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Family Law News

Newsletter of the International Bar Association Legal Practice Division

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TOKYO 19–24 OCTOBER 2014

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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

From the Chair

Gillian Rivers
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I welcome you to this year's edition of the IBA Family Law Committee Newsletter. I extend grateful thanks to our Editor, Ranjit Malhotra, and to our contributors for the excellent articles on international family law. In recognition of the emergence of these issues, we will be organising a session dedicated to surrogacy and the alternative family, in Hong Kong in 2015. Your suggestions as to the content of the sessions and speakers are always welcome.

The Family Law Committee focuses on international matters in family law concerning finance, jurisdiction, enforcement, tax, trusts and child law to include abduction, surrogacy and adoption. We are involved in the organisation and presentation of seminars and sessions for the annual and regional conferences of the IBA and we often work together with other committees. Every year we join forces with the Individual Tax and Private Client, in the International Wealth Transfer Conference held in London every March.

When I wrote last year, the IBA Annual Conference in Boston was well advanced in its planning stages. I am delighted to report that the Committee ran three very successful sessions entitled: 'Human trafficking: modern slavery', 'Collaborative law mediation and arbitration of family disputes' and 'Mobile marriage and divorce: "what is mine is mine, what is yours is mine"'. In March we supported the Individual Tax and Private Client Committee in their two-day 19th International Wealth Transfer Practice Conference, held at Claridge's in London, on the topic of 'Planning for the modern family'. In Edinburgh in May the Family Law Committee worked together with the IBA Healthcare and Life Sciences Committee to present a two-day conference entitled 'Barriers to Healthcare'.

On every occasion we have been very grateful to the speakers who, without exception, have all been of an extremely high level and leaders in their individual fields.

We are now looking forward to our IBA Annual Conference in Tokyo, 19–24 October 2014. Our session covering 'The Hague Child Abduction Convention Symposium' will take place on the morning of Monday 20 October. This is particularly topical given Japan's ratification of The Hague Convention in January this year. Working together with Individual Tax and Private Client Committee we will have a panel discussion on Tuesday 21 October entitled ''Til the sooner of death and divorce do us part: the use of trusts, marital agreements and other structures in the protection of wealth upon the termination of marriage'. We look forward to seeing as many members as possible at these events. In addition we will have a Family Law Committee Breakfast on Wednesday 22 October 2014, all comers are welcome.

Our Committee is continuing its involvement in the very important IBA Presidential Task Force in relation to attempts to combat human trafficking. Last year in Boston our Committee, in conjunction with the IBA Public and Professional Interest Division, produced a showcase session on 'Human Trafficking: Modern Slavery'. At the end of the session we announced the Presidential project, the purpose of which is to consider how to combat human trafficking, rehabilitate victims, punish the perpetrators and bring about law reform. In fact, our project is well advanced and in Tokyo we will be running another human trafficking showcase session on the afternoon of Tuesday 21 October 2014. This is our third Family Law Committee session during the Annual Conference week, where we will explain the project's achievements to date and also have a well-informed panel discussing 'Best legal practices for an effective global response to human trafficking'.

I would also like to take this opportunity to thank all my fellow committee officers for their hard work during the year.

I look forward to seeing you in Tokyo.

With very best wishes.

Ranjit Malhotra
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From the Editor

It gives me immense pleasure to pen this Editor's note, as part of my second tenure as the editor of the IBA Family Law Committee Newsletter. First of all, I would like to express my profound gratitude to all the eminent contributors who have very kindly spared their valuable time in lending their respective names and contributions, thus making the success of this newsletter possible.

Secondly: the content of this edition. This issue features valuable analytical insights into exciting topical issues, from various jurisdictions stretching across two extreme corners of the world – from Calgary, Alberta, and Canada to Auckland and New Zealand, from Chicago to Malaysia, Israel to India, Sri Lanka to Switzerland. This indeed demonstrates the uniquely cosmopolitan character of private international law practitioners, academics, jurists and the like, which is reflective of the true nature of the IBA as an international organisation.

I would also like to mention a special thank you to Mr Soli Sorabjee, Senior Advocate, Supreme Court of India and Former Attorney General of India, for his support of the newsletter with an eloquent and incisive contribution on the recent transgender judgment, handed down by the Supreme Court of India. This judgment recognises the rights of the transgender community in India.

I will keep you all posted as and when we get ready to prepare our next newsletter.

In the meanwhile, we anxiously look forward to the IBA Annual Conference in Tokyo, from 19–24 October, 2014.

Ranjit Malhotra

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TOKYO 19–24 OCTOBER 2014
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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Family Law Committee sessions

Monday 0930 – 1230

The Hague Child Abduction Convention Symposium

Presented by the Family Law Committee and the Immigration and Nationality Law Committee

The seminar will be of interest to all judges and lawyers practising family law, central authority personnel, Legal Aid authority staff, diplomats, police and other law enforcement agencies, social workers and family ADR experts involved in child abduction cases. The seminar will be presented by experts with experience in operating the Convention, emphasising in particular the role of the child and the voice of the child, with an overview of practice throughout Europe, the Pacific Rim and the Americas. The increasing role of mediation in these cases will also be highlighted during the Symposium.

Tuesday 0930 – 1230

Mr, Ms or Mx? Legal issues facing transgender persons

Presented by the Lesbian, Gay, Bisexual and Transgender Issues Committee, the Family Law Committee and the IBA Human Rights Institute

This panel will focus on the unique legal issues facing transgender individuals around the globe. Part of the session will focus on workplace and discrimination issues, with a description of what multinational employers have done to address their transgender population as well as a survey of global discrimination laws and their coverage (or lack thereof) of gender identity and expression discrimination. The session will also focus on family law issues, insurance coverage and related tax issues, and human rights/violence/incarceration issues faced by transgender individuals. The panel will attempt to demystify the complex myriad of legal issues faced by perhaps the most marginalised sector of the LGBT community.

Tuesday 1430 – 1730

IBA SHOWCASE: Best legal practices for an effective global response to human trafficking

Presented by the Section on Public and Professional Interest, the Family Law Committee of the Legal Practice Division and the IBA Presidential Task Force on Human Trafficking

Combating trafficking of human beings – modern day slavery – demands a comprehensive approach. It requires a commitment from all sectors of society: public health and social services workers and agencies, community and faith-based organisations, law enforcement, the legal profession, businesses and foundations, and private citizens.

In the decade since the United Nations trafficking 'Palermo Protocols' entered into force, anti-trafficking experts have learned a great deal about what works – and what does not. Successful strategies can disrupt trafficking into forced labour, trafficking into forced prostitution, as well as the commercial exploitation of children. Trafficking does not affect only women, but also men and children.

Experts recommend a 'victim-centred approach', a focus on the needs of each victim during all phases of a criminal investigation and prosecution. Successful programmes empower victims, providing them with access to justice that ensures respect for their human rights and dignity. Multi-disciplinary teams made up of law enforcement, social service and health care providers, lawyers, prosecutors, and judges are a crucial element in combating this human rights scourge.

The world has a long way to go to eliminate human trafficking. The International Labor Organization estimates that 20.9 million men, women, and children are held in servitude around the globe. But in 2012, there were just 7,705 prosecutions in the entire world.

What can be done? This IBA Showcase Session will focus on successful initiatives aimed at eliminating all forms of human trafficking. High-level experts will discuss legal remedies designed

Continued overleaf

to end such trafficking. Speakers will highlight supply chain compliance efforts, governmental regulation of trafficking, prosecution strategies, as well as other successful regional and international initiatives to hold traffickers accountable.

New developments of the IBA Presidential Task Force on Human Trafficking since the Boston IBA Showcase Session on this subject will also be announced at the end of the session, with discussion of opportunities to help participate in further activities.

Tuesday 1430 – 1730

'Til the sooner of death and divorce do us part: the use of trusts, marital agreements and other structures in the protection of wealth upon the termination of marriage

Presented by the Family Law Committee and the Individual Tax and Private Client Committee

When one or both of the spouses have substantial assets, the difficulties of handling the legal repercussions of the breakdown or end of the relationship become even more complicated. The session will focus on the practical aspects of protecting wealth and on international litigation about marital rights, and is designed to take a comparative look at prenuptial and postnuptial agreements, what structures may be appropriate, entitlement to assets from trusts, family protocols and constitutions, and the attitude of courts in different jurisdictions towards discovery of information, privilege, disclosure and confidentiality.

Wednesday 0800 – 0930

Open committee business meeting and breakfast

Presented by the Family Law Committee

An open meeting of the Family Law Committee will be held to discuss matters of interest and future activities.

To find out more about the conference venue, sessions and social programme, and to register your interest, visit **www.ibanet.org/conferences/tokyo2014.aspx**. Further information on accommodation, tours and excursions during the conference week can also be found at the above address.

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Historical judicial victory for transgender persons

The Supreme Court of India has played a commendable role in safeguarding the human rights and dignity of women and in promoting gender justice. Its celebrated judgment in *Visakha* provided much-needed relief to rampant sexual harassment of women in the workplace. True, the judgment is tantamount to ad hoc judicial legislation, but it was needed when parliament was somnolent about this pervasive evil. Besides, the court made it clear that its directions would operate until parliament enacted the requisite legislation. It was years after the judgment that Parliament bestirred itself and we are yet to witness enactment of the law.

The recent judgment of the Court delivered by the Bench comprising Justices K S Radhakrishnan and A K Sikri is ground-breaking. It provides much delayed justice to the transgender community. The Court noted that Indian law treats gender as a binary male/female concept with sections of the Indian Penal Code and other statutes related to marriage, adoption, divorce, succession, and even in welfare legislation. It rightly recognised that sex identity cannot be based on a mere biological test but must take into account the individual's psyche. The judgment not only outlaws discrimination based on gender presumed to be assigned to an individual at birth but has extended global principles of dignity, freedom and autonomy to this unfairly marginalised transgender community. The judgment lays down a comprehensive framework that takes into its fold the positive right of transgender persons to make decisions about their lives and to choose the activities in which they want to participate.

The most remarkable part is the Court's ruling that transgender people, apart from non-discrimination, should be treated as socially and educationally backward and be given reservation in education and employment. Justice Radhakrishnan's observation that transgenders, even though insignificant in numbers, have every right to enjoy their human rights will displace the fallacious reasoning of the Supreme Court's disastrous judgment on section 377 of the Indian Penal Code that homosexuals constituted an insignificant section of the community. Expectedly the judgment will be criticised as another instance of judicial legislation, an extreme judicial overreach. However, it should be rightly commended for upholding the right to live with dignity of persons who have for long been deprived of their basic rights.

Article 15 and Brussels 11 Revised

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A child in England and Wales can be considered in terms of applications regarding him or her before the court of England and Wales if they derived from an EU country by reason of Article 15 BR2 (Brussels 11 Revised) and if said child is present in England and Wales at the time of the court's due consideration.

In the case before Justice Mostyn,[1] by reason of *A v A* (Children: Habitual Residence 2012 EWCA Civ 1396), given that the child with whom Mostyn J was concerned had never been in Slovakia, his place of habitual residence could not automatically follow that of his mother. The child therefore had no place of habitual residence as established by Article 13. Article 15 provides the importance of transferring a case to a court in the EU better placed to hear a case.

In relation to habitual residence, all must now apply the definition given by the Court of Justice of the EU in *Re A (Area of Freedom, Security and Justice)*[2] and *Mecredi v Chaffe* (2007 2 FLR).[3] Terms used in community law must be uniformly implemented and interpreted throughout the Community, except where an express or implied reference is made to national law.

Article 15 should be interpreted within the principles of *M v M (Stay of Proceedings: Return of Children)*.[4] Indeed the scope of any best-interest enquiry does not mean that there should be a final hearing in England and Wales first or in any event, but the consideration when making any transfer request under Article 15 should be the same as when determining jurisdiction under Article 12: it should not involve any profound investigation of the child's situation or upbringing, and the court to which the transfer request is made should only accept jurisdiction if it is satisfied it is in the best interest of the child to do so. Article 15 does apply to public law as well as private law cases.

A transfer request to Slovakia would therefore be made, it was said, by example in the above-mentioned case. The scope of best-interest enquiry should be the same as when considering jurisdiction under Article 12: it should not consider a complex investigation into the child's own situation and upbringing once more as emphasis but should consider the main issues for the court of England and Wales to consider when deciding finally on the appropriate forum.

A detailed enquiry would not be correct even though Article 15 considered both public and private law issues in the EU. The plan proposed by the Slovakian authorities in the case before Mostyn J best preserved the possibility of promoting the child's own Slovakian and Roma heritage, both of which were important for the child, which neither the local authority nor the guardian in England and Wales had in fact given sufficient regard to.

These considerations and case law of England and Wales offer pertinent principles referable to all cases of similar issues throughout the courts of the EU when considering such children matters.

Notes

1 *Re T (A Child: Article 15 of B2R)* [2013] EWHC 521 (Fam).
2 *Re A (Area of Freedom, Security and Justice)* ECJ (C523/07), [2009] 2 FLR 1.
3 *Mercredi v Chaffe* ECJ Case C/947/10, [2011] 1 FLR 1293.
4 *Re M v M (Stay of Proceedings: Return of Children)* ECJ [2006] 1 FLR 138.

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The Hague Convention and the rights of children

There is a tension between The Hague Convention on International Child Abduction (the 'Hague Convention'), which came into effect in 1980 and focuses on the protection of parental custody rights, and the Convention on the Rights of the Child, which was adopted a decade later and recognises the rights of children to participate in proceedings that affect their future. While The Hague proceedings are intended to summarise, and not to address the best interests of children, let alone engage their rights, children are nevertheless profoundly affected by them. Recent appellate decisions in the United Kingdom and Canada reveal that courts are increasingly willing to recognise a role for children in The Hague proceedings, including giving standing to lawyers representing children. The cases also illustrate that involving children in these proceedings poses significant challenges for judges and counsel, who need to carefully consider not only whether children should participate, but how this participation should be managed.

United Kingdom: *Re L C*

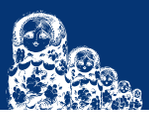
In the 2006 House of Lords decision *Re D (A Child)*, Lady Hale suggested that:

> 'Children should be heard far more frequently in... *Hague Convention* cases than has been the practice hitherto… whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.'[1]

A year later, Lady Hale continued to advocate hearing from children in some way, such as by having their views put before the court by a court-appointed social worker, but observed that in most Hague Convention cases 'the intrusion, the expense and the delay' should cause a court to be cautious about making a child a party or appoint counsel for the child.[2]

In its 2014 decision in *Re L C*,[3] the UK Supreme Court demonstrated that there are Hague Convention cases, even involving younger children, where their views may play a decisive role and separate representation may be appropriate. In this case, there were four children aged 3–11 at the time of their parents' separation. Until separation, they had lived their entire lives in England with their parents. Upon separation, the mother, a Spanish national, took the children to live with her and their maternal grandmother in Spain, with the implicit consent of the father. The children lived in Spain for five months and then returned to England to visit their father. Once there, they expressed a strong desire to stay with him in England. The mother commenced a Hague application in England. At trial, a court-appointed officer[4] (a social worker) testified that the three older children were unhappy in Spain and wanted to stay in England, but the trial judge concluded that all four children were habitually resident in Spain and ordered their return. The trial judge had rejected an application to allow the eldest of the four children to be made a party to the proceedings at an interlocutory stage of the proceedings.[5] He also rejected arguments under Article 13 of the Hague Convention that the children would suffer 'grave risk' of harm if returned and that the three youngest 'objected' to their return. The trial judge also exercised his discretion to order the eldest child's return to Spain with her siblings, notwithstanding her maturity and objections.

