

# **International Family Law, Policy and Practice**

**Cross-Border Influences in the  
Modernisation of Family Justice  
in England and Wales**



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## **CROSS-BORDER INFLUENCES IN THE MODERNISATION OF FAMILY JUSTICE IN ENGLAND AND WALES**

### **Contents**

Editor's Message	3
Editorial Board	4
<b>North American Psychology studies</b>	
Joan B Kelly, PhD – Paternal Involvement and Child and Adolescent Adjustment After Separation and Divorce: Current Research and Implications for Policy and Practice	5
Geoffrey L Greif and Sarah C Finkelstein Waters – Ambiguous Reunification: A Case Illustration and a Framework for Understanding the Aftermath of Abduction	24
<b>Family Law in the European Union</b>	
Judge A Rosas, ECJ – Family Law in the Case Law of the European Court of Justice	32
Elena Falletti – Discrimination and the parent-child relationship. The national case law on cross border mobility of rainbow families in the European Union	39
Laura Carpaneto – Child abduction within the European Union: the functioning of Article 8.11 of regulation no. 2201/2003 from an Italian perspective	46
<b>Modernisation of Family Justice</b>	
Nicole Tytler – Background Note to the Forthcoming Reports of the Children and Vulnerable Witnesses' Working Group. Children as witnesses in criminal proceedings: should there be a minimum age for children appearing court?	53
<b>Guidelines for Submission of Articles</b>	61

## Editor's Message

Welcome to the second issue of our new journal, *International Family Law, Policy and Practice*, which continues our cross-border approach to underlying theories in global family law, this time with some articles from North America and the European Union, derived from the work of speakers at the 2010 International Family Law conference in London, which looked at themes of Parentage, Equality and Gender, on which both American and EU contributions have core points to make.

The keynote speaker in London in 2013 was the leading North American psychologist, Joan B Kelly, PhD, whose article, opening the current issue of the journal, looks at the results of half a century of her work and others' on the impact of children's separation from their non-resident parent on parental divorce or other relationship breakdown. Her conclusions coincidentally confirm the validity of the policy of the recent Family Justice Review, which robustly encourages shared parental responsibility, together with promotion of the policy of 'making it work', rather than the previously favoured concept of simply sharing residence, which has been shown in Australian research to have certain downsides.

Another American psychologist, who also spoke at the London gathering in 2013, was Dr Geoffrey Grief from the University of Maryland, who highlighted the long term damaging effects of international child abduction with a presentation which he has now re-produced for us in an article which includes a striking case study of the international abduction of a young Norwegian-American child not reunited with her Scandinavian mother until her teens. The deeply felt long term effects of such events have always been suspected, but strike a particular resonance at the present time as a later issue in the present 2014 volume will include the results of Professor Marilyn Freeman's research on the long term effects in adulthood of such abductions, to be published in December 2014.

Influences from the European Union, on the other hand, are equally significant in the present issue. Judge Alan Rosas of the EU Court of Justice at Luxembourg, who gave the 2013 International Family Law Lecture at the 2013 London Conference, has also provided his text in an article which indicates the unexpected role that the ECJ in fact has in periodically pronouncing on family law concepts, and in particular family members' rights within the Union, which has strong equality principles.

This EU perspective is followed up with two articles from Italian academics which demonstrate the impact which the EU and its laws has on its citizens' fundamental rights and protections, such as of children in the context of international parental abductions subject to the Hague Convention. These EU influences are of particular interest, since much of the work of the new International Centre is with common law

jurisdictions, such as Australia and New Zealand, and it is easy to forget that our European neighbours' civil law jurisdictions can also be a source of valuable comparative lessons.

Finally, we include a background Note on Children as Witnesses in Court in the criminal context, ahead of an article expected in the next issue on Child and Vulnerable Witnesses, particularly relevant in connection with the current spate of prosecution of child sexual abuse: and to coincide with the initial programme of the Working Group set up by the President of the Family Division to look into procedures for hearing evidence from Child and Vulnerable Witnesses (including alleged victims) in Family Proceedings, in which the Working Group anticipates building on the work already done in the criminal context by the Criminal Bar and the Advocacy Training Council - and in which it is said that family justice 'lags woefully behind' the criminal system where rules and statutes actually prohibit in the Crown Court some processes overdue for updating which the President has (obviously disapprovingly) said 'we still tolerate in the Family Court'. The Note on the criminal system clarifies some of these.

In the next issue we shall also be looking at the progress of other initiatives recommended by the Family Justice Review and the President's own modernising programme.

*Frances Burton*

Frances Burton, Editor

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# North American Psychology Studies

## Paternal Involvement and Child and Adolescent Adjustment After Separation and Divorce: Current Research and Implications for Policy and Practice

Joan B. Kelly\*

### Introduction

The impact of separation and divorce on child and adolescent well-being has generated considerable attention among social scientists, media, and policy makers since the divorce rate began its rapid increase in the early 1960s. Initial studies reported that divorce caused lasting emotional, behavioral, and social detriment to children and adolescents. Hundreds of studies with improved methodology and samples in the past twenty five years present a more complex and promising picture. Longitudinal studies in England and the United States had an important role in demonstrating that some children were substantially at risk *prior* to separation, a revelation that spurred new paths in research, including a focus on risk factors for children, within marriages and after separation.

In the 21st century, a more accurate and nuanced view of the impacts of the separation and divorce process on children has emerged with considerable consensus among social scientists regarding the major factors impacting on children's psychological, social, and academic functioning. Outcomes for children and adolescents are complexly determined, vary considerably, and are best understood within a framework of family and external factors that increase risk and foster resilience in the years following separation.

This article reviews research on the impact of paternal involvement after separation on child and adolescent adjustment, and considers barriers associated with limited father involvement, high conflict and parenting time, and policy implications of the research.

The largest and most robust body of research on father involvement has been conducted in the United States, with important contributions from Australia,

New Zealand, England, and other European countries. The findings presented in this article may not be representative, relevant, or replicated in other countries, cultures or ethnicities. The dominant research paradigm over the past 50 years has been based on the fact that fathers were non-resident parents approximately 85% - 90% of the time. There is no comparable body of research on maternal involvement and children's outcomes when mothers are non-resident parents, nor with children of separated same-sex parents.

