

FRIDAY SESSION 3

Dealing with difficult clients – top tips in those tricky situations

Dealing with difficult clients- top tips in those tricky situations

Amparo Arbáizar, LLM

1

Keep calm and be a Buddha

2

How to tame your difficult client:

- Smile
- Be nice
- Listen
- Walk in your client's shoes
- Be patient
- Breath
- Forget: It is not your fault if some clients are difficult!!!

3


Kindness is the new cool!
rbáizar bogados

4


Give your client taylormade solutions
The client is usually right
Be flexible and creative!
rbáizar bogados

5


You solve your clients problems for a fee not for free
Be a fair lawyer
not a fay lawyer
rbáizar bogados

6


The client will be happy with great results
rbáizar bogados

7


...and they lived happily ever after.
Thank you!
rbáizar bogados

8

CharlesRussell Speechlys

Dealing with difficult clients – top tips in those tricky situations

James Riby

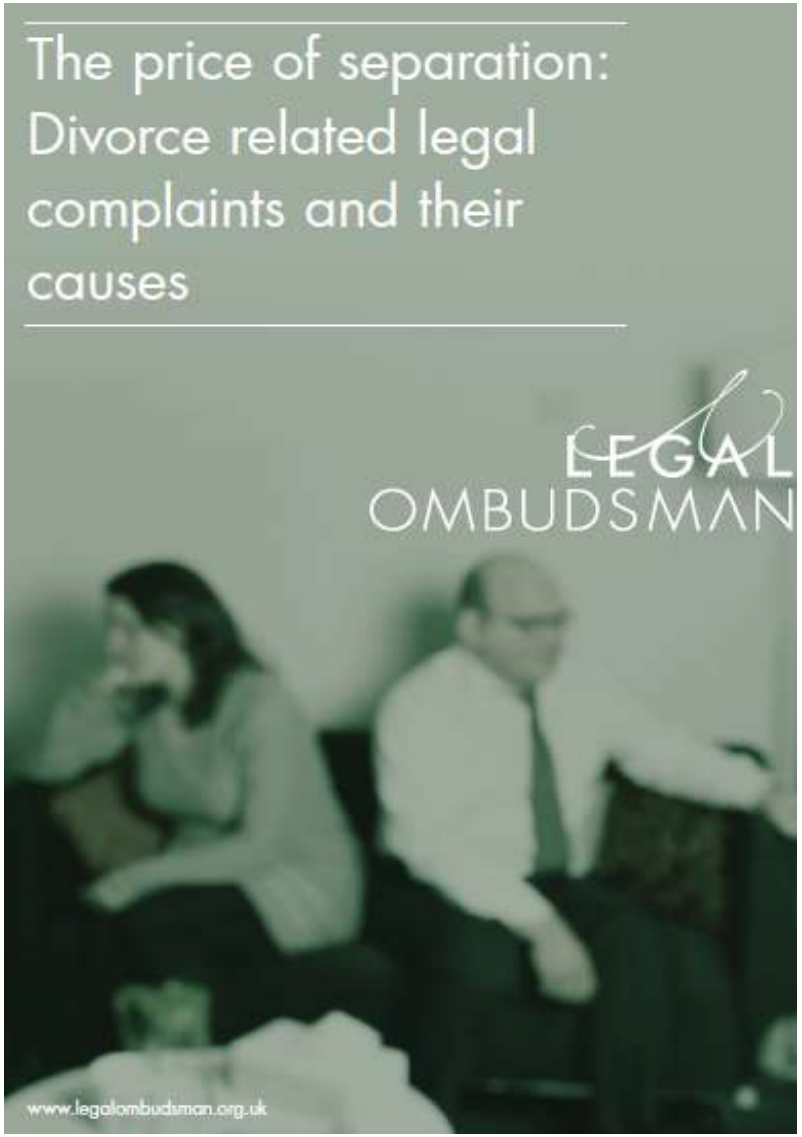
22 March 2019

My top tips….