The father appealed to the Court of Appeal. The three older children, by then aged 9–13 years, consulted solicitors, who were also permitted to represent them in the appeal. The Court of Appeal dismissed the appeal against the finding that the children were habitually resident in Spain and the children's appeals against the trial judge's refusal to make them parties to the proceedings. The only ground on which the father succeeded at the Court of Appeal was that the trial judge had been wrong in the exercise of his discretion in respect of the eldest child. As a consequence of the decision in respect of the eldest child, the Court of Appeal remitted the proceedings back to



the trial court for consideration of whether the potential separation of the sibling group would lead to an intolerable situation, satisfying the Article 13b exception.

The father and eldest child appealed the Court of Appeal's decision to the UK Supreme Court. The UK Supreme Court determined that this child's 'state of mind' while living in Spain in 2012 was a relevant factor in determining whether she had become 'habitually resident' in Spain during the period in question. Further the UK Supreme Court set aside the trial judge's finding regarding the habitual residence of all four children so that the issue could be considered afresh at the trial court. The UK Supreme Court also concluded that the eldest child, who could contribute relevant evidence regarding the issue of her habitual residence, should have been made a party to the original proceedings and allowed her appeal regarding this issue.

This consideration of the children's attitudes about their residence is an appropriate, 'child-centric' approach to the issue of determining 'habitual residence' for the purposes of the Hague Convention. Significantly, the Supreme Court also was receptive to children being represented in the proceedings.

Canada: *R M v J S*

In 2011 the Ontario Court of Appeal recognised that, in a Hague Convention case where there is a claim that the child may suffer serious harm if returned, there is a threat to the child's 'security of the person', and accordingly the Canadian Charter of Rights section 7 requires that 'principles of fundamental justice' apply.[6] In this case, this meant that a 13-year-old girl was entitled to notice and a right to participate in the proceedings. This type of constitutional analysis has encouraged a trend in Canada for judges to make orders for representation for children in Hague proceedings, at least where the children seem mature enough that there is the possibility that they have the ability to formulate and communicate their own views about the proceedings to counsel.

The December 2013 decision of the Alberta Court of Appeal in *R M v J S*[7] illustrates that counsel for a child may have a critical role in proceedings, but needs to carefully consider how to introduce evidence of the child's views. The mother and father were Arab-Palestinian Muslims living in East Jerusalem. They married and had one child – a son – and then separated. They were subsequently divorced in the Sharia Court of Jerusalem. No provision was made for custody of the son, but it was accepted that the mother had de facto custody. The father then immigrated to the province of Alberta in Canada. The boy continued to reside in Jerusalem with his mother, on the understanding that he would spend his summers with the father in Canada. After one summer visit, when the boy was nine years old, the father failed to return him to his mother. The mother then brought an application in Alberta under the Hague Convention for the boy's return.

At the trial, there was affidavit evidence from both parents. Although the boy was not made a formal party, the trial court appointed counsel[8] to represent the interests of the child.[9] Counsel for the child made submissions, reporting that after interviewing the child on two occasions, utilising a series of questions provided to counsel by a child psychologist, counsel concluded that the child [then ten years of age] objected 'to being returned [to East Jerusalem] and has attained an age and degree of maturity at which it is appropriate to take account of its views' within the meaning of Article 13 of the Hague Convention.

Child's counsel concluded that the boy was not subject to undue influence from the father, and was 'mature for his age, bright and articulate when it came to describing his concerns about returning to Israel', noting that as an Arab youth he often felt unsafe and bullied where he resided. His counsel reported that the boy felt 'like a minority and is not comfortable with the amount of killings and fighting happening all the time' and that 'Jewish citizens in Jerusalem pull out their guns to intimidate non-Jewish people'. At trial, counsel for both the child and the father raised arguments under Article 13 of the Hague Convention about both 'grave risk' and the 'child's objections'. The trial judge accepted that there had been a wrongful retention, and rejected the grave risk argument, but accepted the argument based on the child's objection, and accordingly refused the application. The mother appealed to the Court of Queen's Bench,[10] which gave deference to the trial judge's finding and denied the mother's appeal.

In December 2013 the Alberta Court of Appeal allowed the appeal and directed that the child be returned 'forthwith' to the mother in Jerusalem.[11] The Court of Appeal

quoted its 2006 decision in *Den Ouden v Laframboise,* where the Court considered a case of two children, aged 14 and 10, who did not want to be returned to Holland because they enjoyed their new school and new friends in Alberta, and did not wish to have their lives disrupted by a return order. There the Court of Appeal ordered their return, stating:

> 'These feelings are completely understandable and not unexpected… However, to exercise the court's discretion permitted by Article 13, and give effect to feelings of children who find themselves in such situations would undercut the fundamental objective of the Hague Convention. That would lead other parents to believe that they may abduct their children, go to another country, settle there, and then rely on their children's contentment to avoid being returned to the jurisdiction which should properly deal with their custody and residence. We cannot encourage such conduct.'[12]

The Court of Appeal in *R M v J S* expressed concern that the trial judge:

> '… Seemed to treat the child's objection as controlling... The policy of the Convention is that the courts of signatory nations are credited with the ability to address best interests appropriately… In short, the objects and policy considerations underlying the *Hague Convention* appear to have been overridden, without a proper evidentiary basis.'[13]

While concerned about the judge's conclusions, the Court of Appeal decision in *R M v J S* was based on the fact that the trial judge rested his findings on the submissions of the counsel for the child and did not have 'evidence' from a mental health professional. In the view of the appellate court, counsel for the child:

> 'Did not provide a proper evidentiary basis for the court to assess the maturity of the child, nor to assess his views if he was sufficiently mature to have them considered. In saying so, we make no criticism of counsel for the child whose duty it was to represent him… counsel, though well versed in the law, did not demonstrate that they possessed any specialized expertise in understanding and analyzing the thoughts of young children.'[14]

The Alberta Court of Appeal cited the 1994 Ontario Court of Appeal in *Strobridge v Strobridge,*[15] which held that counsel for a child cannot 'give evidence' while making submissions. Accordingly, there was no evidentiary foundation for the trial judge's ruling. The Alberta Court of Appeal went on to rule that evidence about the child's wishes and views should be put before the court by a social worker, psychologist or other child-care professional who had interviewed the child. Such a clinician could then have been cross-examined by all of the parties, ensuring that the evidence is fairly tested. The Alberta Court of Appeal stated in the absence of '*express consent* from the other parties, counsel for a child cannot state the children's views and preferences, as counsel cannot occupy the dual role of advocate and witness.'

Evidence of children's perceptions, wishes and objections

The central ruling of the Alberta Court of Appeal in *R M v J S* is that counsel appointed to represent a child cannot rely on submissions to present evidence of the child's views. Rather there must be admissible evidence from a mental health professional, preferably an independent professional appointed by the court or retained by child's counsel, who has interviewed the child and can testify about the child's wishes, perceptions, recollections and objections to return. Preferably this professional should be qualified to give expert evidence about the child's maturity and the independence of the child's views. In the vast majority of Hague cases heard in England, a specialist with training on the issues in Hague cases from the Children and Family Court Advisory and Support Service ('Cafcass') High Court team fulfils this valuable role. In *Re L C* the UK Supreme Court had the benefit of the evidence of the children's views and experiences and the assessment of the children's maturity provided by the Cafcass officer in her two reports for the trial court.

There is much to commend the approach of these courts in requiring evidence from a mental health professional rather than allowing child's counsel to, in effect, 'give evidence from counsel table'. Allowing the court to have a full understanding of the issues and procedural fairness requires that the parties are given an opportunity to cross-examine the person testifying about the child's interview, perhaps obtaining fuller or qualifying information and, if opinions about the return are expressed

by the witness, testing the experts' qualifications and opinions. Indeed, it will often be desirable for the professional to provide the parties and court with a video-recording of the interview(s) with the child. However, prior to the decision of the Alberta Court of Appeal in *R M v J S,* the widely followed practice in Alberta and many other jurisdictions was where counsel appointed for a child gave a detailed report about the child's views and perspectives through submissions.

Given this pattern of practice, it was unfair to the child involved in *R M v J S* to have ordered his return rather than an expedited rehearing based on admissible evidence from a qualified mental health professional. Compliance with the Alberta Court of Appeal decision in this case will clearly require a change in practice in that province. Generally in Canada, when counsel is appointed to represent children in Hague or other proceedings, the government funds the representation. Following the procedure required by the Court will also likely require an increase in funding per case where counsel are appointed for children in that province, and an increase in the availability of independent mental health professionals to interview children. There is much to commend the English model of having a government funded and supervised agency established to provide such services, with mental health professionals having appropriate training about the issues in Hague cases.

Child's objections vs child's wishes

The Alberta Court of Appeal decision wisely points out that in Hague cases there must be careful scrutiny of views expressed by a child. Usually, prior to the case coming to a hearing, the child will have spent a significant period of time in the care of one parent and not had much contact with the other parent; often children become aligned with the parent whom they are living with. Further, and significantly, Hague cases are not about the best interests or wishes of a child, but about which court will take jurisdiction over a custody dispute and whether the child has 'mature' 'objections' to return. However, in this case, if one accepts his counsel's reports, the boy did not just state that he preferred to live in Canada, but expressed understandable and reasonable 'objections' about growing up as a Palestinian in East Jerusalem.

Children involved in Hague applications

The Alberta Court of Appeal in *R M v J S* and UK Supreme Court in *Re L C* raise the issue of when and how children should be involved in Hague Convention applications. In these cases children, aged 9–13 years, were made parties or had counsel in the proceedings.

Some of the factors to consider in deciding whether to grant party status or legal representation to a child include:[16]

- where there is a reasonable prospect that the child has the capacity to instruct counsel and have an independent position;
- where the child's position may not be adequately represented to the court by the adult parties, for example, because of their lack of legal representation;
- where a therapist involved with the child recommends such involvement;
- where the child has expressed concerns that return might affect his or her life, liberty or security of the person.

The court making an order appointing counsel may provide some direction or restrictions on the role of counsel for the child. In the absence of such restrictions, counsel for the child should take account of such factors as the age, capacity of the child to instruct counsel, views of the child, and any law society guidelines about the role that counsel is to play. Normally counsel should be taking instructions from a child who is expressing clear and consistent views. Counsel should ensure that the child understands the limited scope of Hague proceedings.

Some of the steps that counsel for a child in a Hague case may take include:

- unless inappropriate, facilitating contact and visits with the left-behind parent;
- retaining a mental health professional to interview the child and testify in court about the child's views, perspectives, concerns and capacities;
- adducing other evidence and cross-examining witnesses to advance the child's position;
- discussing with the child and court whether it is appropriate for the child to meet the judge;[17] and
- making submissions on behalf of the child.

Notes

1 [2006] UKHL 51, [2007] 1 AC 619, [59]–[60].
2 *In re M (Children),* [2007] UKHL 55, [57].
3 [2014] UKSC 1.
4 Employed by the Children and Family Court Advisory and Support Service ('Cafcass').
5 The solicitor for the eldest child, T, was Helen Blackburn,

co-author of this article; her counsel were David Williams QC and Jacqueline Renton.
6 *A M R I v K E R*, 2011 ONCA 417.
7 2013 ABCA 441.
8 Counsel for the child was the co-author of this article, Max Blitt.
9 *J S v R M*, 2012 ABPC 18.
10 2012 ABQB 669.
11 2013 ABCA 441.
12 *Den Ouden v Laframboise*, 2006 ABCA 403, [16].
13 2013 ABCA 441, [32] and [34].
14 2013 ABCA 441, [24] and [28].
15 *Strobridge v Strobridge* (1994) 18 O R (3d) 753 (C A).
16 See *Re L C*, [2014] UKSC 1, [53], per Wilson L J.
17 While judicial meetings with older children are often appropriate where the 'best interests of the child' are at issue, there is less scope for such meetings in Hague cases, which typically involve neither a child's best interests nor wishes: see Bala, Birnbaum, Cyr and McColley, 'Children's Voices in Family Court: Guidelines for Judges Meeting Children' (2013) 47:3 *Family Law Quarterly* 381–410.

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A milestone achieved – DNA profiling comes of age

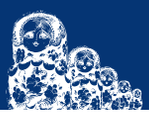
DNA testing enforceable

A valuable right of a party to prove paternity by DNA testing has been tried, tested and proved. A person can now be physically compelled to give a blood sample for DNA profiling in compliance with a civil court order in a paternity action. The erudite judgment of the Delhi High Court of 27 April 2012 in *Rohit Shekhar v Narayan Dutt Tiwari* has held that once a matrimonial or civil court exercises its inherent power to order a person to submit to a medical examination or it directs holding of a scientific, technical or expert investigation, which is then resisted or refused by a party, the Court is entitled to enforce such direction and not simply take the refusal on record to draw an adverse inference therefrom.

The Court also settled the issue that such mandatory testing upon an unwilling person is does not violate of the right to life or privacy of a person under Article 21 of the Constitution of India though the power to direct a DNA test should be exercised after weighing all pros and cons and satisfying the 'test of "eminent need"'. However, this right has been restricted to the civil courts only by holding that the same reasoning cannot be applied in the context of criminal cases as the Supreme Court in *Selvi v State of Karnataka* (2010) 7 Supreme Court Cases 263 has held that narcoanalysis, polygraph (that is, lie-detector) test and BEAP(Brain Electrical Activation Profile) conducted against the will of a person are impermissible under criminal law where an accused cannot be compelled to make self-incriminating statements to be a witness against himself.

Previous instances

- On 30 October 2006, in *CBI v Santosh Kumar Singh*, the Delhi High Court sentenced the accused to death for the rape and murder of a law student on 23 January 1996. The acquittal was turned into conviction by the High Court, amongst other grounds on the basis of the DNA test conducted in the case by The Centre for Cellular and Molecular Biology, Hyderabad, which had clearly established the fact of rape even though the surgeon who had conducted the post mortem had ruled out rape. The Supreme Court has affirmed both the findings and said sentence.
- On 6 December 2005, in *Nirmaljit Kaur v The State of Punjab*, the Apex Court relying exclusively on report dated 30 August 2005, for 'DNA Typing Evidence For Establishing Maternity' came to the conclusion that the child produced before the Court is not the real child of the petitioner and that the petitioner's real child is in the custody of the respondents elsewhere. The Supreme Court also held that 'A perusal of the entire proceedings in this Court and the proceedings pending before the other Courts would only go to show the respondents' evil desire to grab the property and to make the life of the petitioner – a widow with a girl child [–] miserable.' The respondents' were also convicted for Contempt of Court.
- On 26 September 2005, in *State of Uttar Pradesh through CBI v Madhumani Tripathi*, the State of Uttar Pradesh through CBI aggrieved by the orders passed by the



Allahabad High Court releasing the accused on bail, filed appeals before the Supreme Court in a case of murder where the DNA reports showed the accused as the father of a six-month foetus found in the womb of the deceased. The Supreme Court, while disposing of the appeals, held that on the basis of material collected in evidence, the High Court orders be set aside and the bail bonds cancelled, and directed the respondents to surrender forthwith.

- In an international perspective in 2007, the Jamaican Police probing the murder of Pakistan's cricket team coach Bob Woolmer had sought the DNA samples from everyone in the hotel where the deceased was allegedly said to be strangulated. According to the police, as reported, DNA samples were sought from all the members of the West Indies, Ireland and Pakistani teams.
- Maninder Pal Singh Kohli, accused of murdering Hannah Foster in Hampshire in 2003, was apprehended in India and extradited to the UK by British Police in 2007 after his wife consented to DNA testing from their two sons, from which the Forensic Science Service was able to infer a DNA profile for the fugitive criminal that matched the DNA of the accused's semen found on the clothes of Hannah Foster.