As always in using research for practice and policy decisions, caution is warranted. Appropriate use of research in family law should be accompanied by a scrutiny of a study's design, sample size and selection, the use of valid, reliable measures, appropriate data analyses, and considerations of the limitations and generalizability of the study.

### Paternal Involvement in Context

Paternal involvement is part of a larger body of research confirming that separation and divorce increase the risk for a wide range of problems in children and adolescents, when compared to children in continuously married families (Amato, 2000, 2005; Carlson & Corcoran, 2001; Emery, 1999; Hetherington, 1999; Hetherington & Kelly, 2002; Kelly 2000, 2007, 2012; Kelly & Emery, 2003; McLanahan, 1999; Potter, 2010, Simons & Associates, 1996; Sun, 2001; Sun & Li, 2001). More recent studies which control for important pre-divorce and post-separation parenting and economic variables show smaller negative effect sizes of divorce. Nevertheless, the risk for separated children is double that of married family children: 20-25% of children whose parents divorced had adjustment problems,

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<sup>1</sup> An abbreviated version of this article was presented at the 2nd International Family Law and Practice Conference 2013, 'Parentage, Equality and Gender'. 3-5 July 2013. London Metropolitan University, London, England.

compared to 10% of those in still-married families. It is important to note, however, that by two years after divorce, 75%-80% of divorced-family children functioned within the average (or better) range on a variety of psychological, social, and behavioral measures (Hetherington & Kelly, 2002).

Risk factors with the most robust empirical support following separation and divorce for children and adolescents include: the mental health of the parents, particularly the primary residential parent; quality of parenting and parent-child relationships; parental conflict and violence; loss of important relationships; cohabitation and remarriage; relocation; family structure transitions; and economic resources. Protective factors reliably associated with positive outcomes in children following divorce include good adjustment of the residential parent; competent parenting of one or both parents; cooperative or parallel co-parenting styles; reduced or encapsulated co-parental conflict; positive involvement of the nonresident parent; limited number of family structure transitions; and economic stability (for reviews, see Amato, 2005; Austin, 2012; Fabricius, Sokel, Diaz, & Braver, 2012; Hardesty, Haselschwerdt, & Johnson, 2012; Kelly, 2012; Lamb, 2012a; Meadows, McLanahan, & Brooks-Gunn, 2007; Pruett, Cowan, Cowan, & Diamond, 2012; Sandler, Wolchik, Winslow, Mahrer, Moran, & Weinstock, 2012). Our current knowledge of these risk and protective factors provides considerable guidance for practice, post-separation parenting arrangements, interventions for separated parents and children, and policy.

Fathers are typically less involved than mothers in their children's care in married, cohabiting, and never-married families. In the United States, married fathers have significantly increased their level of care and involvement over the past three decades during the midweek and weekends, a trend which continues (Casper & Bianchi, 2002). Between 2002 and 2010, the number of fathers regularly caring for their children increased from 26% to 32%, and one third of fathers with working wives were a regular source of childcare for their children (United States Census Bureau Report, 2010). Among fathers with preschool children, 20% were the primary caregiver. When mothers work outside the home full time, fathers spend more time alone with their children and in providing care on weekdays (Hook & Wolfe, 2012). Fathers' engagement with and caring alone for the child is associated with more warmth,

closeness, monitoring, and stronger father-child relationships (Pleck & Masciadrelli, 2004). Although paternal involvement patterns vary by marital, cohabiting, and separated status, as well as by father's age and education (Jones, J. & Mosher, W.D., 2013), these trends and changes in caretaking patterns and responsibilities within the family in the United States and elsewhere indicate the need to reassess traditional ways of thinking about children's needs post-separation and implement more appropriate parenting plans for children in the 21st century.

### **Reduced Paternal Involvement after Separation**

*Child and Adolescent Views.* Separation and divorce is marked for many youngsters by the loss of important relationships and attachment figures which can have long-term emotional, social, academic, and economic consequences. Loss of contact and closeness in the father-child relationship is the most common result, although separation may result as well in diminished or severed relationships with extended family, day care providers, teachers, and close friends. For four decades, children in Western societies have reported the loss of the non-resident parent, usually the father, as the most negative aspect of divorce. From preschool to college age, the majority of children have consistently expressed sadness, pain, stress, and great dissatisfaction with their parenting time arrangements. They lament the substantially reduced time with fathers, the prolonged separations between contacts, brevity of visits, and the loss of shared activities and emotional support (Cashmore & Parkinson, 2008; Emery, 1999; Hetherington & Kelly, 2002; Kelly, 2007; Smart & Neale, 2000; Smith & Gollop, 2001; Smith, Taylor, & Tapp, 2003; Wallerstein & Kelly, 1980).

Longing for the father has been a persistent theme identified in research over 4 decades in the United States, Australia, England, and New Zealand. Among school-age children, more than half wanted more contact with their fathers, and one third wanted the contacts to be longer (Smith & Gollop, 2001). In retrospective studies of adolescents and college students, between 50% and 70% of students with mother custody arrangements reported that they would have preferred equal time with their parents or a substantially greater number of overnights with the non-resident parent. They indicated that their fathers wanted more time together but their mothers were

opposed to any increases in time. Children and adolescents felt it was important to have more input into the development of parenting plans, were more likely to comply with the parenting plan when they did, and adolescents wanted parents to be flexible with the established parenting arrangements (Birnbaum, Bala, & Cyr, 2011; Fabricius & Hall, 2000; Fortin, Hunt, & Scanlan, 2012; Parkinson & Cashmore, 2008; Smart & Neale, 2000; Smith & Gollop, 2001; Smith, et al., 2003).

Studies with large and diverse samples confirm the importance of fathers' roles in children's post-separation emotional adjustment. In a study of 2,733 10-14 year-olds, while 43% of youngsters in married families rated their fathers as highly involved on seven different dimensions, only 14 % of those in separated/divorced families reported their fathers as highly involved (Carlson, 2006). In an ethnically diverse sample of 1,375 college students, reports of and desires for more father involvement among students from divorced families differed greatly from those of married-family students. The divorced family students wanted more father involvement in all 20 domains measured, with results consistent across gender, ethnicity, and parent work schedules. Both groups were satisfied with the level of mother involvement (Schwartz & Finley, 2009).