- Recognise that there is no right or wrong answer.
- Nor a response that works with every client – all clients and their situations are different (which is one of the attractive parts of the job, right?)
- Try to emphasise and understand their point of view.
- If you are working with a foreign lawyer, try to discuss and agree joint advice before taking it to the client.
- If they don't like your advice, explain it – don't change it.
- If they raise issues/evidence which is irrelevant, explain why – don't just ignore it.
- Try to give them options, so they take responsibility. You can still give them "a steer".
- And always try to ensure they understand the cost and consequences of their stance.
- It's probably best to confirm all advice in writing.
- Recommend other professionals who may assist (for example therapists).
- If you need to terminate the retainer, do so at a time when the client has plenty of time to obtain a new lawyer.

What the English-Welsh client-lawyer dispute resolution service found…

- October 2014 report.
- Family disputes gave rise to more complaints to the Legal Ombudsman than any other type of dispute.
- Around 18% of the complaints they investigate are about family law.
- Half of these relate to divorce cases.
- Research found that dissatisfaction levels are higher in divorce cases (13%) than for other areas of law (average of 7%).



Largest area of complaint: costs

- 27% of divorce related legal complaints to the Legal Ombudsman were about costs.
- A fifth of clients were not given an estimate of costs when they first consulted their lawyer.
- “While it is certainly difficult for a lawyer to provide a fixed price for a complex case with any certainty, and any estimate will need to be hedged around with caveats, there appears to be no good reason why a lawyer cannot at least provide a clear price for the initial work to be done, together with an estimate of the possible range of the ultimate cost of the divorce”.
- Lawyers are expected to provide regular updates to clients on the cost of their matter.

Second largest area of complaint: quality of service/advice

- Around 18% of divorce related complaints were about the lawyer failing to provide adequate service/legal advice.
- Study found that 62% of clients said that a lawyer's reputation was the biggest single reason for choosing that lawyer, and that reputation is most influenced by the standard of service that the client perceives is being provided.
- Other studies have shown the reputation factor may be the sole reason why as much as 82% of clients choose their lawyer.
- In 2017-2018, the Legal Ombudsman found that most complaints (c.19%) about quality against family lawyers regarded a failure to advise clients of possible outcomes and consequences.
- Followed closely by a "failure to follow instructions" (c.18%) and "delay or failure to progress matters" (c.17%).

What do they recommend on dealing with complaints and difficult clients?

- Have a clear and easily accessible complaints process – research shows it increases client confidence in a firm and demonstrates that the firm has confidence in the service it offers and is committed to delivering high standards.
- If possible, another lawyer in your firm should be the first point of contact in the complaints process.
- “We will take into account how the complaint was handled initially by the service provider...if a service provider has made reasonable attempts to try and resolve the complaint, we may consider that nothing further is needed to put things right. However, if a service provider has not dealt with the complaint reasonably, we may direct that some compensation is paid”
- If you cannot resolve issue, inform the client of what redress they can seek outside the firm (for example in England this would be the Legal Ombudsman).

What do they recommend on dealing with complaints and difficult clients? (cont)

- 10 steps – listen, inform, respond:

1. Identify when a complaint is being made or might be.
2. Understand the reasons for the client's position.
3. Acknowledge it promptly (they recommend within 2 working days).
4. Provide options.
5. Be clear about the implications of the client's position on how it will be resolved and how you will continue to conduct their case.

What do they recommend on dealing with complaints and difficult clients? (cont)

6. Use clear, comprehensible language and a neutral tone.

7. When a client has complained, share your findings and your firm's point of view with the client.

8. If you agree that your firm provided unsatisfactory service, acknowledge it and offer an appropriate remedy (for example an apology for a minor inconsequential error, or an appropriate refund for any charges that may have been too high). To ensure lawyers are not afraid of saying sorry, the Legal Ombudsman's scheme's rules say that an apology is not an admission of liability.

9. If you decide you offered a reasonable service, explain why and evidence it.

10. Inform the client they can go to the Legal Ombudsman or that you will facilitate transfer to another lawyer if agreement cannot be reached.