In view of the above-mentioned instances, today, the most debated question to generate thoughts amongst jurists, judges, scientists, lawyers and academicians – irrespective of any legal system – is as to how the present value-based system of justice requires to be changed or modified or reorientated for the purposes of utilising the advantages of modern scientific discoveries and technological advancements in the justice delivery system.

DNA fingerprinting – inputs and advantages

This science is used as a new form of circumstantial evidence, which is placed on a higher pedestal than direct and ocular evidence because of its objectivity, scientific accuracy, infallibility and impartial character. Moreover, this new technology is also extensively applied in civil cases in order to determine paternity or maternity disputes, baby-swapping matters, succession disputes, maintenance proceedings and matrimonial disputes etc. For instance, in case of disputed paternity or maternity of a child, mere comparison of DNA obtained from the body fluid or body tissues of the child with that of the father and mother can offer reliable evidence of biological parentage within a short period of time. No other evidence or corroboration is required because timely medical examination and proper sampling of body fluids, followed by quality forensic examination, can offer irrefutable evidence, avoiding the need of protracted court proceedings.

While scientific process may be 'fool proof', the fact remains that the human action that controls the result of this scientific forensic examination may be questionable. There is also the lurking possibility of manipulation and tampering of the scientific evidence. In instances of organised crime, rioting and public massacres, DNA samples can be fudged by deliberate action. This apart, the reliable results of the scientific process is otherwise apparently unassailable.

Change and reforms in the present system: need of the hour

First, the vigilant search for truth is the hallmark of our criminal justice system. Science and law, two distinct professions, have increasingly become intermingled to ensure a fair process and to see that justice is done. The legal system today has to deal with novel scientific evidence, which has posed new challenges for law. Many of these dilemmas arise from fundamental differences between legal and scientific processes. Scientific evidence has accurate fact-finding results without uncertainties, which accompany legal decision-making. However, if these scientific investigations do not find statutory recognition, their reports may or may not be accepted at the discretion of the court. DNA profiling in criminal cases is one such paradox.

Secondly, the 185th Report of the Law Commission of India on the review of the Indian Evidence Act, 1872, dated 13 March 2003 has recommended, that with reference to proof of paternity, section 112 of the Evidence Act be amended. Three other exceptions by way of blood group test, DNA investigations and medical tests to prove impotency have been recommended to be introduced other than non-access of parties to each other.

If the above-mentioned recommendation is accepted and incorporated into the Evidence Act, it may be the first Indian legislation to give statutory acceptance to DNA investigations conducted by consent of parties. Furthermore, it will dispel the existing

requirement of proof where, other than non-access of parties, even DNA investigations are not considered conclusive proof to rebut legitimacy. As of now, if the DNA result does not match, the identity of the person is not established. But, surprisingly, the contrary is not true. May be the amended position will be a harmony in reality.

Conclusion: so near yet so far

In western countries, DNA testing and profiling is now widely employed. In India, too, systematic and scientific planning ought to be started for the use of DNA technology. Orientation programmes, seminars, workshops, publications and awareness campaigns ought to be carried out for popularising and creating awareness of the benefits of DNA tests. All concerned functionaries in the civil and criminal justice delivery system in general and the police, courts and correctional institutions in particular must be acquainted with this science. A fusion of knowledge of forensic sciences and new DNA technology will not only lead to quick detection of crimes but will also be useful in the prevention and control of crimes. Needless to add, civil disputes will also find quick resolution.

Concerted efforts should be made to emphasise the need for an independent, recognised body – which has been called the DNA Profiling Advisory Committee – and implementation of quality control measures with regards to DNA profiling. This would be able to provide recommendations on the use of current and future DNA methods, to draft an appropriate legislation for all issues concerning DNA profiling, to safeguard the rights of individuals thereunder, and to create a National DNA Bank for aiding Criminal Justice System.

Immediate steps should be taken to make suitable changes in the Code of Criminal Procedure 1973, Indian Penal Code 1860, Indian Evidence Act 1872, The Family Courts Act 1984, and all other prevalent family law legislations in India to provide for statutory amendments to recognise results of DNA investigations and to provide for DNA tests and profiles as authentic modes of proof in matters of civil, criminal and matrimonial disputes.

In sum and substance, rather than leaving it to a case-by-case approach of the courts, clear legislation is needed. The time it takes for DNA evidence to be universally accepted as reliable evidence depends on the protagonists of change. It may also be said that the existing value-based criminal justice system cannot be done away with, and a balance has to be struck between the modern system and the existing precedence. It may be unsafe to convict or acquit a person exclusively on the basis of DNA evidence but scientific results cannot be ignored in seeking the truth for justice. It may be remembered that the DNA witness is unstoppable and, given a chance, it will speak the truth and only the truth. Despite vast benefits, in the field of law, medical jurisprudential techniques are not yet treated as primary or secondary evidence. The present Indian Evidence Act continues to treat technical findings such as results of DNA tests as expert evidence. This stalemate will continue until suitable legislation is enacted by parliament. It is sincerely hoped that the proposed Bill for recognising DNA as evidence sees the light of the day at the earliest opportunity; justice demands that it should be delayed no further. To enable non-resident Indians to benefit from DNA evidence in matters of determining paternity in surrogate arrangements and resolving consequential immigration issues, similar amendments would be extremely positive. Likewise, in matters of ascertaining and establishing evidence in international crimes, DNA evidence would assist Indian law in clinching the culprits with certainty.

Family arbitration: the new silver bullet in family financial dispute resolution?

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The role of family arbitration

At a time when the legal aid cuts in funding for family justice in England and Wales have been adversely impacting on litigation to resolve financial and property disputes in divorce and other family law contexts, the new ADR tool of family arbitration, under the Institute of Family Law Arbitrators (IFLA)[1] Scheme (the 'Scheme') and Rules, and the Arbitration Act 1996, appears to be a timely addition to the methodology in this field, despite the fact that its ambit is restricted to financial proceedings only[2] (and not to any child issues other than child support, which is a financial matter within the Scheme).

The sudden rise in the number of litigants-in-person in family cases generally, following the April 2013 implementation of LASPO 2012,[3] (and especially in such complex matters as financial provision in divorce, separation of cohabitants and in other family financial disputes) has proved an unhappy 'solution' to the absence of legal aid: and this has been the case both from the point of view of the parties, uneasy in court without their lawyers, and of the judiciary who have to try cases in these sometimes chaotic circumstances.

Moreover mediation, now the officially encouraged ADR tool[4] (which is still funded, provided the parties qualify financially) does not suit every case, not least as it does not always produce an enforceable determination since it leads only to a facilitated settlement by the parties. This settlement *may* be enforceable through a consent order endorsed by the court but may also be difficult to achieve fairly in the first place without legal advice that mediators cannot give – unless of course the parties can afford to pay for at least some initial time with their lawyers. Although a mediator may be able to provide some basic information, if the government's information hub has proved insufficient, it seems that there is no change from the results of research into the public view of mediation in 1996,[5] which clearly indicated the adverse lay opinion of the impact of a legal advice-free process, and their dissatisfaction with the loss of previously available legal advice.

But can family arbitration fill the gap? First impressions that it might only be attractive to the rich (on the basis that arbitration must be expensive) could not be more wrong, although a belief registered in comments along the lines of, 'it is for huge multi-national companies' commercial disputes isn't it, shipping and re-insurance and the like?' is apparently widespread – even within the profession itself.[6]

Family arbitration is indeed a boutique process, which will require a minimum cost because initial legal advice is explicitly required (unlike mediation, where the parties not only do not get a determination, but often have to settle their dispute without either legal advice or knowing whether their settlement is fair). Indeed, the cost of arbitration can certainly mount up in terms of the arbitrator's time and fees if the assets in issue are numerous and in the millionaire class. But arbitration can in fact also be particularly useful where the parties' assets are *small* and they thus clearly do not have money to spend on litigation in court – a course of action that will certainly cost more than arbitration because of the necessity to comply with the standard court rules and Practice Directions, which are inevitably front loading, unavoidable and can rarely be kept down owing to the amount of formal professional preparation required to comply with court rules.

Arbitration will, however, usually also be *much* less expensive than collaborative law, for which there is also no public funding, despite protests of some practitioners that it can often be more effective than mediation.

Family arbitration, however, can not only be extremely cost-effective (whether the parties are rich or poor) in actually *saving* much greater litigation or collaborative law costs, but has already been shown in early cases that have reached some of the newly qualified

family arbitrators, to be cost-effective for *any* parties in a family money or property dispute, regardless of their means, *provided* they have at least the funds to take some basic legal advice before requesting an arbitrator.

The minimum legal advice requirement

The reason for this legal advice caveat is because, while legal representation is not necessary before an arbitrator, the system does not work with parties that go into it acting entirely alone and without *any* recourse to legal advice. The Scheme explicitly requires on its application form that the parties should at least have had such basic advice about 'the nature and implications' of their agreement to arbitrate (ie, the impact on their respective legal positions of agreeing to a binding decision from the arbitrator) and *before* inviting an arbitrator to make a determination in their case. This is because, unlike the mediator's facilitated settlement, the family arbitrator will make a *decision under the law of England and Wales*, just like a judge in court proceedings, which the court will enforce in the absence of any vitiating circumstances, whether the parties go to the court together requesting issue of a consent order in the same terms as the Arbitrator's decision, or if either party resiles from it.

The distinction from mediation is because, while mediation remains unregulated, and (whether facilitative or evaluative) is not technically a legal service, family arbitrators are trained, qualified and their standards regulated by the Chartered Institute of Arbitrators. Indeed, for this reason the process has been enthusiastically endorsed by the President of the Family Division of the High Court in the recent case of *S v S*[7] in which he said: 'IFLA arbitrators are all members of the CIArb, that is, MCIArb...'

And:

> '...The Family Procedure Rules 2010 now encourage resort to alternative dispute resolution in this as in other areas of family law: see FPR rule 1(4)(e) and FPR Part 3. It was against this background that the IFLA Scheme was introduced in February 2012.'

He continued:

> 'Where the consent order which a judge is being asked to approve is founded on an arbitral award under the IFLA Scheme... the judge's role will be simple... [s/he] will not need to play the detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral process to vitiate the arbitral award. Although recognising that the judge is not a rubber stamp, the fact that (a) the parties have agreed to be bound by the arbitral award, (b) the fact of the arbitral award (which the judge will of course be able to study), and (c) the fact that the parties are putting the matter before the court by consent, means that it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order. With a Scheme as sophisticated as that embodied in the IFLA Scheme it is difficult to contemplate such a case.'[8]

Moreover, although there are no formal pleadings in family arbitration and much less documentation than is required for court hearings (which both help to keep the costs of arbitration down, well below those of litigation), the family arbitrator needs the parties' assistance in identifying the precise issues, which they are to decide, and can permit much involvement by those parties in determining how the arbitration is to be conducted. These matters are often decided in a preliminary meeting before the arbitration proper begins, whether that is to be through an oral hearing or on paper. The Scheme's application form, ARB1,[9] even permits the parties' own choice of arbitrator whom they may best feel would meet their needs where they are 'agreeing to give an arbitrator the power to make the decision for them'[10] – not a choice they have when going to the court to litigate before an unknown judge. In this respect, IFLA family arbitration has its closest connection with mediation, in that it has long been accepted that (human nature being as it is) parties who feel involved in settlement of their dispute are clearly more likely to be content with the result.

Further, in applying to the Institute of Family Arbitrators for appointment of a family arbitrator – or even going to such an arbitrator direct, either of which the ARB1 permits – the parties will be agreeing to be bound by the arbitrator's decision on the evidence, and that this is be likely to be binding unless there is some appealable point of law involved or there has been some irregularity.[11]

Other advantages of IFLA family arbitration

A further real advantage of the IFLA Scheme is that it avoids the lengthy delays for a court hearing, which have recently

become prevalent. Legal aid has not been the only victim of cuts; Her Majesty's Court and Tribunal Services have also suffered curtailments, which has meant that it is currently often at least six months or more before a date can be obtained. This will seriously impact on the parties' costs, since in such a timescale, valuations and other preparation will probably have to be redone when the case actually starts, not least because of updating required owing to the rise in property values over the past year.

This financial downside clearly adds to the frustration of being unable to proceed once a case is ready for hearing and decision, while an arbitrator (of choice or on offer from the IFLA administrator if none is chosen by the parties) can be appointed very quickly, and an arbitration started within a month or two and completed within perhaps three to four months – the time it would take to reach even the first hearing in the court process if a particularly quickly listed appointment were to be reached.[12]

Another advantage is the privacy of the determination, referred to by the President, Sir James Munby, in *S v S*.[13] This is not the case in court proceedings – and is particularly pertinent in the context of the President's current initiative for greater transparency in the proceedings of the new family court to be inaugurated on 22 April 2014.

The role of mediation

How then may the IFLA Scheme interact with decisions in respect of children, since its ambit is restricted to financial and property matters? Easily: since these issues may (and ideally should) be decided within specialist family mediation, which may be funded if the parties qualify financially, or determined in privately paid mediation, just as child matters are dealt with separately from financial matters in court proceedings, and generally before the financial proceedings if at all possible, since it is difficult to determine money and property issues in detail unless it is known where the children will live and in what manner. Unlike the system in Canada and certain other jurisdictions that use the 'med-arb' methodology (with the same person as mediator and arbitrator), English law approaches these matters separately, the reason for restricting the IFLA Scheme (for the time being at least) to financial provision.

Conclusion

The financial, timely determination, court enforcement and privacy aspect of the IFLA Scheme are obvious. However the Scheme has only been available for just over two years and there have been few reported cases.[14] Nevertheless the potential for addressing the current legal aid famine in family law cases is also obvious. Much has been said about ways to cut costs in litigation generally since as long ago as the Lord Chancellorship of Lord Mackay,[15] which generated the Woolf Reforms and the concept of proactive judicial case management, but it may be that the IFLA Scheme is the first genuine potential for family friendly costs in a commodity which is increasingly required, namely family financial dispute resolution – including for ordinary people who, since the 1949 Legal Aid Act, have relied on affordable access to justice through means tested legal aid, but now no longer have that resource to call on.

Notes

1 IFLA is the Institute of Family Law Arbitrators, set up by a consortium of the Chartered Institute of Arbitrators, the Family Law Bar Association and Resolution (the Solicitors' Family Law Association) and the Centre for Child and Family Law Reform, a research committee sponsored by City University in London.
2 Article 2 of the IFLA Rules, which may be found on the IFLA website (www.ifla.org.uk) and at www.familyarbitrator.com.
3 The Legal Aid Sentencing and Punishment of Offenders Act 2012 removed virtually all legal aid in private family law, preserving it only in exceptional cases, eg, where domestic violence was involved (to which strict criteria apply).
4 See the Family Procedure Rules (FPR) 2010, Part 3, now statutorily enforced in the Children and Families Act 2014.
5 Following the enactment of Part II of the Family Law Act 1996 which would have created the then Mediation Information and Assessment Meetings now embodied in the FPR 2010 rule 3 and Part 3. The Ministry of Justice's figures (67 per cent fall in recourse to public funded mediation since April 2013) indicate that this dissatisfaction with mediation remains.
6 The writer is aware of a recent case in a London County Court where neither of the leading Family Bar QCs knew about the Scheme although lack of awareness appears more common among solicitors.
7 *S v S* [2014] EWHC 7 Fam, 14 January 2014.
8 *Ibid* [21].
9 The ARB1, version 2014, which may be seen on the IFLA website at www.ifla.org.uk.
10 *S v S* [19].
11 *Ibid.*
12 See the account of D R Sheridan, MCIArb, in *Family Arbitration*, Appendix 9, to be launched by IFLA in June 2014, which recounts just such a four-month IFLA case, completed in that time from start to finish.
13 *S v S* [22].
14 See, eg, *AI v MT* [2013] EWHC 100 (Fam) and the articles of Sir Peter Singer in 'Family Law Arbitration in Family Proceedings: the IFLA Scheme, Part 1', [2012] *Family Law* 1353, and Part 2, [2012] *Family Law* 1496.
15 1987–1997.