A third study compared college students whose parents divorced an average of eight years earlier with a matched sample of students in still-married families. The divorced student sample reported more painful childhood feelings and experiences, more worries about such things as parents attending major events and financial support, and more desire to spend increased time with their fathers. Two thirds of the divorced-family students said they missed not having their fathers around, and one third questioned whether they were loved by their fathers. Among the divorced family students, those who lived in sole physical (mother) custody arrangements reported more pain, more feelings of loss, and more self-identification as a child of divorce compared to those in shared physical custody (Laumann-Billings & Emery, 2000). Even when fathers and children continue to see each other, the majority of father-child relationships decline in closeness over time (King, 2006, 2007; King & Sobolewski, 2006; Wallerstein & Kelly, 1980). The weakened ties between fathers and children extend into adulthood. Young adults whose parents divorced when they were younger reported less contact with fathers, less affection,

closeness, and trust of their fathers, and fewer offers of intergenerational assistance compared to those whose parents remained married (Booth & Amato, 2001; King, 2002).

### ***Children Resisting or Refusing Father Involvement.***

A small minority of youngsters strongly resist or refuse contact with the non-resident parent, often quite appropriately. High levels of parent involvement are likely to be detrimental for children and adolescents when fathers or mothers have prior and/or current histories of violence, child abuse, substance abuse, severe personality disorders and mental illness. Limited contacts, supervised visits, or no contact at all may be appropriate in many of these cases unless and until treatment interventions significantly change parenting behaviour and styles, and ensure safe interactions with their children (Jaffe, Johnston, Crooks, & Bala, 2008; Johnston, Kuehne, & Roseby, 2008; Kelly & Johnson, 2008; Hardesty, Haselschwerdt, & Johnson, 2012). Additionally, rigid and insensitive parenting practices, and alignments with embittered parents also may result in strongly negative views of the nonresident parent and resistance to contact (Fidler and Bala, 2010; Johnston, 1993; Johnston et al., 2008; Kelly & Johnston, 2001).

If education and treatment interventions are completed successfully, parenting plans and orders may then be implemented, in consultation with children, to develop more healthy parent-child relationships. Mothers are just as likely as fathers to have the range of problems noted above, and similar restrictions on contact with their children are appropriate. In the historical social and legal context in which mothers have been presumed to be the best caretaker for children, destructive maternal behaviors and detrimental mother-child relationships have too often been ignored in custody and access decision-making. Judicial decisions awarding primary residence to the father have been relatively rare in such circumstances, and restricted contact with mothers less likely to occur.

### **Measuring Paternal Involvement**

The most common measure of father involvement has been the frequency of visits in a defined period of time, e.g. in four weeks, a month, or year. However, frequency has been an imprecise measure and unreliable predictor of children's outcomes, as it fails to indicate the amount of actual time children and non-resident parents spend together. Seeing a father twice a month,

for example, may mean every other Saturday for three hours or eight hours (with no overnights), every other weekend from Friday to Sunday evenings (48 hours each, four overnights), or every other week from Wednesday evening to Monday morning (10 days, 10 overnights in four weeks). In each instance, the actual time spent with fathers is substantially different and the number of days between contacts varies considerably.

More recently, researchers have argued that the actual quantity of time that fathers and children spend together is a more appropriate and reliable measure than frequency for assessing the impact of paternal involvement. The amount of time determines opportunities for father-child interactions, and combined with measures of quality and type of paternal involvement, is a better predictor of child outcomes (Fabricius, Braver, Diaz, & Velez, 2010; Fabricius, et al., 2012; Sandler, Wheeler & Braver, 2013). A new method for measuring parenting time, the residential calendar, has demonstrated construct and content validity with a large sample (N = 878) of Flemish adolescents, and may be useful in future research on father involvement and post-separation outcomes for children and adolescents (Sodermans, Vanassche, Matthijs, & Swicegood, 2012).

Quality of maternal and paternal parenting has emerged as a central predictor of children's adjustment after separation and divorce in the past decade, and in fact, is a more potent predictor of adjustment than parent conflict (for recent reviews, see Fabricius, et al., 2012; Kelly, 2012; Pruett, et al., 2012; Sandler, et al., 2012). Newer studies of father involvement often measure quantity of time, quality of parenting, and dimensions of the father-child relationship. Fathers can be loving, sensitive, competent, and committed, or erratic, aloof, noncommittal, self-centred, and mean-spirited (as is true of mothers). How fathers spend time with their children (types of activities), child and adolescent ratings of closeness to the father, and extent and content of communication in the father-child relationship have demonstrated validity in predicting behavioural, emotional, and academic outcomes of separated youngsters (e.g. Carlson, 2006; Fabricius, et al., 2010; Finley & Schwartz, 2004; King, 2002; King, Harris, & Heard, 2004; Menning, 2006).

### **Paternal Involvement and Very Young Children**

Most research on the impact of paternal involvement following separation has been conducted with school age children and adolescents. A small but growing body of research on psychosocial, emotional,

and behavioural impacts of early involvement of fathers with their infants and toddlers, although conducted predominantly in married families, provides some guidance for developing post-separation parenting plan arrangements that promote resilience for young children. Attachment researchers have focused almost exclusively on infant-mother attachments and maternal sensitivity in middle-class, white families for many decades. This narrow focus delayed a more full understanding of the impacts of infant-father attachments, early paternal involvement, and child outcomes in both married and separated families. (see Main, Hesse & Hesse, 2011; Lamb, 2010; DeWolff & van IJzendoorn, 1997).

*Research on infant attachments to parents and other caregivers.* Empirical research on fathers and their infants confirms that babies form multiple attachments to emotionally available caregivers around 7-8 months, including their fathers, mothers, and consistent caregivers. This is true when fathers work full time, and mothers remain at home full time to care for the infant, and is equally true when mothers work full time and fathers are the primary caregivers. Fathers experience their own hormonal changes in preparation for and after birth, and are as gentle and competent as mothers if given opportunities to parent their infants and young children (Brown, Mangelsdorf, & Neff, 2012; Lamb, 2012a). Secure attachments are formed in 65% of infants in middle class families with either mothers or fathers (Easterbrooks & Goldberg, 1987; Lamb, 1977 a,b; Thompson, 1991; van IJzendoorn & DeWolff, 1997), suggesting that a parent need not be a 'super' parent, but rather, an average, loving, consistent parent.