DEALING WITH DIFFICULT CLIENTS
Top tips in those tricky situations

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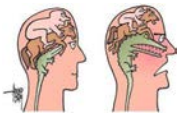
1

my Tips

2

Just relax,
Learn when to talk
and when to be quiet

3



Let them tell their own story first, so that you can work efficiently with them afterwards

4

Really listen to what the client says to discover what their client's underlying needs really are.

5

Be honest! If you clam up in front of a narcissist, don't show your aversion but be open about it. Be straight with anyone who comes across as aggressive.

6

Announce how much time you have at the start of the meeting.

7

And don't take things personally, even if they're personal.

Don't take things personal.

Life is much easier if you don't.

8

www.linkadvocaten.nl

9


BRODIES LLP
Dealing with difficult clients – top tips in those tricky situations
Jennifer Wilkie
Brodies LLP, Edinburgh, Scotland
brodies.com

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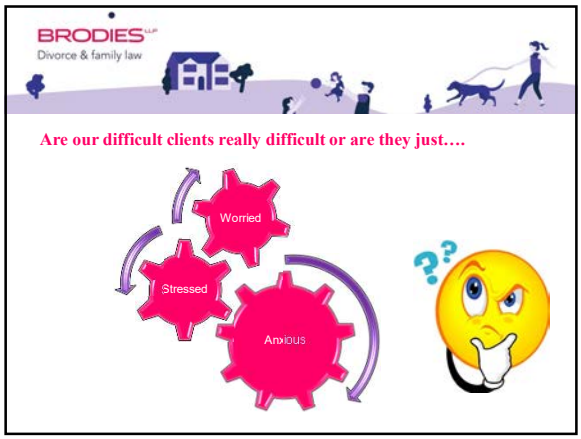
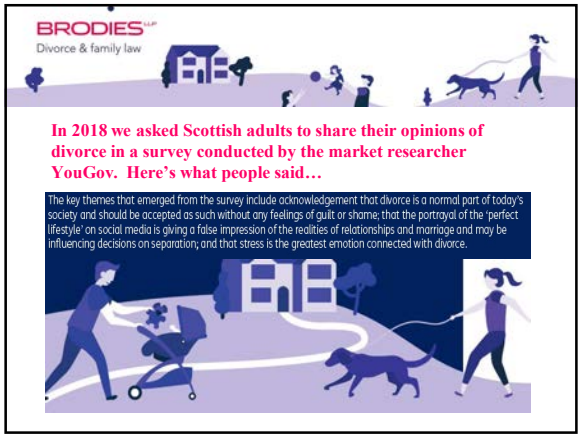
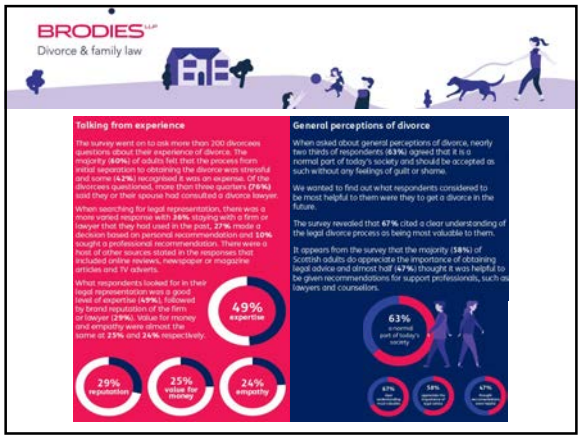

BRODIES LLP
Divorce & family law
Are our difficult clients really difficult or are they just….
Worried
Stressed
Anxious

2


BRODIES LLP
Divorce & family law
In 2018 we asked Scottish adults to share their opinions of divorce in a survey conducted by the market researcher YouGov. Here's what people said…
The key themes that emerged from the survey include acknowledgement that divorce is a normal part of today's society and should be accepted as such without any feelings of guilt or shame; that the portrayal of the 'perfect lifestyle' on social media is giving a false impression of the realities of relationships and marriage and may be influencing decisions on separation; and that stress is the greatest emotion connected with divorce.