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The Sri Lankan experience of The Hague Convention on the Civil Aspects of International Child Abduction*

International child abductions are difficult and complex situations. Unfortunately, they are not uncommon. Every year, hundreds of children are wrongfully taken from their home country or held in another country by abducting parents.[1]

With the explosion of international travel and tourism, the social consequences of a global economy and the increasing irrelevance of national frontiers, impediments to transnational marriages have fallen away.[2] Yet these unions are no less prone to divorce and to quarrels about children than unions that do not involve a transnational element.[3]

The Sri Lankan experience

To deal with the phenomenon of international child abduction, the Government of Sri Lanka signed The Hague Convention on the Civil Aspects of International Child Abduction (the 'Convention') in December 2001. Consequently the Civil Aspects of International Child Abduction Act No 10 of 2001 (the 'Sri Lankan Act') was enacted by the Parliament of Sri Lanka to give full effect to the Convention in the domestic legal system. The Sri Lankan Act came into force on 1 March 2002 by virtue of an Order made under section 1 thereof by the Minister of Justice, Law Reform and National Integration published in Gazette Extraordinary No 1225/29 of 1 March 2002.

In Sri Lanka the Secretary to the Ministry of the Minister in charge of the subject of Justice is the Central Authority for the purposes of the Sri Lankan Act.[4] The Sri Lankan Act provides that a child's removal to or retention in Sri Lanka shall be deemed to be wrongful where:

a) the removal or retention is in breach of rights of custody attributed to any person or institution or other body, either jointly or alone, under the law of the specified country in which that child had his or her habitual residence, immediately prior to such removal or retention; or
b) at the time of the removal or retention those rights were actually exercised either jointly or alone, by such person, institution or other body or would have been exercised by such person, institution, or other body but for such removal or retention.[5]

As is the case with the Convention, the Sri Lankan Act does not provide a definition of habitual residence. Therefore the determination of whether a particular place constitutes the habitual residence of the child is purely a factual matter.

The Sri Lankan Act empowers the Central Authority to apply to the High Court for an order for the return of an abducted child.[6] Although the Act provides that the Central Authority can take administrative measures to secure the return of a child, the Central Authority will in practice seek a judicial order.

The Sri Lankan Act also largely mirrors the provisions in the Convention that allow a High Court to refuse to make an order for the return of the child.[7]

International child abduction in Sri Lanka

According to information provided to one of the co-authors of this paper informally there have been 43 Hague Convention International Child Abductions applications received by the Ministry of Justice in Sri Lanka during the time period 2007–2013.[8]

Case law on the Sri Lankan experience of the Hague Convention

The Hiruni Jayawardene *case*

The first experience the Sri Lankan Central Authority and the Sri Lankan High Court had

regarding The Hague Convention was with regard to the *Hiruni Jayawardena* case in 2001. The application requesting the return of the child came from Germany. Both parents were of Sri Lankan origin but the father had acquired German citizenship. The abducted child was born in Germany and was a German citizen. The father had abducted the child to Sri Lanka. The case in the High Court was not successful as it was held that the wrongful removal had taken place before the Sri Lankan Act had been brought into force. The case proceeded to the Supreme Court where once again the application was refused on the basis of the same reasoning as that of the High Court.

The Rosario *case*[9]

This was a landmark case. A six-year-old boy was brought to Sri Lanka by his father during a period of the summer holidays when he was entitled, in terms of an order from a court in France, to have the child with him. The father never returned the son back to the mother at the end of the period. He took the child to Switzerland, then to the Maldives and finally to Sri Lanka.

The father was of Sri Lankan origin who had acquired French citizenship. The boy's mother was from Lithuania. The Rosarios married in France but later separated and subsequently divorced.

An application was made by the French Central Authority on behalf of the mother to the Sri Lankan Central Authority for the return of the child.

In January 2009, the Attorney-General's Department, on the instructions of the Sri Lankan Central Authority, caused an application to be submitted to court seeking an order for the return of the child in terms of section 9 of the Sri Lankan Act using the address that the private investigator had traced the father to. This was more than half a year from the expiry of one year from the date of the abduction.

The learned High Court Judge, by her judgment dated the 13 November 2009, refused to make an order for the return of the child. On appeal, the Court of Appeal held that the mother was not informed by the father that he was taking the child to Sri Lanka and noted that she had made every effort to locate the child including telephoning the father's parents, creating a blog, appearing on three well-known TV programmes and contacting persons in, or travelling to, Sri Lanka.

The Court of Appeal held that the delay in bringing the matter before the High Court was due to the misconduct of the father and the concealment of the child by the father from the mother and therefore the failure to file an application within one year cannot be grounds to dismiss the application and that such delay must be disregarded by the courts.

It was finally held that the application for return should be allowed and that the child should return to his habitual residence in France.

Following the judgment of the Court of Appeal, the father disappeared with the child and thereafter through lawyers filed a Special Leave to Appeal Application to the Supreme Court of Sri Lanka. The Honorable Chief Justice held in her decision dated 4 July 2011 that there was no basis to grant special leave to appeal. The application was accordingly dismissed with no costs. The mother thereafter returned to France with the child.

The Naullage Jayawardena *case*[10]

This was a case that concerned the abduction of a child from Germany to Sri Lanka. The father was Sri Lankan by birth, and later a German citizen employed and domiciled in Germany. He had married a Sri Lankan woman. The child concerned was born in Germany and had her habitual residence in Germany.

In August 2001, while on a family visit to Sri Lanka, irreconcilable differences arose between the parents of the child, the mother later refusing to return to Germany and staying with the daughter in Sri Lanka. The father returned to Germany where he filed for a divorce and custody in respect of their child. The German Court held in favour of the father. In 2002 the German Central Authority made an application on behalf of the father, by which it was claimed that the child had been wrongfully retained in Sri Lanka. The Sri Lankan Central Authority instituted proceedings in the Sri Lankan High Court praying for an order for the return of the child to Germany. The case went through to the Supreme Court of Sri Lanka.

After protracted proceedings in the High Court and Court of Appeal, which took years, and in which various points including the applicability of the Act were argued, regrettably, the Supreme Court at the very end terminated the proceedings in 2006 and merely observed that:

> 'Since the child is nearly 10 years of age now and has been consistently in the custody of the mother in Sri Lanka for nearly five years, the Court is of the view that the Central Authority should re-examine the matter in the light of current circumstances.'

There have been several other applications to the High Court. Space considerations mean that it is not possible to provide full details.

The Umesh Samarasekera *case*

In 2008, the *Umesh Samarasekera* case was filed. This case involved a family of Sri Lankan origin with Australian citizenship. The parents were divorced at the time of the abduction. The father finally voluntarily agreed to return the child, on the condition that he would have a right to access when the child was returned to Australia. The Court of Appeal dismissed the case.

The Dr Petty *case*

One of the most interesting cases under the Sri Lankan Act was the *Dr Petty* case in 2008. This was one of the first cases that involved a family with no Sri Lankan connection; the family was exclusively of Australian origin. In this case it was the mother who was the abductor. The mother and father had been divorced, and the mother remarried. The mother's subsequent husband, also an Australian, was an owner of a hotel in the city of Galle in Sri Lanka. The mother brought the child to Sri Lanka without the consent of the child's biological father. The child was admitted to a Sri Lankan international school. The application was made by the father through the Australian Central Authority to the Sri Lankan Central Authority. The key point of interest in this case is that the High Court based its decision on the evidence given by the 12-year-old child. When giving evidence in court, the child had given evidence in the Sinhala language stating '*Mata yanna baehae. Thaththa mawa marayi*', (I cannot go, my father will kill me). A senior lawyer of the Attorney-General's Department who was interviewed stated: 'When you closed your eyes and listened to the child's evidence, one would never have thought that this child was of Australian origin with no Sri Lankan background as he spoke Sinhala as clearly as you and I would speak[,] with no accent whatsoever.' The child had been living in Sri Lanka for two years; however, the application was made during the stipulated time period of one year under the Act and the Convention. The Court held against the father and refused the application to return the child.

The Sashanie Kristina *case*

Yet another case in which the Court admitted the evidence of the child was the *Sashanie Kristina* case. The father had abducted the daughter to Sri Lanka. The daughter was 15 years old when the application was made by the Australian Central Authority. When giving evidence, she stated that she did not want to go back to her mother in Australia. The Court refused the application for the return of the daughter based on her evidence. An interesting point to note in regard to this case is that during the pendency of the case, the child reached the age of 16.

The Thanuja Vanderbon *case*

In the *Thanuja Vanderbon* case, children were being retained in Sri Lanka by the father after the mother, father and the three children had come to Sri Lanka to visit. The mother had returned to Australia and had made a request for the return of the children to Australia. The High Court held that there was a breach of joint parental custody even though there had not been any formal custody award. It would appear, therefore, that the abduction was a breach of custody rights that arose by operation of Australian law as opposed to a breach of a custody order granted by a court order. The children were returned to Australia and information has since been received that the family is reunited.

Conclusion

International parental child abduction is a devastating and tragic phenomenon.[11] The value of the Convention is enormous as it provides a theoretically fast mechanism that secures the voluntary return of an abducted child.[12]

Sri Lanka took an important step in becoming a Contracting State to the Convention and by implementing the Convention by enacting necessary domestic law.

There are, however, serious problems in so far as the implementation in Sri Lanka of the statutory framework of the Convention is concerned, such as, most notably, the delay in the procedure.[13]

Sri Lanka must rectify the problems associated with these delays. If more resources are needed to provide an increased number of officials to deal with the mechanisms and implementation of the provisions of the Sri Lankan Act, such resources should be allocated.

The Sri Lankan Act does not provide for an expedited time frame/procedure in the Court of Appeal/Supreme Court and it is the view of the co-authors of this article is that consideration should be given to international best practice and, if appropriate, legislative amendments should be introduced to provide for a speedier resolution of cases.

High Courts seem, in certain instances, not to understand that a return application should not be permitted to turn into a full-blown custody inquiry – which is invariably what a lawyer acting for the abducting parent will do, since this will benefit the parent who has abducted the child and who therefore wishes the proceedings to be drawn out as long as possible. The delays inherent in judicial process should not be permitted to be exploited in this manner to thwart the objectives of the Convention.

It would also appear that several provisions of the Convention would not, notwithstanding the incorporation thereof into domestic legislation, be administratively implemented or possible in Sri Lanka. For example it would appear that the Central Authority may not act in cases where the assistance of the Central Authority is sought to obtain an order for access. This is a matter of serious concern. Most significantly, however, it would appear that the invariable practice of the Sri Lankan Central Authority is not to act on an application made direct by a parent or a lawyer on behalf of a parent. It is a sad fact that although summary procedure is provided for by law as the applicable procedure, this has not resulted in the speedy resolution of cases at the level of the High Court.

Notes

* This paper is a much condensed version of a paper that was originally authored by Ruwani Dantanarayana, Attorney-at-Law under the supervision of John Wilson, Attorney-at-Law & Notary Public. It was reduced in length and reworked by Ruwani Dantanarayana and John Wilson for the purposes of the IBA Family Law Committee Newsletter of 2014. We thank those in the Ministry of Justice and the Attorney-General's Department who shared their experiences and time with us.

1 *International Child Abduction: A Guide Book for Left Behind Parents* (http://travel.gc.ca/travelling/publications/international-child-abductions).

2 Janet Chiancone, Linda Girdner, Patricia Hoff, 'Issues in Resolving Cases of International Child Abduction by Parents' US Department of Justice, Juvenile Justice Bulletin, December 2001, available at www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf.

3 Chris Brady and David Steefel, 'The Hague Convention on the Civil Aspects of International Child Abduction' *The Colorado Lawyer* 25 (April 2012).

4 Section 4 of the Sri Lankan Act.

5 Section 3(1) of the Sri Lankan Act.

6 Section 9 of the Sri Lankan Act.

7 The most significant ground is that the High Court is satisfied that the child is settled in their new environment. Other grounds are that:
   (a) the person, institution or other body having the care of the person of the child was not exercising such rights of custody at the time of removal or retention or had consented to, or subsequently acquiesced in, such removal or retention; or
   (b) there is a grave risk that the child's return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation; or
   (c) if the child objects to being returned and the court is satisfied that the child has attained an age and a degree of maturity at which it is appropriate to take account of the child's views.

8 Piyumathie Peiris, Additional Secretary to the Ministry of Justice, in an interview on 2 August 2013 at the Ministry of Justice.

9 *Sudath Gamlath v Rosario*, C A Revision Application No CA (PHC) APN 03/10.

10 *Dharani Wijayatilake v Naullage Nalin Jayawardena* (SC Appeal No. 87/2005).

11 Caitlin M Bannon, 'The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Mechanisms to Address Noncompliance', 31 B C Third World L J 129 (2011) at 162, available at http://lawdigitalcommons.bc.edu/twlj/vol31/iss1.

12 *Ibid.*

13 An official who was interviewed by the author of this article stated that though the Sri Lankan Act requires that High Court proceedings take place within six weeks, this is never achieved in practice.

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Hard times for family lawyers

Severe cuts to the legal aid budget have had a dramatic effect on the practice of family law in the UK.

As far as high-street solicitors' practices are concerned, the rot set in with the Legal Services Act 2007, which exposed the long-established professions to competition in the commercial market place. Legal services can now be provided by 'Alternative Business Structures', owned or managed by non-lawyers, although lawyers still have to be employed in order to do the work reserved for lawyers. Large organisations such as banks, supermarkets and even a road haulage company have hired lawyers to compete with traditional solicitors' firms, adopting a 'pile 'em high, sell 'em cheap' philosophy, which has earned the epithet 'Tesco law'.

More recently, however, the legal professions (barristers, solicitors and the relative newcomers, legal executives) have faced an even greater challenge from the Legal Aid, Sentencing and Punishment of Offenders Act 2012. From 1 April 2013, this has sliced £350m from the annual legal aid budget of £2.2bn. Those worst affected are junior barristers working in the criminal courts, whose fees are now so low that they can hardly make a living. Resentment has boiled over to such an extent that on two days in 2014, barristers took the unprecedented action of going on strike, with the result that the courts could not function.

But on the civil side, legal aid has been slashed even more, with many areas being taken out of scope altogether. In the area of family law, disputes around divorce and the custody of children no longer attract legal aid, unless there is evidence of child abuse or domestic violence. Solicitors and legal executives (who mostly work for solicitors, although they can now run their own practices) complain that clients seeking a divorce who bring up domestic violence as an issue are often unable to obtain sufficient evidence of domestic violence, which means that their case cannot be paid for out of legal aid. Care proceedings, in which local authorities seek to take children away from their parents, do still get legal aid for the parents, but otherwise the tussles between separating or separated couples over property and children have to be paid for privately. Many people are, of course, unable or unwilling to pay the lawyers' fees.

Not surprisingly, the family courts are now swamped with litigants in person, who are ignorant of court procedures and tend to introduce much irrelevant material. This makes life difficult for the judges. According to Sir Alan Ward, who recently stepped down from the Court of Appeal, 'Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved.' What *is* surprising is that an alternative to the courts has not been taken up. Legal aid is still available for mediation, with lawyers being paid a fee of £150 for supporting a client into mediation. But since legal aid was removed from court proceedings on 1 April 2013, the number of couples attending out-of-court sessions to resolve family disputes has dropped by nearly half. It may be that some disputes are simply not suitable for mediation. For example, the parent with custody of the children may not want the other parent to see the children under any circumstances – and no amount of mediation will change their mind. Nor is there much scope for mediation in cases of domestic violence.