A meta-analysis of studies that included fathers, mothers, and infants (N=950) reported that 67% of the infants had secure attachments with their fathers, similar to that of infants and mothers in non-clinical samples. 45% had secure attachments to both their mothers and their fathers, 17% were insecurely attached to both parents, and the remaining 38% were mixed, i.e., secure with one parent, insecure with the other, with no differences between mothers and fathers (van IJzendoorn & De Wolff, 1997). Kochanska & Kim (2013) found similar percentages of infants secure with either mothers or fathers (65%). 40% were securely attached to both parents, 18% had insecure attachments with both parents, and 42% mixed. Follow-up analyses using data from each parent, teachers, and the children indicated that infants (N=102) who had insecure attachments with both parents at 12 and 18 months



were most at risk, with a high level of behaviour problems at ages 6 ½ and 8. A secure attachment as an infant with either mother or father had a significant beneficial effect, offsetting risks for developing mental health problems at those two follow-up points. Having a secure attachment with both parents did not add a protective effect beyond one parent, although in separated families, it is likely to be more beneficial when parents are consistently in contact with their young children.

Consistent with other recent studies, there was no support for the primacy of the mother as an attachment figure in predicting future outcomes. Nor was there support for the belief that infants and toddlers have a gender bias in attachment formation or develop an attachment hierarchy in which mothers are consistently preferred. Infants appear to prefer one parent or the other at different ages and for different needs and experiences, particularly in the first 18 months, and are responsive to consistent and sensitive caregiving, challenging play, and cognitive stimulation (Kochanska & Kim, 2013; van IJzendoorn and De Wolff, 1997; Waters & McIntosh, 2011). Attachment status to mothers and fathers are generally independent, i.e. do not generalize across relationships within the family system, although each infant-parent relationship is influenced by the contingent responses of the other parent (Sroufe, 1985; van IJzendoorn & De Wolff, 1997).

### **Early Paternal Involvement and Child Outcomes**

Independent of the positive outcomes of secure attachments with mothers, secure attachments with fathers are associated in many studies with later positive measures of self-esteem, self-regulation and compliance, social competence and peer relationships, cognitive and verbal skills, IQ, and emotional and behavioral adjustment (see Lamb & Lewis, 2013, for review). The concept of paternal involvement is a broader one than attachment, encompassing behavioral and learning systems that support an array of psycho-developmental goals, including cognitive, social, moral, cultural, and spiritual. A number of longitudinal studies have demonstrated various positive benefits to children from early father involvement. Demonstrating the importance of co-parental relationships in child rearing outcomes, these positive outcomes occurred only when accompanied by supportive co-parenting behaviour (Jia, Kotila, & Schoppe-Sullivan, 2012).

These various studies with infants and young children in married families demonstrating benefits of positive involvement of fathers are directly relevant for consideration of young children's needs and interests in separated and divorced families. Young children of parents who lived together for the child's first several years prior to separation have formed attachments and important relationships to both parents when present and emotionally available. Both parents, if adequate, provided important resources for the child's development and future well-being which are important to maintain to the fullest extent possible after separation. Of interest is that longer-term benefits of parental inputs in the early years tend to appear at different developmental periods for children. Early maternal inputs are consistently related to child development in early childhood more so than fathers, but early paternal inputs are more related to child development once children enter school and adolescence, more so than mothers. The challenge of separation is to enhance rather than diminish the young child's future well-being and the capacity to function competently at each successive stage.

### **Controversies about Parenting Plans for Very Young Children**

When very young children have attachments to both parents at the time of separation, whether secure or insecure, a central practice and policy issue is what patterns or living arrangements will maintain these attachments in an appropriate post-separation parenting plan (Kelly & Lamb, 2000; Lamb & Kelly, 2001; Lamb & Kelly, 2009; Warshak, 2000, 2002). While consistently insecure attachments with mothers and fathers are associated over time with more negative outcomes, insecure attachments are far better for children than disrupted attachments following separation, as the detrimental consequences of disruption in important attachment relationships are well-established for young children (Bowlby, 1973). The separation of parents is associated with negative changes in attachment security in infants and young children, similar to other life changing family circumstances such as poverty, violence, and mental illness (Hamilton, 2000; Thompson, 1991; Waters, Merrick, Treboux, Crowell, & Albersheim, 2000). For some infants, the increased insecurity may be transitory if emotional turmoil and high conflict subside, parents become more emotionally stable and available, and living and economic arrangements stabilize. But the increased insecurity in infant-father attachments occasioned by the separation may be

reinforced and consolidated by the inexplicable disappearance and infrequent re-appearance of the father in the child's life.

Children from birth to three years are developing and consolidating attachment relationships. Their immature ability to internalize memories of attachment figures requires 'refreshing' or renewing at regular intervals with face-to-face contact and care giving. Additionally, their primitive sense of time hinders understanding of absences and whether and when they might see a parent again. Attachment relationships are weakened by lengthy absences, e.g. seven or 12 days between contacts for infants and fathers, and infrequent and inconsistent contacts. (Similarly, a seven-day separation from mothers is also not appropriate in the first two years). Typical parenting plans that severely limit involved fathers' opportunities to be with their infants and toddlers to one brief visit a week reflect a failure to understand young children's attachment and developmental needs as well as longer-term psychological, social, and academic needs.

The amount and pattern of time with each parent needed for young children to sustain and consolidate both attachment relationships are important and controversial issues, as is the related issue of overnights of infants with their fathers. The controversies have arisen from adherence to one of two bodies of theory and research (described above): infant attachment and paternal involvement. Prominent attachment theorists and researchers have argued that infants' primary attachments were to their mothers, and must be protected and prioritized after parental separation. Separations from mothers of any length were perceived to be detrimental to young children (see Biringen & Solomon, 2001; MacIntosh, 2011; Main, Hesse, & Hesse, 2011; Solomon & George, 1999). Overnights with fathers, even if the infant was attached to father, were considered to be highly detrimental to the infant and infant-mother relationship, and recommendations made to delay overnights until ages 3 or 4. In general, these attachment theorists did not incorporate infant-father attachment research in their formulations or view these attachments as important to maintain after separation (McIntosh, 2011). Established and relevant day care research demonstrating that adequate quality day care did not damage infant-mother attachments was also not considered.