3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Divorce & family law
Talking from experience
The survey went on to ask more than 200 divorcees questions about their experience of divorce. The majority (60%) of adults felt that the process from initial separation to obtaining the divorce was stressful and some (42%) recognised it was an expense. Of the divorcees questioned, more than three quarters (76%) said they or their spouse had consulted a divorce lawyer.
When searching for legal representation, there was a more varied response with 26% staying with a firm or lawyer that they had used in the past, 27% made a decision based on personal recommendation and 10% sought a professional recommendation. There were a host of other sources stated in the responses that included online reviews, newspaper or magazine articles and TV adverts.
What respondents looked for in their legal representation was a good level of expertise (49%), followed by brand reputation of the firm or lawyer (29%). Value for money and empathy were almost the same at 25% and 24% respectively.
49% expertise
29% reputation
25% value for money
24% empathy
General perceptions of divorce
When asked about general perceptions of divorce, nearly two thirds of respondents (63%) agreed that it is a normal part of today's society and should be accepted as such without any feelings of guilt or shame.
We wanted to find out what respondents considered to be most helpful to them were they to get a divorce in the future.
The survey revealed that 67% cited a clear understanding of the legal divorce process as being most valuable to them.
It appears from the survey that the majority (58%) of Scottish adults do appreciate the importance of obtaining legal advice and almost half (47%) thought it was helpful to be given recommendations for support professionals, such as lawyers and counsellors.
63%

4


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If things go wrong who do people complain to in Scotland?
• Scottish Legal Complaints Commission (SLCC)
"We can normally only look at a complaint if the lawyer has already had the opportunity to put things right"
https://www.scottishlegalcomplaints.org.uk/for-legal-service-users/family-law-a-guide-for-legal-consumers.aspx

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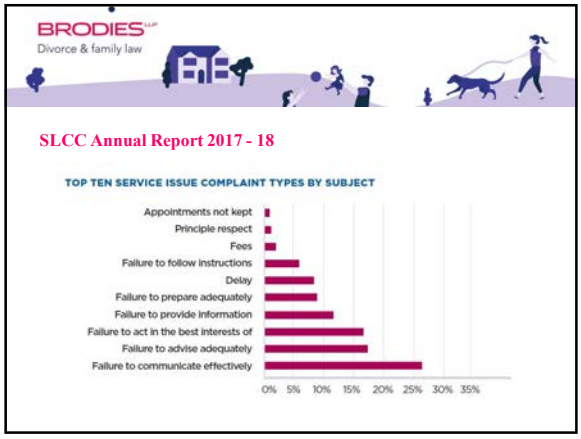
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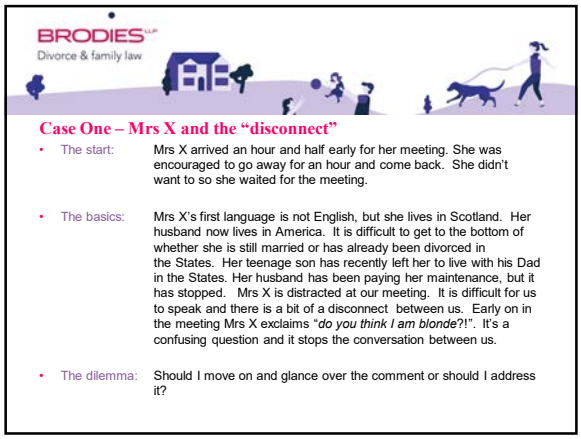
Divorce & family law
SLCC Annual Report 2017 - 18
TOP TEN SERVICE ISSUE COMPLAINT TYPES BY SUBJECT
Appointments not kept
Principle respect
Fees
Failure to follow instructions
Delay
Failure to prepare adequately
Failure to provide information
Failure to act in the best interests of
Failure to advise adequately
Failure to communicate effectively
0% 5% 10% 15% 20% 25% 30% 35%

6



Case One – Mrs X and the "disconnect"

- The start: Mrs X arrived an hour and half early for her meeting. She was encouraged to go away for an hour and come back. She didn't want to so she waited for the meeting.
- The basics: Mrs X's first language is not English, but she lives in Scotland. Her husband now lives in America. It is difficult to get to the bottom of whether she is still married or has already been divorced in the States. Her teenage son has recently left her to live with his Dad in the States. Her husband has been paying her maintenance, but it has stopped. Mrs X is distracted at our meeting. It is difficult for us to speak and there is a bit of a disconnect between us. Early on in the meeting Mrs X exclaims "*do you think I am blonde*?!". It's a confusing question and it stops the conversation between us.
- The dilemma: Should I move on and glance over the comment or should I address it?