The sad outlook for many family lawyers is that there will be no work for them. Ironically, the family justice system is currently being overhauled, with the Children and Families Act 2014 having received the Royal Assent.

One priority of the Act is to speed up procedures for adoption. Adoption agencies will no longer have to match children with adoptive parents of the same race or religion, while local authorities will have a duty to consider 'fostering for adoption' – that is, placing a child with foster parents who are also approved prospective adopters. Another priority is to encourage mediation (the uptake of which has, as we have seen, been going down rather than up). Before a potential litigant can make 'a relevant family application' to the court, they must attend a 'mediation, information and assessment meeting', without which the court may refuse to deal with their case.

In a significant departure from the milestone Children Act 1989, the new Act introduces a presumption that, unless the contrary is shown, the welfare of the

child (which is the court's paramount consideration) is enhanced by the involvement of both parents in its upbringing. Thus a new 'child arrangements order' will replace both the 'residence order' and the 'contact order' of the 1989 Act. Shared residence and shared care will be the norm.

The goal of reducing delays in the system is further promoted in the 2014 Act by restricting the use of expert evidence in court, and limiting directions for a medical or psychiatric examination of the child to cases where this is necessary in order for the court to resolve the proceedings justly. In care and supervision cases involving local authorities, a maximum period of 26 weeks has now been introduced for completing such cases, with the court requiring a specific justification before granting an extension of time.

The government hopes to significantly boost the number of children going from local authority care or foster homes into adoption. In 2013, fewer than 4,000 children were adopted in England, just five per cent of the total number of children in care. Readers may be familiar with the quite different matter of children who *have* been adopted, but adopted abroad. The immigration rules make it difficult for them to join their adoptive parents in the UK, unless they have been adopted in accordance with a decision of the competent administrative authority or court in their own country, provided this is a country whose adoption orders are recognised in the UK. The list of such countries was unchanged for some 30 years, and included many Commonwealth countries (but not India). That list has now been radically revised by the Adoption (Recognition of Overseas Adoptions) Order 2013, which has taken out many of the Commonwealth countries, but has, at last, added India.

So the state of family law in England appears somewhat chaotic, with measures being put in place to speed up procedures, but those procedures being slowed down by laypeople representing themselves. The participation of lawyers would make a big difference, but the government does not want to pay them, and the general public will not have much sympathy for the plight of the impecunious lawyer.

New Zealand's family court refashioned

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On 31 March 2014, massive changes were made to Family Court of New Zealand (the 'Family Court'). They affect almost all participants: judges, lawyers, clients, counsellors, mediators, experts such as psychologists, and children.

Whether the refashioning is for the better is a matter of intense debate. Arguably, it is a step or two backwards and will have to be 'fixed' in the future. Those involved will doubtless do their best to make the system work, but the real consequences may not be felt for a while: disgruntled parties, children whose interests have not been protected, and courts that have become besieged.

The new system is complex. What follows is merely a snapshot.

The role of the Family Court

When established in 1981, the Family Court was seen as a far more humane and caring way of dealing with disputes than what preceded it. The Court itself was designed to be low on formality and to have a non-adjudicative arm. Thus, people could go to the Court and make a 'request' for 'counselling'. Six sessions (more recently reduced to three) of free counselling were then available. Before a hearing, the Judge could hold a mediation conference with the aim of securing an agreement. Latterly, judges have been appointing 'lawyers to assist' (an *amicus*), with the express instruction to hold a mediation, again in an endeavour to reach an agreement.

This arm of the Court has been swept away. Conciliation is now almost totally distanced from the Court. The Court is expected to focus on adjudication. Whether this severing is wise is not yet clear.

Out-of-court processes

Under the new regime, two newly legislated concepts exist to assist parties resolve disputes involving children: parenting information programmes (PIPs) and family dispute resolution (FDR). However, they have a quasi-punitive edge to them, because, subject to some exceptions, a parent cannot lodge a claim in court unless the parties have first been through a PIP and FDR. In other words, PIPs and FDR are barriers to accessing the Court.

Attendance at a PIP is free and, as it name suggests, the goal is to provide information, not to help parties sort out their differences.

FDR is rather different. FDR is in effect mediation and there is a charge for it at the going rate. Both parties must share the cost of this unless one of them has sufficiently little income that the state will assist. The Family Dispute Resolution Act 2013 requires FDR organisations and providers to be approved by the Justice Ministry, but the FDR process is left largely unregulated. Separating parents enter a contract, which will set out things like the number of sessions and who may attend etc. The attendance of lawyers and children is not a matter determined by parliament. The Act does, however, require FDR providers to assist parties to resolve their dispute and to ensure that the parties' 'first and paramount consideration in reaching a resolution is the welfare and best interests of the children' (section 4). It may well be questioned whether this latter rubric satisfactorily protects the rights of children.

Although counselling as it was practised has gone, the government decided to pay for three sessions of counselling for those in poor financial circumstances. This counselling, which has no statutory backing, is designed to help people prepare for FDR. It is provided for through the FDR contractual system.

The government also decided to fund four hours of legal aid support for those in poor financial circumstances. This, again, is not expressly legislated for but is authorised as a specified legal service under section 68(2) of the Legal Services Act 2011.

Getting to court

In Care of Children Act cases that involve parenting or guardianship disputes, a party in general cannot apply to the Family Court unless they have an FDR form. The main exceptions are where one of the parties was 'unable to participate effectively' in FDR or where there has been domestic violence (section 46E, Care of Children Act 2004). Other exceptions are where a party is responding to an application by the other party, where the application is without notice or for a consent order, seeks to enforce an existing order, or where the child is also subject to proceedings in relation to child abuse. The Court has no overriding power to dispense with FDR.

An application must also contain a statement that a PIP has been attended within two years or that the applicant 'is unable to participate effectively' in a PIP (section 47B). The latter must be supported by evidence. The PIP statement is not necessary for applications made without notice but, unlike FDR, is required for consent orders and variations of existing orders.

These rules with their exceptions and subtle differences will not be easy for ordinary people to grasp. People will need guidance through the complexities.

Lawyer for the child

One of the hallmarks of the previous system was that it was mandatory for a lawyer to be appointed to represent the child. The underlying rationale for this was that parents in dispute could not properly be expected to articulate the child's perspective and that an independent lawyer was necessary for this purpose. This was reinforced by the rule in section 6 that the child, of whatever age and maturity, must be given reasonable opportunities to express views, which in turn must be taken into account. One of the roles of lawyer for the child is to present those views to the Court.

The position is now turned on its head. The default position is that lawyer for the child will not be appointed. The Court may appoint such a lawyer only if it 'has concerns for the safety or wellbeing of the child' and 'considers an appointment necessary' (section 7, Care of Children Act 2004). This language is vague. Concerns for the child may arise whenever a case is heading to a hearing and appointment may be thought necessary.

On the other hand, the test is a threshold that has to be crossed. What evidence will a judge need? What process must be followed in making the appointment?

Appointment of lawyer for the child may in future be contested. The reason for this is that, whereas the state used to pay for a lawyer for the child, now it is mandatory, subject to a narrow test of serious hardship, for the parties to contribute significantly to these costs. Some parties may want to challenge the appointment on the basis that they cannot afford the extra cost.

Expert reports

The new regime for expert reports, such as those of child psychologists, is similar. The test for ordering such a report is now narrower than before, and the parties, again subject to serious hardship, must contribute to the costs. So, for example, a psychological report can be ordered only if it 'is essential for the proper disposition of the application', is the best source of information, will not cause undue delay and any delay will not have an unacceptable effect on the child (section 133, Care of Children Act 2004). It is expected that judges will order far fewer reports than in the past, despite the vital role they have hitherto played.

The role of other lawyers

The government's stated aim is that the Family Court should concentrate on its adjudicative function. It is therefore somewhat counterintuitive that it has also promoted rules that are designed to keep lawyers out of court and have parties fend for themselves.

The general rule is that lawyers may not represent their clients in court in children's cases until a Family Court judge has made a direction that the case should 'proceed to a hearing' (section 7A, Care of Children Act 2004). This includes signing and filing documents, but excludes giving behind-the-scenes advice and conducting negotiations. However, a lawyer may act for the client in Hague Convention abduction cases and in relation to applications made without notice and in some other situations.

The new rules are likely to cause confusion, leaving lawyers and clients simply bemused. The judges will have to cope with an increase of self-represented litigants, already a problem facing the Court. The wealthy and articulate will be able to afford lawyers to give them the right tips, while the less well-spoken and less well-off will be left to struggle. From both practical and philosophical points of view, the system is deficient and will surely have to be remedied at some point in the future.

Conclusion

The emphasis on mediation under the new scheme is welcome. It is hoped that it will assist many parents to reach durable solutions for their children. However, the rules on mediation are left very open-ended, and access to the Family Court is made hard. Whether all the changes will in fact help children and be in accordance with their best interests is doubtful. Some children may fall through the cracks.

Note

* Special thanks to my excellent research assistant, Sean Brennan.

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Domicile and divorce

Malaysia has a dual legal system, based on both English common law and Islamic Sharia law. This article will focus on family law governing non-Muslims as regulated by the Law Reform (Marriage & Divorce) Act 1976 (the 'Act').

The general power of the Malaysian High Court to entertain divorce petitions is stated in section 48 of the Act, which reads:

> 'Nothing in this Act shall authorise the court to make any decree of divorce except:
> a) Where the marriage has been registered or deemed to be registered under this Act;
> b) Where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
> c) Where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.'

Hence, the power of our courts is limited by section 48 of the Act to grant a Decree of Divorce in cases where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

Domicile

Section 3(2) of the Act provides that, for the purposes of the Act, a citizen in Malaysia deemed to be domiciled in Malaysia unless the contrary is proved. This presumption is rebuttable upon proof to the contrary. Unfortunately, neither the Act nor the Interpretation Act 1976 provides any definition of the word 'domicile'.

Therefore, section 3 of the Civil Law Act 1956 operates to apply English common law, prevailing as at 7 April 1956. Section 3 states:

> '(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
> a) In West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered or in force in England on the 1st day of April 1956…'

There are three categories of domicile, namely of origin, of choice and matrimonial. For one to change his/her domicile from the one of origin to that of choice, that individual has to express his/her intention and take active steps to acquire a domicile of choice.

Domicile of dependence/matrimonial domicile

Applying English common law, in West Malaysia, a married woman acquires her husband's domicile during the subsistence of the marriage. This common law position has been given statutory recognition in section 48(1)(c) of the Act, before the Court can entertain proceedings for a decree of divorce.

This position that upon marriage, a wife acquires a domicile of dependence was affirmed in the case of *Charnley v Charnley and Betty* (1960) MLJ 29, where it was held 'The domicile of a married woman is that of her husband while the marriage subsists, even though the parties may be living apart.'

In contrast with Malaysia, other Commonwealth jurisdictions have legislated for laws more reflective of gender equality, repealing the applicability of this common law rule. For example, England, by section 4 of the Domicile and Matrimonial Proceedings Act of 1973, and Singapore, by section 45A of the Women's Charter (1980), have given wives an independent domicile.

Some local cases

As to the material time of proof of domicile in the context of divorce proceedings, this was held by the Supreme Court in *Tan Hock v Khor Chai Heah* (1990) 1 MLJ 422, to be at the time of the presentation of the petition. The relevant passage from the pronouncing judgment:

> '... The Petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court could exercise its powers under s 48 of the Act to grant any relief to the parties.'

On the issue of the burden of proof to be discharged, in *Joseph Wong Phui Lun v Yeah Loon Gait* (1978) 1 MLJ 236, the court held that the burden is one beyond a mere balance of probabilities:

> '... clear evidence is required to establish a change of domicile. In particular, to

displace a domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.'

The distinction in the concepts of domicile and nationality was re-emphasised in *Ang Geck Choo v Wong Tiew Yong* (1997) 3 MLJ 467; (1997) 3 CLJ 201:

'It is accepted law that the concept of nationality and the issue of domicile are two totally different concepts which deserve different and separate treatments. A person may change his place of domicile but yet not be divested of his nationality. It would be fallacious to think that the terms "domicile" and "residence" as being synonymous…'

The court in *Melvin Lee Campbell v Amy Anak Edward Sumek* (1988) 2 MLJ 338 had occasion to consider whether parties were of Malaysian domicile on a divorce petition presented by an American husband and a Sarawak native (Malaysian). The husband asserted that he had abandoned his domicile of origin and acquired a Malaysian domicile of choice, having lived in Malaysia for more than ten years prior to the presentation of the joint petition. Apart from his residence, the court considered the fact that the husband had neither bought any property nor made any actual investments in Malaysia, and that his previous business enquiries were exploratory in nature. The court viewed the evidence with care and caution and was not satisfied that his domicile of origin had been abandoned:

'... the provision of Section 48(1) in my view requires that the court must be satisfied that at the time is presented, the domicile of both the petitioners was in Malaysia… Taking into consideration all factors both in favour and against the husband petitioner in the light of all the relevant circumstances, and giving due consideration to his assertion that he intended to make Malaysia his permanent home, and also bearing in mind that the burden of proving the abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia falls squarely on the husband petitioner, I have, with regret, come to the conclusion that the husband petitioner has not succeeded in showing to my satisfaction that at the time of the presentation of the joint petition his domicile was in Malaysia. Accordingly, I rule that in relation to the instant joint petition, the court has no jurisdiction to entertain it.'

In *Gurcharan Singh a/l Karnal Singh v Mninder Kaur a/p Piara Singh* (2010) 6 MLJ 405, the High Court was presented with a petition for registration of a foreign divorce order, which the Malaysian husband had obtained in Arizona after a short residence of three weeks. The court refused the husband's application for a declaration to recognise the foreign divorce decree, holding:

'As the marriage was solemnised in Malaysia, the foreign decree obtained by the petitioner in this case required a court order declaring it to be valid. Malaysia does not have any specific provision in the LRA 1976 or any other legislation for the recognition of a foreign divorce, so the Malaysian court would need to refer to the UK common law position pursuant to s 3 of the Civil Law Act 1956 and also s 47 of the LRA 1976. According to English case law, the true test of jurisdiction to dissolve a marriage was the domicile of the married pair. Thus a divorce granted by a court of another country would not be recognised as valid in England unless the parties were domiciled in that country.

Similarly, by applying the relevant common law principle, a Malaysian court should only recognise a foreign decree of divorce to dissolve a Malaysian marriage if it was granted by the court of the parties' domicile.'

Exceptions to the domicile requirement

Section 49 of the Act provides exceptions to the general rule that only parties domiciled in Malaysia may file a petition for divorce (joint or contested).

This section mitigates the harshness of section 48 of the Act caused to a wife (not a husband). Strict application of section 48 may result in injustice caused to the wife who has been deserted or whose husband has been deported from Malaysia, and whose husband was, before the desertion or deportation, domiciled in Malaysia.

The wife would be able to commence proceedings although the husband is no longer domiciled or resident in Malaysia at the time when the petition is presented. This is subject to the pre-condition that the wife must have been resident in Malaysia for two years immediately preceding the commencement of the proceedings and that her husband must have been domiciled in Malaysia before the act of desertion or deportation.

This protects a wife who, by virtue of her marriage, had acquired a domicile of

dependence in Malaysia or had her domicile of origin in Malaysia by her husband transformed into a domicile of dependence because of her marriage.

This section also applies equally to such a wife who has not undergone any change in her Malaysian domicile because the parties to the marriage were domiciled in Malaysia at the time of marriage but now faces a possible change in her domicile of dependence as her husband has acquired a domicile of choice in another country.

Domicile, CEDAW and the Federal Constitution

The issue of domicile in the context of section 48 is presently being revisited by the Malaysian Court of Appeal in *Pauline Chai Siew Phin v Tan Sri Khoo Kay Peng*.