On the other side of the controversy were those who pointed to the paternal involvement research, including the infant-father attachment research, and the benefits of warm, involved fathering to children in the

short and longer term. In this perspective, infant & toddler attachments to both parents should be privileged in developing parenting plans after separation. To maintain very young children's attachments, regular and frequent contact between infants/toddlers and their involved, adequate nonresident fathers was recommended, including some overnights. It was argued that infant-toddler relationships with their fathers benefitted from opportunities for 'real' and diverse care giving and parenting behaviours, including nurturance, feeding, playing, bedtime rituals, reading, socializing, and teaching. Research on attachment and father involvement, and parenting plans with overnights, were viewed as support for this perspective (Cowan, et al., 2007; Grossman, Grossman, Fremmer-Bombik, et al., 2002; Grossman, Grossman, Kindler, & Zimmerman, 2008; Kelly & Lamb, 2000; Lamb, 2012 (b); Lamb & Kelly, 2001; Lamb & Kelly, 2009; Pruett, Ebling & Insabella, 2004; Pruett et al, 2012; Warshak, 2000, 2002).

These heated controversies in the United States and elsewhere in the last decade were exacerbated by a *Family Court Review* special issue on attachment (McIntosh, 2011), which focused on infant-mother attachment research and policy conclusions regarding overnights. Subsequent articles criticized the absence of any articles or consideration of infant-father attachments, and the limited and methodologically flawed research used to establish broad conclusions that substantial time with fathers and overnights after separation were detrimental (see Lamb, 2012b, and 2012c; Ludolph, 2012; Ludolph & Dale, 2012; McIntosh & Smyth, 2012; Pruett et al., 2012).

Recognizing the detrimental polarization in the family law field and between professionals, three psychologists involved in the debates collaborated on two articles in an effort to reach an integrated consensus from a psycho-developmental perspective on parenting plan arrangements for very young children (Pruett, McIntosh, & Kelly, 2014; McIntosh, Pruett, & Kelly, 2014). In the first article (Pruett, et. al., 2014) early attachment formation and joint parental involvement were both viewed as important for children's early development, and for life-long parent-child relationships. Infants benefit from a secure attachment with one warm and sensitive care giver, and maintaining two such attachments after separation was seen as advantageous. Based on a consideration of limited research, which cannot be generalized to all populations, some caution about high frequency overnights in the first 18 months was advised, particularly in high parent conflict situations. The authors stated that a blanket 'no

overnight' recommendation or policy was not supported or warranted by current research or clinical wisdom. Parents' psychological resources, the nature of each parent-child relationship, and intense parental conflict were more important in determining children's outcomes than the parenting plan itself in several studies (see Warshak (2014) for an in-depth analysis of 16 shared parenting studies). The second article (McIntosh et al., 2014) formulated practice applications building on the consensus foundation of the first article. A core set of assumptions and considerations was provided as guidance in developing and implementing overnight parenting plans, including when overnights are seen to be appropriate, and what factors to consider in determining lower or higher frequency of overnights in the first three years, as well as when overnights are not appropriate, at least initially.

### **Paternal involvement and adjustment of older children and adolescence following separation and divorce.**

Extensive research confirms that more father involvement and close father-child relationships following separation (regardless of family structure and living circumstances) are associated with better adjustment and increased resilience in children and adolescents. Benefits were widespread across the age spectrum, including: behavioral (e.g., lower incidents of aggression, delinquency, substance abuse); cognitive (e.g., better verbal and math literacy); emotional/social (e.g., greater problem solving competence, stress tolerance, empathy, and better peer relationships); and academic (e.g., higher grade completion and high school graduation rates, higher achievement scores (see Kelly, 2007, 2012; Lamb, 2010, 2012a; Pruett, et al., 2012; Sandler, et al., 2012 for reviews). As with infant-father involvement studies, these positive effects were independent of the contributions of mothers' involvement. There is no evidence that higher levels of father involvement diminish the closeness or importance of child and adolescent relationships with their mothers in separated families (Buchanan, Maccoby & Dornbusch, 1996; King, 2002; Lee, 2002).

When school age children had actively involved fathers and close relationships with their separated fathers, frequent contact was associated with more positive adjustment and better academic achievement, compared to those with less involved fathers (Amato & Fowler, 2002; Amato & Gilbreth, 1999). Active involvement was defined as help with homework and projects, emotional support and warmth, age-

appropriate expectations for their children, authoritative parenting (setting limits appropriately, non-coercive discipline and control, enforcement of rules), and monitoring of their children's whereabouts and friends.

Carlson's (2006) study of 2,733 10-14 year olds in married and divorced families used seven measures of father involvement: talks over important decisions, listens to the adolescent's side of things, knows who the adolescent is with, spends enough time with the adolescent, adolescent feelings of closeness, shares ideas, and talks about things that matter. Lower father involvement on these relationships quality measures was associated with more delinquency, externalizing and internalizing problems, and negative feelings, and higher levels of involvement were associated with fewer problems on all outcomes measured (behavioral, delinquency, depression and anxiety). Of particular note was that boys and girls benefited equally, and higher levels of paternal involvement reduced the differences in adjustment between divorced and married family adolescents, that is, reduced risk. Another longitudinal study of adolescents in low-income neighborhoods demonstrated that higher levels of nonresident father involvement were associated with lower delinquency and decreases in delinquency over time (Coley & Medeiros, 2007).

Spending overnights with fathers was beneficial to adolescents' relationships to their fathers (Cashmore, Parkinson, & Taylor, 2008). Those adolescents reporting 30 or more overnights a year (2.5 per month or more) with fathers, when compared to adolescents without overnights, reported that their nonresident fathers were closer to them, more involved, more aware of their activities and friends, and had better quality relationships. The number of overnights was linked to parental trust and parent conflict, but 30 or more overnights resulted in better father-son relationships after accounting for level of parent conflict and overall frequency of visits.

A U.S. study of 10,331 culturally diverse married families with adolescents nearly 16 years of age assessed the relationships between parental availability, parental involvement, and quality of parent-child relations, as rated independently by the adolescents for each parent, to adolescent self-esteem (Bulanda & Majumdar, 2009). The parenting of both mothers and fathers was independently related to adolescent self-esteem. Parental physical availability of mothers and fathers independently and significantly contributed to higher levels of self-esteem, as did higher levels of parental involvement (both instrumental and recreational).