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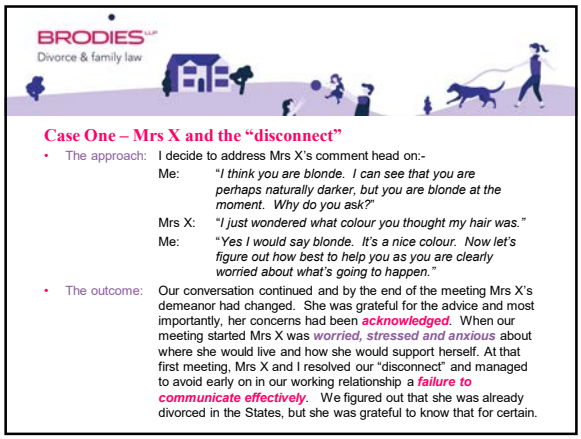

Case One – Mrs X and the "disconnect"

- The approach: I decide to address Mrs X's comment head on:-

  Me: "*I think you are blonde. I can see that you are perhaps naturally darker, but you are blonde at the moment. Why do you ask?*"

  Mrs X: "*I just wondered what colour you thought my hair was.*"

  Me: "*Yes I would say blonde. It's a nice colour. Now let's figure out how best to help you as you are clearly worried about what's going to happen.*"
- The outcome: Our conversation continued and by the end of the meeting Mrs X's demeanor had changed. She was grateful for the advice and most importantly, her concerns had been ***acknowledged***. When our meeting started Mrs X was ***worried, stressed and anxious*** about where she would live and how she would support herself. At that first meeting, Mrs X and I resolved our "disconnect" and managed to avoid early on in our working relationship a ***failure to communicate effectively***. We figured out that she was already divorced in the States, but she was grateful to know that for certain.

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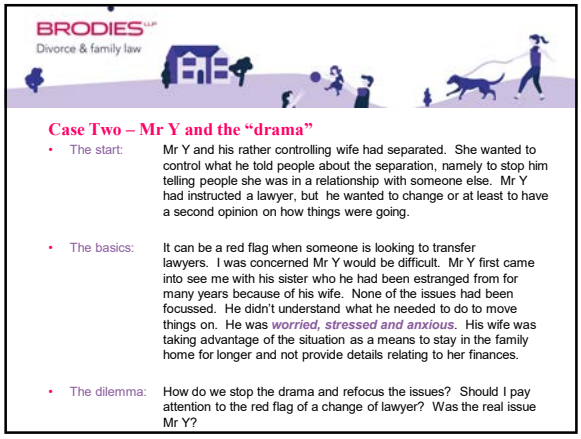

Case Two – Mr Y and the "drama"

- The start: Mr Y and his rather controlling wife had separated. She wanted to control what he told people about the separation, namely to stop him telling people she was in a relationship with someone else. Mr Y had instructed a lawyer, but he wanted to change or at least to have a second opinion on how things were going.
- The basics: It can be a red flag when someone is looking to transfer lawyers. I was concerned Mr Y would be difficult. Mr Y first came into see me with his sister who he had been estranged from for many years because of his wife. None of the issues had been focussed. He didn't understand what he needed to do to move things on. He was ***worried, stressed and anxious***. His wife was taking advantage of the situation as a means to stay in the family home for longer and not provide details relating to her finances.
- The dilemma: How do we stop the drama and refocus the issues? Should I pay attention to the red flag of a change of lawyer? Was the real issue Mr Y?