English proceedings

The wife had filed a divorce petition in London in February 2013, alleging that she had acquired English domicile. The husband applied to strike out the petition and the issue of the English court's jurisdiction to hear the petition has been fixed for hearing in October 2014.

Malaysian proceedings

On 11 December 2013, the husband obtained an order from the Malaysian High Court where the judge had allowed the husband to dispense with the requirement of referring the matrimonial difficulty to the Reconciliatory Tribunal, with leave issue a divorce petition. The wife applied to stay said exemption but this was dismissed. The High Court judge had held that the husband could file his divorce petition in Malaysia as the wife's domicile was dependent on his.

Legal arguments advanced by the wife's counsel on appeal have, inter alia, approached the issue from two angles. These are:

a) that section 48 of the Act and the application of the English common law position on domicile, is discriminatory of women and unconstitutional, by contravening Article 8(2) of the Malaysian Federal Constitution:

   Article 8(2): 'Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, gender or place of birth in any law…'

b) that Malaysia has allegedly breached its international obligations under Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on the issue of the acquisition of domicile of choice by a wife.

By way of background, in 1995, Malaysia had acceded to CEDAW with a number of reservations by the Malaysian government specifically in areas that conflicted with domestic laws (ie, Federal Constitution/ Sharia laws). The government's reservation in the context of this case, included Article 16(1)(c) and the relevant passage is reproduced below:

> 'On 19 July 2010, the Government of Malaysia, notified the following:
>
> "... , the Government of Malaysia, [...] withdraws its reservations in respect of articles 5 (a), 7 (b) and 16 (2) of the Convention; ... ."
>
> The previous reservation reads as follows:
>
> 'The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles [5(a), 7(b), 9(2), 16(1)(a), (c), (f), (g), (h), and 16(2)] of the aforesaid Convention.'
>
> Article 16(1)(c) of CEDAW:
>
> "1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ….;
>
> (c) The same rights and responsibilities during marriage and at its dissolution;"[1]

The husband's counsel submitted that, due to the Malaysian government's reservation to Article 16(1)(c) of CEDAW:

a) CEDAW does not apply to the Act which governs marriage and divorce laws of non-Muslims. The current law presumes that a wife's domicile is dependent on her husband's, ie, Malaysia;
b) The application of the landmark High

Court case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832, which recognised that '… CEDAW had the force of law and was binding on member states, including Malaysia' was distinguished and restricted to areas where the Malaysian government has not expressed any reservations.

c) In any event, any discriminatory effect of sections 48–49 of the Act on the domicile of a wife/spouse would be the role of legislature to address and not be on a piece-meal basis by way of judicial intervention.

In the meantime, family practitioners eagerly await the Court of Appeal's judgment in *Pauline Chai Siew Phin v Tan Sri Khoo Kay Peng* on this issue which were fixed for 24 April 2014.

Note

1 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#71.

International surrogacy and same-sex partners: the Israeli approach

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Introduction

In my article in the September 2013 edition of Family Law Newsletter, 'The Israeli family court: judicial powers and therapeutic interventions', I briefly described the jurisdiction, principles and practices of the Israeli family courts.

In this article I show how these principles and practices are applied by reporting on a case decided in March 2014 by the Family Court in Tel-Aviv.[1] The court was able to deal with a novel situation involving a same-sex couple and international surrogacy, even in the absence of specific legislation.[2]

The facts

The plaintiffs, A and G, are two males who have lived together since 2006, and married (outside Israel; Israel has not yet passed legislation for same-sex marriages) in 2009. In 2010, they wished to expand their family, and entered into an agreement whereby they would obtain ova from an anonymous donor, fertilise the ova with sperm from each of them, and have the fertilised ova implanted in a surrogate's womb, in the hope that two children would be born. They made a surrogacy agreement in California, US, with a woman whom they chose. After the pregnancy had been confirmed, they also made and signed a parenting agreement, which included provisions that the child or children to be born would have both of the plaintiffs as parents for all purposes, irrespective of the identity of the genetic father, and detailed arrangements about custody, visitation and child support in the event that the relationship between them should come to an end. One daughter was born and, in accordance with the law of California, both the donor of the ova and the surrogate waived any legal relationship with the child, and the plaintiffs were recognised and registered jointly as the parents of the child.

The case before the court

After returning to Israel, the plaintiffs requested registration and recognition as parents under Israeli law.

After DNA testing proved that G was the genetic father of the child, and he was duly registered as father, the plaintiffs jointly applied to the Family Court under section 1(4) of the Family Courts Law for a paternity declaration, namely that A was also the father of the child.[3]

The Attorney-General, representing the state, was the defendant to the action. The response given was in essence that the State

would not insist on an adoption application, but would agree to a judicial parenting order (as opposed to a formal declaration of paternity, which is only granted to a biological father), only after receiving a report from a welfare officer.[4]

The plaintiffs contended that there was no basis to require a welfare officer's report.

Surrogacy law in Israel

In 1996 the Knesset, Israel's parliament, passed the Surrogacy Contracts (Approval of Contracts and Status of the Newborn) Law, (the 'Surrogacy Law').[5]

The law provides, inter alia, that only a married couple, male and female, may enter into a surrogacy contract; that the surrogate must have already given birth to a child; that the surrogate must not be related to either of the spouses; that all three of the adults must go through checks as to their suitability, physical, mental and social; that only after these checks have been carried out may they enter into a contract, whose terms must be approved by a committee consisting of medical, mental and social work health professionals and a minister of the religion to which the parties belong, before the process of implantation of gametes begins.

In order to obviate problems that might arise immediately after the child is born, section 10 of the Surrogacy Law provides that the child is at this stage handed over, in the presence of a welfare officer, to the physical custody of the proposed parents, and they have all the responsibilities and duties of custodial parent from the moment of birth, but that the sole legal guardianship of the child is granted to a welfare officer.

Section 11 provides that the proposed parents must make an application for a parenting order to the Family Court within seven days of the birth, and that, after receiving a report from the welfare officer, the court will make a parenting order, which grants legal guardianship to the proposed parents, unless the report states that the making of a parenting order would be against the best interests of the child. The welfare officer appointed under the Surrogacy Law thus has three roles: to supervise the handing over of the child by the surrogate to the proposed parents; to act as temporary legal guardian of the child; and to make a report to the court prior to the making of a parenting order.

The Surrogacy Law does not make any provision for international surrogacy, nor does it provide for surrogacy arrangements for same-sex couples or for single parents. For this reason, a commission was set up to propose amendments to allow for supervision of international surrogacy agreements and to widen the scope of persons who can enter into such arrangements. The Commission reported in May 2012, and recommended that a parenting order could be made on the basis of international surrogacy agreements that would be recognised in Israel, subject to proof of compliance with the laws of the country in which the child was born. It was also recommended that a parenting order could be granted to a single parent or to a same-sex couple.

However, the recommendations have not yet been made law.

The submissions before the court

Bearing in mind the absence of legislation or direct case law, the court was called upon to decide the specific issue: was it essential to have a welfare officer's report, or could the court make a parenting order on the basis of the material before it.

The Welfare (Procedure in Matters of Minors, Mentally Ill Persons and Absentees) Law, 5715-1955, empowers a court, hearing a matter relating to a child, to order that a welfare officer, appointed under the provisions of that law, make a report. The welfare officer is entitled to demand information from any relevant source, and a person so requested is obliged to give all such information as may be necessary. This provision is widely used by the courts, including the family courts, the Rabbinical courts and the Sharia courts, in matters of child custody and visitation, in applications to appoint a guardian for a disabled person, in applications under the Hague Convention on Child Abduction, and a variety of other cases; the welfare officers are senior social workers in local authorities, and the provision of reports is free of charge to the litigants.

It is under the provisions of this law that the Attorney-General requested the preparation of a report since, as stated, the Surrogacy Law does not apply. It was submitted on his behalf that in a parenting order application under the Surrogacy Law, the welfare authorities are involved in vetting the parties from the outset of the process, before the start of the pregnancy, and a welfare officer's report is an integral part of the proceedings before the court. In a case

involving a foreign surrogacy, there is no such vetting, and therefore no independent and objective professional assessment of the suitability of the proposed parents.[6]

The plaintiffs submitted that the court has discretion in ordinary cases involving custody and guardianship of children to order a welfare officer to make a report, and that it is not compulsory.[7] They also submitted that the court could decide the case on the basis of the materials that they had provided.

This material included their affidavit evidence and the documents attached to the statement of claim. They pointed to their stable relationship (as stated, they had lived together since 2006 and were married in 2009), and the various agreements in writing. These agreements included those between the plaintiffs and the surrogacy agency, the surrogate herself, the donor of the ova and the fertility clinic, and the parenting agreement between the plaintiffs. In addition, the court had before it the judgment of the American court recognising the plaintiffs jointly as parents of the child,[8] their registration as her parents in the birth certificate, and a certificate attesting to the child's conversion to Judaism and a ceremony celebrating the conversion.[9]

The plaintiffs also made additional submissions, including that there is a constitutional right to parenthood under the Basic Law: Human Dignity and Liberty,[10] and that any infringement of this right may only be permitted under specific legislation, and that there was no such legislation. They contended that the only reason for the involvement of a welfare officer was to protect the surrogate. The plaintiffs also stated (and on this there was no dispute) that the welfare officers would not be able to prepare a report for several months, in light of the many urgent cases they have to deal with under conditions of insufficient personnel.

The Attorney-General responded that the establishment of legal parenthood could not be granted merely because a person wanted to be the parent of a particular child with whom he had no biological connection, and for this reason a welfare officer's report was mandated by the Surrogacy Law. Even in the absence of specific legislation, the court ought to deal with the specific situation in the light of the legislative intent of the Surrogacy Law, and that unfair advantages would be given to those involved in foreign surrogacies and that this would be improper discrimination against those couples who chose to undertake the surrogacy in Israel.

According to the Attorney-General, a report was needed to protect the child, and not only the surrogate, and he invited the court to reject the plaintiffs' arguments that an investigation for preparation of a report would be demeaning and intrusive, and that it would be discriminatory and offensive to a particular sector of society. On the contrary, the report would show whether the family unit into which the child was entering was stable and that all the necessary conditions for the child's upbringing were in place, the criterion being the best interests of the child.

The decision

The court found that in the circumstances of the case it was not necessary to order a welfare officer to report, and that it would be appropriate to make a parenting order in favour of A.

While rejecting some of the plaintiffs' arguments, especially those relating to sectoral discrimination, the court found that it had before it sufficient information to be convinced, without need for a report, that making a parenting order would be in the child's best interests. This was based specifically on the fact that the Attorney-General had not disputed any of the plaintiffs' factual submissions as to the stability of their relationship and their parenting capacity.[11] The decision of whether to require a report is at the discretion of the court and not mandatory, and in the absence of any dispute on the facts a report was unnecessary. The court emphasised that the reports of welfare officers are recommendations to the court, and constitute only part of the evidence before the court, which is in no way bound by the findings and recommendations of the welfare officer.

The court also took account of the proposals to amend the existing legislation to allow foreign surrogacy, and that the plaintiffs had proven the legality of the processes they undertook in the US, including the waiver by the surrogate of any legal or other connection with the child, and the judgment of the American court and the birth registration.

Following recent decisions of the Supreme Court of Israel in other cases of international surrogacy, the Family Court joined its voice to those calling for completion of the legislative reforms.

Conclusion

The case that came before the Family Court demonstrates the ability of the court to deal with a novel situation on the basis of existing principles. The fact that surrogacy is recognised in Israel, and that the family court is free, if necessary in the interests of justice, to diverge from the ordinary rules of evidence and procedure, provided the judge in this case (who before his appointment to the judiciary was an advocate with many years of experience in a wide range of family matters) with the ability to determine the matter in the interests of the child.

However, if the Attorney-General had disputed the stability of the plaintiffs' relationship, or had expressed doubts about their parenting abilities, it is reasonable to assume that an independent report would have been ordered.

The case does however point out that the international community needs, as a matter of urgency, to reach agreements as to all the stages of international surrogacy. Any Convention or bilateral agreement on the subject needs to address several issues, including the protection of women from exploitation and the legality of the surrogacy relationship.

But particular importance attaches to the need to establish the suitability of the proposed parent or parents, in their home country, as a condition of entering into a surrogacy arrangement. Since some considerable time must pass between the investigation of suitability of the proposed parent or parents in principle and that the birth of the child, the court of the home country must also be convinced that a parenting order would be in the interests of the child.

Notes

1 FC (Tel Aviv) 21182-04-13, *A L & G L v Attorney-General*.
2 Nothing in this article should be construed as approval or disapproval of surrogacy in general or of same-sex parenting. The objective is to describe the existing legal framework.
3 The plaintiffs chose not to make an application that A should adopt the child; this would have been a possible course of action, but the plaintiffs saw this as being unnecessary in the light of their parenting agreement.
4 A welfare officer is a senior social worker who has been granted statutory powers under various laws that provide for their appointment. The title 'welfare officer' was recently abolished, and welfare officers are now called 'social workers appointed under the… law'. But for this paper I shall, for the sake of brevity, call them welfare officers.
5 As far as I am aware, Israel was the first country to pass legislation regulating surrogacy.
6 In a case I dealt with a few years ago, I expressed concern that in the absence of an independent assessment of the suitability of the proposed parents by a welfare officer, a child born by surrogacy might be handed over to a paedophile. To my sorrow, last year it was reported in the press that a convicted paedophile in Israel had received custody and full guardianship of a child born to him by surrogacy abroad. The National Council for the child made immediate contact with the relevant authorities in Israel, so that arrangements could be made to prevent such occurrences, and it to be hoped that legislation, and indeed international conventions dealing with foreign surrogacy, will contain the necessary vetting arrangements.
7 In adoption and abduction cases, in child protection matters, and, as we have seen, in Israeli surrogacy cases, a welfare officer's report is, however, compulsory.
8 Israeli law does not provide for recognition of foreign judgments, so far as they relate to personal status.
9 These last documents were also issued in the US, and the question whether the relevant authorities in Israel would recognise the child as Jewish was not an issue in the case before the court.
10 This law, passed in 1992, contains the privileges and immunities of persons that are protected, 'reflecting the values of the State of Israel as a Jewish and democratic state' (section 1A), and, in the absence of a written constitution, has constitutional status by virtue of special restrictions on its amendment or suspension.
11 According to Israel evidence law, the failure of a party to dispute a factual issue attested to by the other party entitles the court to conclude that those facts are proven, since the failure to dispute them, or to ask to cross-examine, means that there is no dispute.

Domicile, marriage and divorce

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The problem

Divorce by mutual consent requires both spouses to jointly petition the court and maintain the unanimous decision to part for at least six months from the date of first hearing before the competent court. Hence, when a traditional marriage of a non-resident Indian (NRI) breaks up overseas, the anxiety to dissolve it expeditiously is preferred to be done in the foreign matrimonial home of the spouses. The vexed question that then crops up frequently before Indian marital courts is whether to accord recognition to such foreign divorce decrees or not as invariably such overseas dissolution is based on the ground of *irretrievable breakdown of marriage*, which is not a ground for divorce under the Hindu Marriage Act 1955 (HMA).

A recent decision

A recent reported verdict of the Delhi High Court in *Pritam Ashok Sadaphule v Hima Chugh*, 2014 (1) RCR (Civil) 697 (Delhi) refused to give its imprimatur to a decree of divorce obtained by the husband from an English court. The marriage, solemnised in New Delhi according to the Hindu rites, was dissolved in UK on the grounds of the marriage having been broken down irretrievably. The wife had represented to the English court protesting that she was in India and was in acute financial difficulty to travel to London to contest the case. She requested the English court not to grant divorce and had also petitioned the Delhi High Court for grant of a decree of permanent injunction against her husband from continuing with his divorce petition in UK. However, the English court proceeded with the matter and dissolved the marriage.