Parental availability and involvement appear to be indicators for adolescents of their self-worth. Adolescent self-esteem was even higher when both parents were highly involved, suggesting both independent as well as interactive benefits. Finally, mother-adolescent and father-adolescent relationship quality was significantly and positively linked to adolescent self-esteem. The relationship between parent-child relationship quality and self-esteem grew stronger when both parents had good quality relationships with their adolescents. While this was a sample of married families, it is reasonable to expect that these three variables would continue to foster positive adolescent self-esteem once living in separate households.

In a nationally representative study, higher levels of paternal involvement after separation in children's school and academic work were associated with better academic functioning and behavior, including more A grades, fewer suspensions, and a more positive attitude toward school (Nord, Brimhall, & West, 1997). Father involvement in school included attendance at parent-teacher conferences and other school functions for parents and children. Adolescents who shared a greater variety of activities with their non-resident fathers were less likely to experience school failure (Anguino, 2004), and higher levels of involvement and on-going school-related discussions (grades, homework, other issues) were significant in lowering the probability of school failure (Menning, 2006). When adolescents were struggling academically, increased school-related discussions with fathers during the intervening year of the study resulted in significant improvements in school performance.

Racial and ethnic differences in level of nonresident father involvement and type of activities have been noted (King, Harris, & Heard, 2004). Among 5377 adolescents in grades 7 – 12, White adolescents had more overnight visits, contacts, phone and letter contacts than African Americans or Hispanics, and Asians reported the most contacts overall. White fathers with high school education or less had lowest levels of involvement, Hispanic girls had low levels of contacts with fathers, and white boys had more contacts of all types compared to white Girls. White adolescents were more likely to play sports with their fathers, African Americans to attend religious services, and Hispanics to work on school projects. Attending services and working on projects were strongly associated with adolescent well-being but playing sports was not.

## **Potential Barriers to Paternal Involvement after Separation and Divorce**

Many factors determine the extent of contact between fathers and their children following separation and divorce, including demographic, marital status, institutional, psychological, maternal gate-keeping, co-parental relationship, parent conflict, and relocation. Demographic variables diminishing father involvement include being unmarried at the time of childbirth, unemployment, lower income, less education, and the age of the child (Amato, Meyers, & Emery, 2009; Amato & Dorius, 2010; Insabella, Williams, & Pruett, 2003). Fathers who never lived with the child or left the household early in the child's life were less likely to have contact and involvement (Amato et al., 2009). Marital status has a significant effect. Compared to divorced fathers, unmarried fathers were younger, poorer, less well educated, had briefer relationships with mothers, more infants and toddlers, fewer overnights, and less overall time with their children. Unmarried mothers created more obstacles to father involvement than did divorced mothers, and unmarried fathers had little influence in child decision-making, compared to divorced fathers (Insabella, et. al., 2003).

Race and ethnicity also influence children's time with their fathers. A study of 2-year-olds of 883 low-income mothers in a racially and ethnically diverse sample found that nonresident white fathers were less involved with their children than were African American and Latino fathers, a difference that was explained by the status of mother-father relationships. White non-resident fathers were less likely to maintain romantic relationships with the mothers than minority nonresident fathers, and mothers in the white father group were more likely to re-partner, both of which were negatively related to biological fathers' involvement with their own children (Cabrera, Ryan, Mitchell, Shannon, and Tamis-LeMonda, 2008). Remarriage of one or both parents, and a child born in fathers' new marriages, were also associated with less contact with fathers (King, 2009).

Institutional barriers and societal attitudes about father involvement after separation continue to lead to inadequate parenting plan arrangements between fathers and children (Fabricius, et al., 2010; Kelly, 2007). Within family law and judicial institutions, despite remarkably consistent evidence accumulated over several decades linking positive frequent father involvement and psychological, behavioural, social, and academic benefits for youngsters, every other weekend

contact (four days a month) has remained the typical parenting plan for millions of children worldwide. Aside from weakened father-child relationships over time and diminished parental influence, the limited time and lengthy separations from fathers has been particularly detrimental and painful for children with adequate, loving fathers wanting more involvement. While this may be attributable in part to lack of knowledge of research about children's risks and needs following separation, maternal preference remains a strong factor in many jurisdictions, as do 'tender years' attitudes even if no longer supported by statutes. Many courts have formal or unwritten 'guidelines' that provide a template for parenting plan arrangements to which judges, evaluators, lawyers (and parents) adhere. Many judges have their own concept of children's 'best interests' and it does not typically include highly involved fathers, who are often dismissed as 'only wanting more time in order to pay less child support'. Guidelines, whether established or privately held, fail to consider individual child, family, and parent-child relationship needs. Involved fathers seeking more than every other weekend with their children must often turn to the adversarial system with its win-lose framework that pits parents against each other, polarizes thinking, focuses on parental deficiencies, escalates conflict and often consolidates long lasting hostility (Kelly, 1994, 2007). Parents without economic resources have nowhere to turn unless robust court-related custody mediation programs and legal processes accommodating unrepresented fathers are available.

Some fathers may have their own psychological barriers and limitations which lead to infrequent, inconsistent, or no contact with their children following separation. Lack of interest in being a father, marginal involvement and remote relationships with the children prior to separation, and inability to be consistent and comply with a parenting plan schedule after separation are likely to end in deteriorated or terminated parent-child relationships. Mental illness, substance abuse, violence, personality limitations, and anger and paternal depression all interfere with father-child relationships (Hetherington & Kelly, 2002; Johnston et al., 2008; Kelly, 2007; Wallerstein & Kelly, 1980). In some of these situations, children respond by resisting and limiting contact with their fathers or ceasing contacts altogether. Ambiguities in the non-resident father role and a lack of social and cultural support for post-separation fathering have also contributed to reduced involvement, although more so in the last century (Thompson & Laible, 1999) in the United States.