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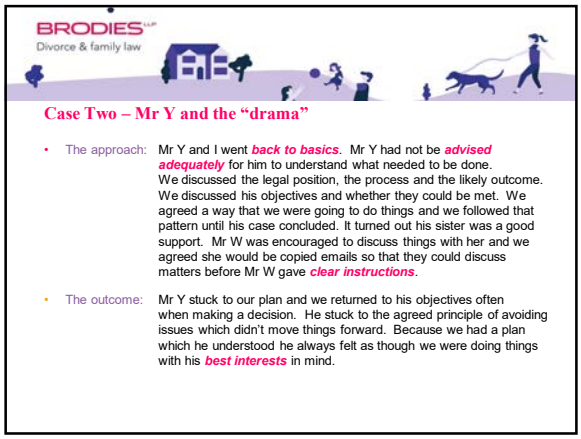
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Divorce & family law
Case Two – Mr Y and the "drama"
• The approach: Mr Y and I went back to basics. Mr Y had not be advised adequately for him to understand what needed to be done. We discussed the legal position, the process and the likely outcome. We discussed his objectives and whether they could be met. We agreed a way that we were going to do things and we followed that pattern until his case concluded. It turned out his sister was a good support. Mr W was encouraged to discuss things with her and we agreed she would be copied emails so that they could discuss matters before Mr W gave clear instructions.
• The outcome: Mr Y stuck to our plan and we returned to his objectives often when making a decision. He stuck to the agreed principle of avoiding issues which didn't move things forward. Because we had a plan which he understood he always felt as though we were doing things with his best interests in mind.

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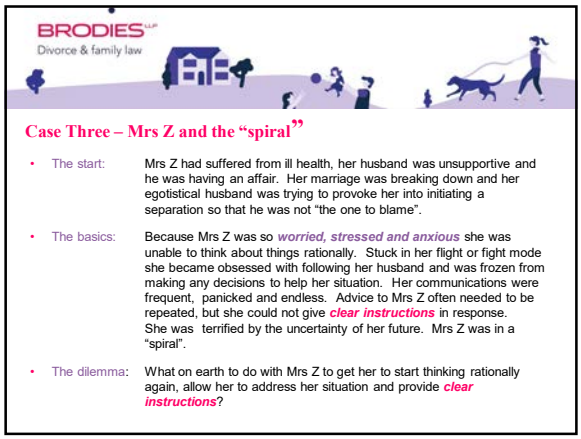
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Case Three – Mrs Z and the "spiral"
• The start: Mrs Z had suffered from ill health, her husband was unsupportive and he was having an affair. Her marriage was breaking down and her egotistical husband was trying to provoke her into initiating a separation so that he was not "the one to blame".
• The basics: Because Mrs Z was so worried, stressed and anxious she was unable to think about things rationally. Stuck in her flight or fight mode she became obsessed with following her husband and was frozen from making any decisions to help her situation. Her communications were frequent, panicked and endless. Advice to Mrs Z often needed to be repeated, but she could not give clear instructions in response. She was terrified by the uncertainty of her future. Mrs Z was in a "spiral".
• The dilemma: What on earth to do with Mrs Z to get her to start thinking rationally again, allow her to address her situation and provide clear instructions?

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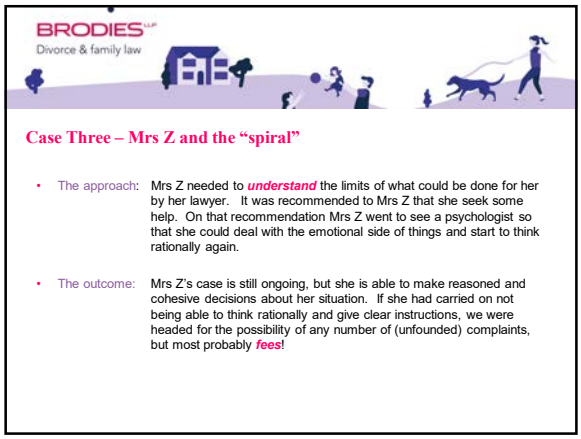
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Case Three – Mrs Z and the "spiral"
• The approach: Mrs Z needed to understand the limits of what could be done for her by her lawyer. It was recommended to Mrs Z that she seek some help. On that recommendation Mrs Z went to see a psychologist so that she could deal with the emotional side of things and start to think rationally again.
• The outcome: Mrs Z's case is still ongoing, but she is able to make reasoned and cohesive decisions about her situation. If she had carried on not being able to think rationally and give clear instructions, we were headed for the possibility of any number of (unfounded) complaints, but most probably fees!