The parties had met in England in 2004 and married at New Delhi in 2005 to return to UK for work reasons. Developing matrimonial differences, the wife returned to India in 2010 to allege matrimonial cruelty. The husband petitioned for divorce in UK in 2010 and, failing to injunct him in Delhi High Court through an anti-suit injunction, in 2011 the wife also filed a petition for divorce in Delhi under the HMA on the grounds of cruelty. The husband appeared in the Delhi matrimonial court alleging that since the English court had already dissolved the marriage, the divorce petition in Delhi was not maintainable. The Delhi matrimonial court rejected this plea of the husband, which was challenged by him before the Delhi High Court. Relying on the Supreme Court judgment in *Y Narashimha Rao's* case (1991) 3 SCC 451, the Delhi High Court rejected the challenge holding that the ex parte English divorce decree was not passed by a competent court in accordance with Hindu Law and the wife had not submitted to the jurisdiction of the English court. Hence, the divorce petition before the Delhi matrimonial court by the wife was held to be maintainable.

Previous precedents

The Apex Court, in its celebrated decision in *Y Narashimha Rao's* case, had laid down authoritative principles for recognition of foreign matrimonial judgments by settling that 'the jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married.' Culling out exceptions when parties voluntarily and unconditionally submit to the jurisdiction of a foreign Court, where the contested decision is on a ground available under the law under which parties are married, the Supreme Court afforded protection to spouses to ensure that they were not saddled with ex parte decisions based on foreign law. The Supreme Court went further in *Neerja Saraph*'s case (1994) SCC 6 461 to the extent of advocating of the feasibility of an Indian legislation being made to safeguard interests of women so that no marriage between an NRI and an Indian woman solemnised in India may be annulled by a foreign court.

In *Harmeeta Singh's* case 2003 (2) RCR (Civil) 197 the Delhi High Court has held that in the event of a decree of divorce being passed by a court in the US on an NRI spouse's petition, it would have to be confirmed by a Court in India in consonance with the principles of private international law embodied in section 13 of the Civil Procedure Code. Likewise, the Bombay High Court in *Navin Chander Advani's* case 2005 (2) HLR

582 held that the personal law of the parties will prevail. Similarly, the views of the Delhi High Court in *Monia Khosla'*s case AIR 1986 Delhi 399 hold that the Courts in India would not be ousted of their jurisdiction simply because one of the spouses was not resident in India.

Domicile confers jurisdiction

In another perspective, the Supreme Court in *Sondur Gopal's* case 2013 (7) SCC 426, has, while interpreting the extra territorial application of the HMA, authoritatively held that where both parties are Hindu by religion and have a permanent domicile in India, a matrimonial cause of action would be maintainable in India even if they reside outside India. It has been settled that the extra territorial application of the HMA is linked to Hindus domiciled in India under the scheme of the HMA and hence provisions of HMA will apply to them.

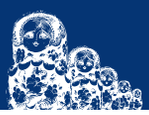
Irretrievable breakdown

The Apex Court in the case of *Vishnu Dutt Sharma JT* 2009 (7) SC 5, and in *Neelam Kumar AIR* 2011 SC 193, have held that since irretrievable breakdown of marriage is not a ground for divorce recognised by statutory law, no marriage can be dissolved on this ground under the HMA and it is for parliament to enact or amend the law on the subject. Therefore, any foreign court matrimonial decree dissolving a Hindu marriage on the breakdown principle does not find recognition in India. Consequently, whenever any such foreign divorce decree is thrust before an Indian matrimonial court in an attempt to avoid a matrimonial litigation of a divorce petition preferred by the local spouse on conventional fault grounds under HMA, the lack of maintainability has to be tested on judicial principles settled by the Apex Court. Invariably, attempts to avoid divorce trials in India on the basis of a foreign matrimonial decree do not find favour. Parties may be directed to file pleadings and establish facts by leading evidence upon issues being framed by the Indian court. The crisis only perpetuates the misery of parties who can no longer live together.

A possible resolution

With the influx of foreign matrimonial judgments being thrust before Indian courts by a 30 million NRI population in 180 countries abroad, parliament, in its wisdom, could well consider enacting a simplified irretrievable breakdown ground hedged with safeguards if one or both parties are resident abroad. Shifting the adjudicatory forum on Indian soil will aid and assist spouses to peacefully bury the hatchet on an equitable settlement that is fair to both parties on home turf, without putting parties to expensive litigation abroad. This would also resolve the application of personal law issues being adjudicated by competent courts in India without a conflict of jurisdictions. Overseas spouses upon being offered a breakdown ground would prefer Indian matrimonial courts to settle issues so that parties are not in collision with law, and domestic judgments so obtained would assume finality to conclusively settle aggravated matrimonial disputes without acrimony. If both spouses unanimously wish to terminate a matrimonial union, the breakdown principle in any case finds application even in divorces by mutual consent under the HMA. Therefore, landing credibility to irretrievable breakdown with legislative inputs will only define a recognised principle ingrained in the thought of dissolving a broken union. However, considering domestic conditions and to prevent spouses on Indian soil from being treated unfairly, issues relating to custody of children, maintenance and settlement of matrimonial property must be conclusively settled simultaneously. Friendly and speedy resolution of warring marital differences ought to be redressed by expeditiously setting up family courts under the Family Courts Act 1984.

A friendly law and a congenial atmosphere to resolve marital relationships gone sour is the epitome of any civilised set-up. Peace at home brings happiness and stability. No sooner is this done, spouses will stop importing and imposing foreign matrimonial decrees against hapless partners pitted on Indian soil on uncomfortable terrain. A time has come to change for the better by incorporating what courts offer abroad.



Maintenance in immigrant marriages

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In most, if not all, American states, spousal maintenance – previously known as alimony – is a complicated issue with many factors, layers and a vast body of interpretative case law. Unlike child support awards, governed by statutory guidelines, which the court has the discretion to deviate from only in the case of strong justification and basis, maintenance awards are the product of varying circumstance as applied to law, all of which are argued passionately by counsel and parties alike, for or against. Almost universally, however, most states consider the following factors when determining both the extent and the amount of maintenance:

1. the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;
2. the needs of each party;
3. the present and future earning capacity of each party;
4. any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
5. the time necessary to enable the party seeking maintenance to acquire appropriate education, training and employment, and whether that party is able to support himself or herself through appropriate employment, or is the custodian of a child, making it appropriate that the custodian not seek employment;
6. the standard of living established during the marriage;
7. the duration of the marriage;
8 the ages and the physical and emotional conditions of both parties;
9. the tax consequences of the property division upon the respective economic circumstances of the parties;
10. contributions and services by the party seeking maintenance to the education, training, career or career potential, or licence of the other spouse;
11. any valid agreement of the parties; and
12. any other factor that the court expressly finds to be just and equitable.

What is certain is that a number of these factors are open to much interpretation. For example, the need or the amount of time the party seeking maintenance requires to become self-supporting: this is an issue of much argument when pursuing rehabilitative maintenance. The case law, however, is clear in one important regard; the longer the marriage, the higher the likelihood of a maintenance award, and the length is also one of the single most important factors when determining both the amount and duration of the maintenance.

Correspondingly, a relatively short-term marriage results in either a zero award of maintenance or extremely limited relief. Finally, a marriage less than three years almost certainly means that the court will deny maintenance completely. Of course, in the context of an immigrant marriage, this has serious consequences. A young woman moving from India to the US may not know anyone in her new country, her husband is sponsoring her immigration application, she will either not be legally permitted to work (depending on her visa) or will need to retrain, complete credentials that are more acceptable in the US and make the necessary contacts in a foreign land. When the husband is living in the US – and even more so in the context of an arranged marriage, where the two parties are basically strangers – people moving to their spouses' adopted country may discover things they were completely unaware of, and also find themselves in the most vulnerable position of being also totally beholden to their spouse financially and, due to cultural pressures, be reluctant to return to India. The person may have left a job in India or moved to the US to be a homemaker in the hopes of a domestically and financially stable life. The parents may have spent vast sums on a wedding and all the trappings required to ensure a smoother transition for their child. Most drastically, the young woman (it may be a young man as well, but

statistically it is heavily weighted to almost always be a young woman), may be subject to abuse and be isolated without access to the resources she needs.

Despite this, however, trial courts so far have applied the usual factors stated above in determining a maintenance award and usually denying maintenance. If the marriage is short and definitely less than three years, especially if there are not any young children, the parties themselves are relatively young and healthy, the court's reasoning is that there has not been sufficient time to find any consistent standard of living of the marriage, to establish a reasonable maintenance award, the parties, being young and healthy, are able to support themselves and so on. However, more recently, the Appellate Courts have been very cautious, more open to awarding *some* maintenance even in a short-term marriage, by for the first time giving a nod to the extenuating circumstances these (largely) women face as a result of moving across the world and also the petitioners' unique arguments that their husbands must be held to the sworn affidavits of support they completed when applying for the green cards or visas for their wives (Form I-864EZ), thereby turning the vulnerability of being dependent on their husbands financially and for their permanent residency into the very factor supporting their pleas for maintenance.

In *Naik v Naik*, 399 N J Super 390, 393 (App Div 2008), the parties were married in India in December 2003. After the marriage, the husband, Sumeru first returned to the US and then sponsored his now-wife, Urvi's immigration application. The parties had exclusively phone contact for 15 months, and had only met in person briefly before their wedding. When Urvi came to the US, the parties were completely incompatible and the marriage shortly broke down. In fact, the Naiks contend that the marriage was never consummated and each alleged severe mental cruelty against the other. The New Jersey trial court entered a dual judgment of divorce and denied Urvi any maintenance. Specifically, after hearing testimony, the trial court contended that maintenance was unwarranted based on:

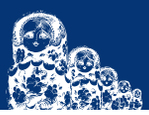
> 'the very short duration of the marriage; the young ages of the parties' ; the fact that no children were born of the marriage; and that both parties' are in good physical and emotional health.'

The judge found the wife to be a well-educated person, having a post-high-school diploma in mechanical engineering and being fluent in Hindi and Gujarati and practically fluent in English. The marriage did not keep the wife from the job market, and she demonstrated no plans to return to school or to rehabilitate herself in any way. Urvi appealed the New Jersey Court's judgment and (remarkably) argued the appeal *pro se* – that is, without counsel. Urvi contended on appeal that Sumeru was bound by the affidavit of support that he filed when petitioning to sponsor Urvi's permanent residence or green card application. A citizen or resident of the US sponsoring an alien relative for admission must petition for the alien's admission and execute an Affidavit of Support (Form I-864EZ). The *Naik* Court stated:

> 'Section 213A of the Immigration Nationality Act ("INA") provides that the Affidavit of Support is a legally enforceable contract, "against the sponsor by the sponsored alien". 8 U.S.C.A. 1183(a)(1)(B). Prior to a 1996 amendment the Affidavit of Support was called Form I-134. It was not a legally binding contract. However, the 1996 amendments introduced From I-864EZ, which creates a legally enforceable obligation. The statute provides that an action to enforce this contract "may be brought against the sponsor in any appropriate court by a sponsored alien, with respect to financial support." Once a sponsor files an Affidavit of Support, the sponsor agrees to support the sponsored immigrant at an annual rate of not less than 125 percent of the Federal Poverty Line.'

Pursuant to the INA the support must continue until a triggering termination event occurs, such as: the sponsored immigrant becomes a naturalised citizen; the sponsored immigrant completes 40 qualifying quarters of work (*approximately ten years*); or the sponsored immigrant becomes able to sufficiently provide for him or herself. Divorce, however, is NOT a terminable event.

Since this was a matter of first impression in New Jersey, the Court looked for guidance in the case of *Moody v Sorokina*, 40 A D 3d 14, 830 N Y S 2d 399 (2007), a decision by the Appellate Court of the State of New York. The *Moody* Court, reversing the trial Court's denial of maintenance,



held that the wife was 'entitled to seek enforcement of the affidavit of support.' The Appellate Division quoted at length the instructions to the Affidavit of Support which in pertinent part state:

> 'I understand that, under section 213A of the [INA] as amended, this affidavit of support constitutes a contract between me and the U.S. Government. This contract is designed to protect the United States Government, and State and local government agencies or private entities that provide means-tested public benefits, from having to pay benefits to or on behalf of the sponsored immigrant (s), for as long as I am obligated to support them under this affidavit of support. I understand that the sponsored immigrants are entitled to sue me if I fail to meet my obligations under this affidavit of support, as defined by section 213A and [Immigration and Naturalization Service] regulations.'

Interestingly, a recent case was decided in the author's own state of Illinois in 2011 where the Appellate Court affirmed the wife's award of maintenance also in part based on her relying on the affidavit of support the husband submitted when completing her green card application. In *Amin*, the trial Court awarded Gunjan 18 months of maintenance, and she could seek further maintenance upon filing a petition for review prior to the expiration of 18 months. What is notable is that the duration of the maintenance was greater than that of the marriage itself, which began in January 2006 and the parties separated in September 2007. The trial court expressly found and stated for the record that the respondent was 'bright, intelligent and articulate' and stated further that she should be self-supporting in a short period of time. The Appellate Court next dealt with the question of amount and affirmed the trial court's reliance on the Affidavit of Support that Dhaval had completed when applying for Gunjan's green card. In fact, the 125 per cent of the Federal Poverty Guidelines would constitute an award of US$1,128 per month for a single person and Ordered Dhaval to pay Gunjan US$1,200 for a period of 18 months, upon which there would be a review of further maintenance upon Gunjan's filing of a proper petition. The Appellate Court found that the record clearly reflected that the trial court considered the Affidavit of Support, in addition to the statutory factors and applicable case law in discussing and ruling on the issue of maintenance to respondent.

The brilliance of the argument is even more significant given that the very issue that was the source of often abuse has been turned on its head as the source of a right by these women. While many immigrant women had to undergo much abuse because they were entirely dependent on their spouses financially and for green cards, and in cases held hostage, or unable to leave less than safe situations because of the much repeated threat that they would have no financial support in the case of a divorce and be deported, that very immigration sponsorship is now the basis of their receipt of maintenance and ability thus to leave a marriage by choice. What's more, these cases are a recent shift in the case law (as noted by the New Jersey Appellate Court, a matter of first impression, which then relied on New York's interpretation which also had considered the issue for the first time) and interestingly the cases, not only brought by immigrant women, often seen as disempowered but in some cases argued in the Appellate Court no less, by them *pro se* (without counsel). The question of course for the practitioner becomes how to counsel clients both marrying an immigrant and planning to sponsor them and for the party planning to move and be sponsored. As always, planning seems to be the prudent course and the completion of a prenuptial agreement, perhaps the mechanism to define obligations in the case of a dissolution. In the meantime, this interesting shift in case law will also flesh out the extent of the maintenance and how subsequent cases interpret these cases of first impression.

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How the UK government is tackling the issue of forced marriage: raising awareness in South Asia

A forced marriage is one in which one or both spouses do not (or, in the case of vulnerable adults, cannot) consent to the marriage or are coerced into it. Coercion can include physical, psychological, financial, sexual and emotional pressure. The UK leads the world in tacking forced marriage and is committed to stamping it out.

What has the UK done so far?

- It established the Forced Marriage Unit (FMU) in 2005.
- It introduced the Forced Marriage (Civil Protection) Act 2007.
- It has criminalised the act of forcing someone to marry by the introduction of the Anti-social Behaviour, Crime and Policing Act 2014.

The Forced Marriage Unit

A joint Foreign & Commonwealth Office and Home Office Unit was established in January 2005 to lead on the government's forced marriage policy, outreach and casework. It operates both inside the UK – where support is provided to any individual (irrespective of nationality) – and overseas, where consular assistance is provided to British Nationals including dual nationals.