Maternal gate-keeping as a factor controlling fathers' involvement in their children's lives has been identified in the past 15 years as a substantial barrier to developing and maintaining close relationships between fathers and their children, in the marriage and after separation. Longitudinal research has documented how some married mothers begin to marginalize interested fathers and restrict their care giving early in the first year of life (Cowan & Cowan, 1987), a pattern which once established continues thereafter. Maternal gate-keeping refers to a set of beliefs and behaviours that can facilitate or inhibit paternal involvement (Austin, 2012; Austin, Fieldstone, & Pruett, 2013; Allen & Hawkins, 1999; Ganong, Coleman, & McCauley, 2012; Pruett, et al., 2012; Pruett, Arthur, & Ebling, 2007; Trinder, 2008). Austin et. al. (2013) propose a model of gatekeeping along a continuum of facilitative-cooperative-disengaged-restrictive-very restrictive, and note that maternal gate-keeping can be justified or not justified. Restrictive maternal gate-keeping commonly intensifies after separation. Between one-quarter to one-third of mothers appear actively to inhibit paternal participation after separation (Fagan & Barnett, 2003). Gate-opening and gate-closing are related to the co-parental relationship, in particular, levels of conflict and hostility, mothers' beliefs about children's needs and the maternal role, and maternal perceptions of paternal competence (Trinder, 2008).

The nature of the co-parental relationship also shapes the father-child relationship after separation. High levels of conflict during cohabitation or marriage and at separation are associated with lower father involvement and more difficulties in father-child relationships. Maternal hostility at separation was linked to less paternal involvement, i.e. fewer contacts and overnights with fathers, 3 years after divorce (Maccoby & Mnookin, 1992). Child custody mediation was associated with better co-parenting relationships and higher levels of longer-term father involvement (Emery, 2012; Kelly, 2004).

Maccoby & Mnookin (1992) and Hetherington and Kelly (2002) described 3 types of post-divorce co-parental relationships. Co-operative co-parenting (25-30%) characterized parents as capable of coordination and some flexibility in their schedules, with the ability to resolve differences on their own or with some assistance. These parents were likely to sustain father-child relationships over time because of their willingness to acknowledge the importance of both parents in the child's life despite their differences. Parents in parallel co-parenting relationships (>50%) were emotionally

disengaged, and had low levels of communication and conflict, largely parenting separately in their own homes. Highly structured parenting plans and specifying situations requiring joint parental decision-making were more likely to enable fathers in these post-divorce families to remain more involved. As with co-operative parenting, if parents had adequate parenting skills, children in parallel parenting arrangements were also likely to have positive outcomes (Hetherington & Kelly, 2002). Approximately 8-20% of parents were in conflicted co-parental relationships in the years after separation, characterized by high levels of conflict, poor communication, difficulty in focusing on children's needs, and behaviors likely to put their children in the middle of their disputes, compared to parents in the other two types of co-parenting relationships. Children in such situations are at substantial risk for adjustment problems, not just because of the high conflict, but also because there are a disproportionately high number of mothers and fathers in this group with severe personality disorders, substance abuse problems, mental illness, and poor parenting (Johnston et al., 2008; Kelly, 2003, 2012).

The relocation of a parent with children away from the non-resident parent may make it difficult to maintain a good father-child relationship over time, particularly for very young children who are unable to sustain the child-parent relationship on their own (Kelly & Lamb, 2003), and for youngsters of all ages where hostility and lack of cooperation between parents continues. Austin (2008) proposed that facilitative gate-keeping is a key factor in predicting children's adjustment to relocation. If the moving parent is supportive of the child's relationship with the other parent, facilitates contacts and communications, then the risk of harm will be greatly diminished if the parent is a competent parent (Austin, 2008, 2012; Kelly & Lamb, 2003).

### **Parenting Time, Parent Conflict and Quality of Parenting**

One of the questions raised about higher levels of father involvement is whether it is beneficial when parent conflict is high. Research confirms significant associations between ongoing, destructive conflict and child adjustment problems in both marriage and divorce (Cummings & Davies, 2010; Goodman, et al., 2005; Grych, 2005; Hetherington & Kelly, 2002; Kelly 2000). However, not all children are similarly affected. The impact of child adjustment is related to the intensity and focus of the conflict, whether the children are exposed to the conflict (or violence), and whether parents use

their children to express their hostility to the other parent by using children as messengers, asking inappropriate questions about the other parent, or demeaning the other parent. It is important to note, however, that children whose parents encapsulated their conflict (Hetherington & Kelly, 2002) and did not put children in the middle of their disputes (Buchanan, Maccoby, & Dornbusch, 1991) were as well adjusted as children of low conflict parents. The presence of protective buffers, such as encapsulation, competent parenting of one or both parents, and parental warmth, were found to diminish the impact of high parental conflict after separation and divorce (Hetherington & Kelly, 2002; Kelly, 2012; Sandler et al, 2012).

Some authors (e.g., Emery, 2004) have recommended that when the co-parental relationship is highly conflicted that children's time with one of the parents should be restricted as a way of reducing the impact of conflict on the children. Since mothers are most often the 'primary' parent and the fathers the non-resident parents, such a recommendation is likely to disproportionately reduce father-child time. It also ignores the reality that mothers are just as often impaired in their functioning and are as hostile as fathers, but nevertheless are designated the primary residential parent. Relying on more current research, others have argued (Fabricius et al., 2012; Lamb, 2012b; Lamb & Kelly, 2009; Sandler, et al, 2012) that this broad policy recommendation will deny children adequate time with supportive, competent fathers. The Emery proposal does not differentiate the type of conflict (Birnbaum & Bala, 2010; Grych, 2005; Kelly, 2003, 2012), consider whether the child is exposed to the conflict, identify the parent primarily fueling the conflict (Kelly, 2003, 2007), and consider the parenting skills and mental health of each parent. Moreover, such a recommendation ignores the fact that the majority of parents with high conflict after separation substantially diminish their conflict in the first and second year after final court orders.

More exposure to conflict earlier in their lives following separation was associated with distress about divorce among college students, but was similar for those reporting both high and low levels of time with father. However, more time spent with fathers following an earlier separation was beneficial in high as well as low conflict families. More parenting time was related to better father-child relationships, even when parent conflict was reported to be severe (Fabricius, et al., 2010; Fabricius et al., 2012). Such findings were not applicable to families in which a parent was abusive or violent. In

addition, parental warmth from either parent in the presence of high conflict was a protective factor in children's adjustment, including when the other parent warmth was low. Two warm parents were more beneficial than one (Sandler, Miles, Cookston, & Braver, 2008; Sandler et al., 2012). When fathers had high levels of time with children, a higher quality father-child relationship predicted better child adjustment despite the parent conflict (Sandler et al., 2012).