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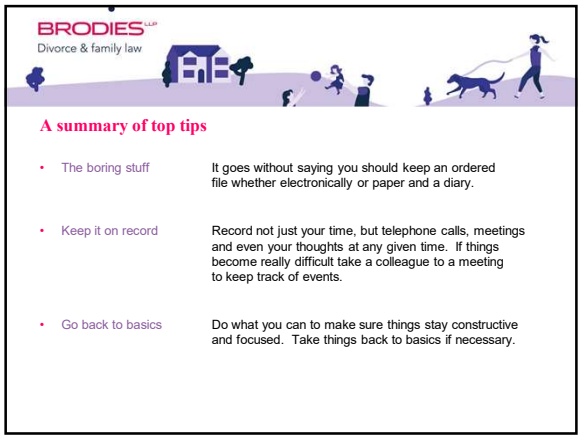
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Divorce & family law
A summary of top tips
• The boring stuff
It goes without saying you should keep an ordered file whether electronically or paper and a diary.
• Keep it on record
Record not just your time, but telephone calls, meetings and even your thoughts at any given time. If things become really difficult take a colleague to a meeting to keep track of events.
• Go back to basics
Do what you can to make sure things stay constructive and focused. Take things back to basics if necessary.

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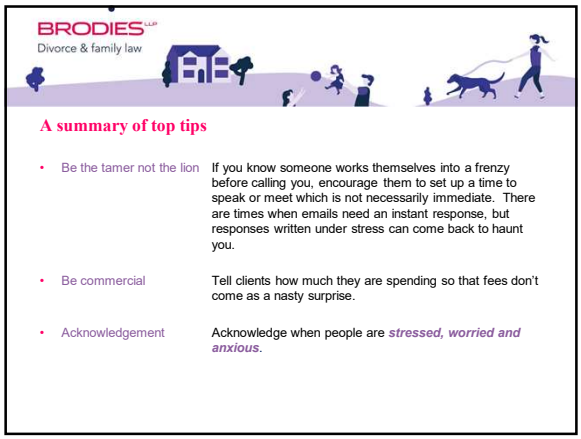
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A summary of top tips
• Be the tamer not the lion
If you know someone works themselves into a frenzy before calling you, encourage them to set up a time to speak or meet which is not necessarily immediate. There are times when emails need an instant response, but responses written under stress can come back to haunt you.
• Be commercial
Tell clients how much they are spending so that fees don't come as a nasty surprise.
• Acknowledgement
Acknowledge when people are stressed, worried and anxious.

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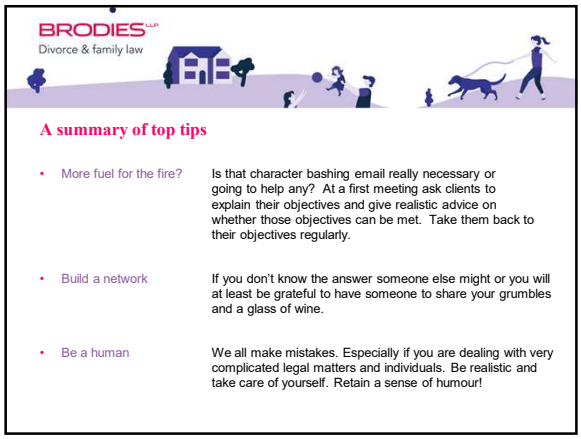
BRODIES LLP
Divorce & family law
A summary of top tips
• More fuel for the fire?
Is that character bashing email really necessary or going to help any? At a first meeting ask clients to explain their objectives and give realistic advice on whether those objectives can be met. Take them back to their objectives regularly.
• Build a network
If you don't know the answer someone else might or you will at least be grateful to have someone to share your grumbles and a glass of wine.
• Be a human
We all make mistakes. Especially if you are dealing with very complicated legal matters and individuals. Be realistic and take care of yourself. Retain a sense of humour!

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