The FMU operates a public helpline (open weekdays 0900–1700, telephone +44 207 008 0151) to support victims of forced marriage and professionals dealing with cases.

Assistance can take the form of simple safety advice, through aiding a victim to prevent their unwanted spouse moving to the UK ('reluctant sponsor' cases) and, in extreme circumstances, rescues of victims held against their will.

The FMU undertakes extensive outreach and training programmes in the UK, through social media and overseas (for the latter see later).

The Forced Marriage (Civil Protection) Act 2007

The Act came into force on 25 November 2008 and provides a specific civil remedy, a Forced Marriage Protection Order (FMPO) to prevent a forced marriage and to assist a victim where a forced marriage has already taken place.

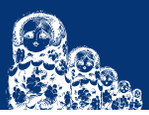
FMPOs can include forbidding a person being taken overseas or ordering that they be returned to the UK. Between November 2008, when the Forced Marriage (Civil Protection) Act 2007 came into force, and June 2013, 580 forced marriage protection orders were made to prevent marriages from taking place.

Criminalisation of forced marriage

On 8 June 2012 the Prime Minister announced that the act of forcing someone to marry would become a criminal offence. On 13 March 2014 the Anti-social Behaviour, Crime and Policing Bill received royal assent and the new offence is expected to be brought into force this summer (by the time this article is published, it may well be operational). The offence is not retrospective.

Two new criminal offences have been created:

- **Breach of an FMPO.** Section 120 of the 2014 Act inserts a new provision (section 63CA) into the Family Law Act 1996, which provides that 'a person who without reasonable excuse does anything that the person is prohibited from doing by a FMPO is guilty of an offence'. On conviction on indictment a person is liable to imprisonment for a term not exceeding five years, or a fine or both. On summary conviction, to imprisonment for a term not exceeding 12 months, or a fine or both.
- **Offence of forced marriage.** Section 121(1) (for England and Wales) and section 122(1) (for Scotland) states that a person commits an offence under the law if he or she 'uses



violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage and, believes, or ought reasonably to believe, that conduct may cause the other person to enter into the marriage without free and full consent.' Section 121(2) (for England and Wales) and Section 122(2) (for Scotland) states that in relation to a victim who lacks capacity to consent to marriage, the offence under subsection (1) is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into marriage (whether or not the conduct amounts to violence, threats or any other form of coercion). In addition under subsection 121 (3) and 122(3) a person commits an offence if he or she (a) practices any form of deception with the intention of causing another person to leave the UK and (b) intends the other person to be subjected to conduct outside the UK that is an offence under subsection (1) or would be an offence under that subsection if the victim were in England, Wales or Scotland. As long as either the perpetrator or victim are in England, Wales or Scotland or, if neither of them are present but at least one is habitually residence there, or if neither are there but at least one of them is a UK national an offence can be committed. The penalty under this section is, on summary conviction imprisonment for a term not exceeding 12 months or a fine or both and, on indictment a term of imprisonment not exceeding seven years.

As breach of a FMPO is already punishable as a civil contempt of court, you may ask how criminalising it will change things. Not all victims of forced marriage will want to pursue criminal sanctions ('I don't want to get married but I don't want to see my mum or dad behind bars either') so those who prefer can still use the civil legislation. In the event an order is breached, the victim can either call the police to have the offender arrested or make an application to the civil (county) court where the FMPO was made.

If a victim decides to pursue the criminal law route, the decision to prosecute will rest with the Crown Prosecution Service (CPS) with both evidential and public interest tests being taken into account. If the civil route is pursued, the CPS would not be involved.

It is acknowledged that legislation alone is not enough, but it does send a clear message that this brutal practice is wholly unacceptable and will not be tolerated in the UK. Awareness raising and preventative measures will continue to supplement the law.

Some statistics[1]

In 2013 the FMU gave advice or support related to a possible forced marriage in 1,302 cases. Forced marriage can happen to men or women of any age and involve any country. Eighty-two per cent of cases involved female victims and 18 per cent male. Nearly three quarters involved were in the 16–25 age group.

The FMU handled cases involving 74 different countries, 97 cases involved victims with disabilities and 12 cases involved victims who identified as lesbian, gay, bisexual or transgender. These figures are only the tip of the iceberg and many more cases go unreported.

The South Asia context

The majority of cases handled by the FMU involve South Asia. In 2013, 42.7 per cent of cases were linked with Pakistan, 10.9 per cent with India and 9.8 per cent with Bangladesh.

The FMU works closely with professionals in the UK (including teachers, the police, social workers, doctors and marriage registrars) on preventative work.

Overseas awareness raising campaigns have taken place in all three of the abovementioned countries.

In India, the British High Commission in Delhi organised a seminar in March 2013 entitled 'Forced Marriage and its Complications' in Jalandhar, Punjab, partnering with a local NGO (PAHAL) to deliver education and awareness on the topic. The event was attended by more than 200 people drawn from local government bodies (Panchayat), teachers, social workers and rural based NGOs. The gathering was addressed by speakers including the Deputy Superintendent of Police, the District Legal Services Authority and senior advocates as well as the President of PAHAL, Professor Lakbir Singh. There was wide coverage in the local print media and interest generated on social media. A follow-up campaign (on this and other issues) is being planned in conjunction with the NRI and Women's Wing of the Punjab police for later this year.

In Pakistan, a series of events was organised in March 2014 by the British High Commission in Islamabad. These events included, on 8 March, community theatre for development organised by a

partner NGO SACH, the event being linked to International Women's Day. A poster competition was held, inviting students from different institutes around the country to portray their views on the topic followed by an exhibition. Seven workshops were held in Kotli and surrounding villages attended by teachers, prominent community leaders, religious leaders and local media.

In Bangladesh, also in March 2014, the British High Commission in Dhaka organised a painting competition for children aged 12–16 years in Sylet to raise awareness against forced marriage practice. In addition to the children (and their parents/guardians), the event was attended by the city mayor, cultural activists and representatives from many educational establishments.

Personal context

In my role as Head of Consular Operations for Northern India at the British High Commission in New Delhi I recall leading a team to rescue a 17-year-old girl from in Punjab and found it a terrifying experience (involved armed police and unhappy family members) and know that my fear would be fraction of the fear felt by that young girl. Forced marriage is a form of violence and a serious abuse of human rights. I am proud not only to have assisted a victim but to be part of the work the UK government is undertaking to stamp out this appalling and indefensible practice.

For more information about the FMU please see www.gov.uk/forced-marriage.

Note

1 Figures supplied by the FMU, London.

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Succession planning for patchwork families in Switzerland

'And they lived happily ever after.' We all are only too aware of the fact that reality is very much different from fairy tales. While fairy-tale weddings are still quite common, fairy-tale endings of marriages are much rarer.

This is nothing new: around 42 per cent of marriages in Switzerland end in divorce. A substantial number of all divorced fathers lose, for various reasons, contact with their children. They marry again and start a new family or live together with partners who are raising children from their own first marriages.

Such situations are daily business for family lawyers but they also affect succession planning as well: difficult family relationships combined with the restrictions of forced heirship rights in Switzerland can be a real challenge when it comes to succession planning.

In the following, I will illustrate this with two examples and discuss possible solutions.

Swiss forced heirship rights

In accordance with Swiss law, all descendants (children) are together entitled to a legitimate portion of three quarters of the estates of each of their parents. If they have to share the estate with the spouse of the deceased, the legitimate portion is three eights of the estate.

The surviving spouse is entitled to a legitimate portion of one quarter.

Compared to other continental European countries, Swiss descendants are, thus, protected by relatively high legitimate portions respectively by extremely high legitimate portions in case there is no surviving spouse. If a deceased is not survived by descendants, the parents are protected by forced heirship rights as well. The concept of forced heirship rights follows strictly biological relations and wedding vows. However, emotional relations are not necessarily in line with the relations protected

by forced heirship rights. I will focus on the forced heirship rights of the children and the spouse, as they tend to be the main obstacle with regard to succession planning.

Divorced mother

Facts

Ann, mother of 12-year-old Julia has just been divorced after a long and grim fight with her ex-husband Peter, Julia's father, over matrimonial property claims and alimony.

Ann inherited substantial means from her late father. Now, Ann would like to make sure that her ex-husband does not get anything from her estate in case something happens to her.

Legal situation

At first glance, the situation looks unspectacular: Peter is no longer married to Ann and, thus, neither an intestate heir nor protected by forced heirship rights. Julia, on the other hand, is protected by a legitimate portion of three quarters of Ann's estate. In the absence of a last will, Ann's entire estate would go to her daughter Julia, which is exactly what Ann wishes to happen with her wealth. Nevertheless, if Julia dies after having inherited from Ann, Ann's ex-husband Peter would be the sole heir of Julia.

This may seem very hypothetical, especially since Ann and Julia are in perfect health. However, Ann and Julia may have a car accident while they spend their vacation together. In case Julia survives Ann, even if only by minutes, Julia inherits from Ann, and Julia's estate then passes on to Peter.

Solutions

Such result can be avoided by entering into an inheritance contract. Julia could waive her forced heirship rights and, for example, agree that she will inherit subject to the condition that she survives her mother for at least one year. Alternatively, she could agree to inherit as a provisional heir and to appoint Ann's sister or Ann's nephew as remainderman. If Julia enters into an inheritance contract with Ann and waives her forced heirship right, then it is possible to avoid Ann's estate falling into the hands of her ex-husband. The problem with this solution is that only persons of legal age can enter into an inheritance contract (or write a valid last will). As long as Julia is minor, an inheritance contract is no solution.

Alternatively, one could consider establishing a family foundation or a trust. If done correctly, the respective assets will not be part of the estate of Ann and thus cannot be passed on to Peter. Depending on the specific financial situation, this can work, although there are four major obstacles: (1) if the settlor maintains control over the foundation or the trust it can be argued that the respective assets must be considered for the calculation of the legitimate portions; (2) transfers made to trusts and foundations will be considered for the calculation of legitimate portions if they were made within five years before death; (3) such transfers that were made with the obvious intention to circumvent forced heirship rights will be considered without limitation; and (4) establishing a foundation or a trust as a Swiss resident can be very unattractive from a tax point of view.

Depending on the specific circumstances and the kind of assets involved, taking out a life insurance policy can be an option, as the insurance proceeds of a (risk) life insurance do not fall into the estate in accordance to Swiss law. A life insurance can reduce problems arising out of forced heirship rights but will not solve the problem entirely.

As a consequence, there are not that many options left for Ann: she can write a last will, which violates the forced heirship rights of her daughter and can thus be challenged. At least, she can write a last will in order to make sure that her daughter respectively her ex-husband will not get the disposable portion of her estate. In addition, Ann can exclude her ex-husband from the administration of her estate respectively from the administration of the assets inherited by Julia in case Julia inherits from Ann while she is still underage.

Estranged son

Facts

Tom was married for more than 30 years to his wife Kate, who died two years ago. Kate brought a young daughter, Claire, into their marriage. Tom always treated Claire as if she was his own child. Claire indeed sees Tom as her father and her children see Tom as their grandfather.

Before Tom married Kate, Tom had a short affair that resulted in a son, Luke. Tom and Luke's mother never got along very well and, soon after Luke was born, his mother married and moved with her husband to South Africa. Tom had almost no contact with Luke and

when they met years later, they both felt that it was too late to build a strong relationship between the two of them.

Now, Tom would prefer to pass his wealth to Claire and his beloved 'grandchildren' rather than to Luke, to whom he does not feel close despite the genetic bonds relating them to each other.

Legal situation

As the only child of Tom, Luke inherits 100 per cent of Tom's estate in the absence of a last will or an inheritance contract. Moreover, Luke is entitled to a legitimate portion of three quarters of his intestate share. Consequently, Tom has only a disposable portion of one quarter of his estate that he can pass to his stepdaughter Claire and her children.

Possible solutions

Of course, Tom could move to a country that does not apply forced heirship rights (eg, England) but as Tom wants to live close to his stepdaughter so that he can see her children as often as possible, this is not an option for him.

The preferred solution for cases like that of Tom and Luke is an inheritance contract in which the possible heir waives his share in the estate entirely or at least his forced heirship rights. In order to enter into such an inheritance contract, Tom would have to convince Luke that he formally waives his rights. Obviously, he could offer Luke a consideration. Luke would then have to balance the advantage of instant money and the avoidance of possible future court proceedings with the potential value of his legitimate portion. In this context, it is important that Tom informs Luke about his approximate wealth in order to avoid that Luke later challenges the inheritance contract based on an alleged absence of intent.

If Luke refuses to enter into an inheritance contract, Tom has still some alternatives. These alternatives, however, are riskier; whether they work depends on the specific circumstances.

Tom could make his stepdaughter a proper gift and transfer a substantial part of his wealth to her during his lifetime. As mentioned before, such transfers of assets to third parties will be considered for the calculation of the legitimate portions if they are made within five years before death or with the obvious intend to circumvent forced heirship rights.

We have already discussed the option of establishing a (foreign) family foundation or a trust in order to avoid forced heirship rights. While it is likely that Luke could attack such foundation or trust based on his forced heirship rights, the existence of a foundation or a trust can make the enforcement of such rights very difficult and expensive.

In the case at hand, a life insurance may be a good instrument to pass some money to Claire, especially as only the surrender value of the insurance policy will be considered in connection with Luke's legitimate portion.

If Tom could adopt Claire, the situation would look very different as Claire and Luke would then both be entitled to a legitimate portion of three quarters each. Unfortunately, adopting an adult is subject to strict regulations in Switzerland and normally impossible if the person who wishes to adopt someone already has descendants.

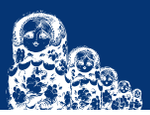
Taxes

It is not only the forced heirship rights that make succession planning difficult for a testator living in a patchwork family: the tax consequences must be kept in mind as well. Although there are attempts to establish a federal inheritance tax, the right to levy inheritance taxes still belongs to the cantons. As a result, there are 26 inheritance tax regimes in Switzerland.

All cantons have abolished inheritance taxes for spouses and almost all cantons abolished inheritance taxes for descendants. Most cantons levy inheritance taxes from other heirs and make the tax rate subject to the degree of kinship between the deceased and the heir. Third parties are often taxed at very substantial tax rates of up to 50 per cent, depending on the canton where the deceased had his last residence. Some cantons tax stepchildren at a lower rate, others know tax-exempted amounts for stepchildren or godchildren. However, such tax-exempted amounts are usually rather low and play, thus, not a significant role with regard to succession and tax planning.

Inheritance law revision

The Swiss parliament asked the Federal Council to prepare a revision of the Swiss inheritance law and to adapt the inheritance law to the reality and the different ways of life of families in the 21st century. It is yet unclear how such a new law will look like and



whether and when it will become effective. The discussion in the parliament showed that inheritance law is, probably more than other areas of law, rooted in and connected with social perceptions. Hence, it will be difficult to find a compromise and a common denominator for a revised law.

Further, an inheritance law revision will only make a real difference for members of patchwork families if the inheritance tax laws are modified as well.

Summary

Swiss inheritance law protects descendants with forced heirship rights whereby the respective rules were established with intact and traditional families in mind. The reality obviously differs from that traditional family model: A very significant part of the Swiss population lives in patchwork families and/or has emotional relations that are not congruent with the biological relations. A modern inheritance law should provide the tools for reasonable succession planning for persons who live in such non-traditional families and at the same time contain all the necessary provisions for the many traditional families existing in Switzerland.

At the moment, careful succession planning is necessary whereby it is important to consider the tax consequences as well. It makes sense to see succession planning as an ongoing process, which should be initiated early enough as a testator who writes a last will in contemplation of death has, for natural reasons, only very limited options to deal with forced heirship rights.

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