### **Managing Parent Conflict**

Between 8-15% of parents (one or both) remain angry and in high conflict on a more chronic basis (Hetherington & Kelly, 2002; King & Heard, 1999) following divorce. Rather than restricting appropriate father-child relationships, other interventions and remedies designed to reduce high conflict should be universally available and provided soon after separation. These include meaningful parent education programs, mandatory custody mediation for parents unable to reach agreements on their own, early judicial settlement programs, and parenting coordination. The most effective research-based education programs for separating parents provide up to date information about children's views and needs after separation, the various impacts of conflict on adjustment, the importance of parents containing conflict, elements and benefits of effective parenting, and how to manage the co-parenting relationships in higher conflict situations. Empirically tested interactive online programs have become an effective way to provide this type of content (e.g. *Children in Between*; *Parenting Wisely*; *Two Families Now*). When provided early in the separation process, some programs have demonstrated that parents became more child-focused in their decisions and reduced conflict to which the child was exposed (Braver, Griffin, & Cookston, 2005; Sigal, Sandler, Wolchik, & Braver, 2011). Many parents in conflict have been reported to settle their custody and parenting disputes during or after a well-designed parent education program.

Voluntary and mandatory custody mediation services enable parents to talk directly with each other about their roles as parents and visions for their children's futures in a contained and more facilitative setting. Excluding parents with a history of violence, several studies reported settlement rates between 55-80%, improved co-parenting relationships, more detailed parenting plans, and parenting plan arrangements with more expansive time for father involvement, compared to traditional adversarial processes (Kelly, 2004). When various layered services are offered apart from the adversarial system in an

integrated fashion, required early and prior to entering litigation, and sufficiently funded, there are substantial benefits to families and savings to family court systems (see Parkinson, 2013, for special issue on Family Relationship Centres in Australia and commentary) (Kelly, 2013). When such alternative interventions are not successful, early judicial settlement conferences and judicial case management enable the majority of parents to settle their parenting time disputes before entering into protracted litigation.

Structural remedies are necessary to implement in high conflict families to reduce ambiguity, and to establish clear responsibilities and boundaries of each parent. Many jurisdictions now require parenting plans with details of parenting time and parenting responsibilities specified for each parent to be included in final court orders or settlement agreements. Parenting plans that are clear and detailed as to school year, vacation, and holiday schedules, parent caretaking and financial responsibilities for medical, child care and children's extracurricular activities all contribute to reducing conflict. They also provide a structure for enforcement actions which facilitate father involvement. Language that specifies those decisions requiring joint decision-making (e.g. medical, education) is important to keep both parents involved and reduce conflict. Consent agreements or court orders to utilize mediation or parenting co-ordination (mediation/arbitration) services when new child-related disputes arise are effective for those with continuing high conflict and keep the children out of the middle of ongoing disputes (Kelly, 2004, 2014).

Parenting plan arrangements with highly conflicted parents should be designed to eliminate face-to-face transitions of parents with children to ensure that children will not witness or be engaged in hostility expressed by one or both parents. Drop-offs and pick-ups at neutral locations such as day care or school reduce or eliminate conflict to which children are exposed. Extending weekends to Monday morning with fathers dropping their children off at school or day care eliminates the opportunity for hostile behaviours and open conflict in front of children at Sunday evening exchanges (and provides fathers with more opportunities to oversee homework and engage in school-related activities). Additionally, newer online resources are valuable for parent communication, schedule changes, and management of child disputes such as *All About the Children*, *Google Calender*, *Our Family Wizard*, and *Talking Parents* provide excellent and efficient structures for arms-length child-related and financial transactions.

## Are Higher Levels of Paternal Involvement 'Shared Parenting'?

There is no universally accepted definition of 'shared parenting'. Various labels have been used to describe significant parenting time with each parent, i.e. joint physical custody, shared custody, shared parenting, shared residence, or shared responsibility; some definitions include shared decision-making while others do not. Research in the United States has most often defined joint or shared physical custody/parenting as 35% -50% with one parent and the remaining time with the other. Some countries have adopted 30% - 70% as the range (Carlsund, Eriksson, Lofstedt, & Sellstrom, 2012). A few U. S. states and some countries have defined shared parenting rigidly as 50/50 equal time. Anything less does not qualify, a mystifying decision, since 40-60% is generally perceived by children as very substantial time sharing.

Father involvement research has not usually defined what 'more' or 'less' paternal involvement meant in actual quantity of time spent with children. An every other weekend parenting arrangement (14% of time with father) is clearly a minimal level of involvement from both a research and child perspective, and is associated with a weakening of father-child relationships and diminished closeness over time, and linked to more behaviour, academic, and social problems of children and adolescents. Of course, many children have even less contact, or sporadic contacts. Adding a midweek contact of 1-3 hours is only a minimal improvement but does allow children to see their fathers once a week instead of enduring a 12 day separation.

Accumulated research would suggest that doubling the typical amount of time with fathers would be appropriate if the father-child relationship is good. Not only would such a policy change increase the probability of more positive adjustment, but it would reduce the documented sense of longing, feeling deprived and not loved reported by children over the decades. An increasingly common pattern in the United States doubles parent-child time: every other weekend plus a weekly overnight during the school week with the non-resident parent (28% time with father). While this is a bit short of the shared residence range, it is a meaningful change for fathers and children enabling them to sustain closer relationships. Within the range of shared parenting is a plan in which children spend every other weekend until Monday morning, as well as an additional overnight during each week, a 36% timeshare. Generally, all pick-ups and drop-offs are at school or daycare. When fathers with conflicting night and early morning

work schedules or longer distances are not able to have midweek overnights, increasing the number of weekends and holiday time together would be appropriate. As parenting plans approach 50% timeshare, care must be taken to develop plans that do not stress young children. The 50/50 parenting plan of alternating weeks may work very well for children 8 years and older, but for younger children the 7 day separation from each parent is quite lengthy and may be stressful.

To be more involved as a parent with the developmental challenges and life activities that children must navigate requires opportunities and sufficient time to interact around core activities, including school. Father-child contacts and overnights during the school week connect fathers directly to their children's school responsibilities, and enable fathers to oversee and participate in their children's school demands and achievements. As indicated earlier, having fathers as well as mothers involved in homework and school projects is associated with better achievement, more regular attendance, less likelihood of school dropout, and a higher likelihood of high school graduation.

Using the 35-50% parenting time definition, the number of families sharing physical (dual) residence has until recently been a small percentage of separated and divorced families, ranging from 5 – 20% in the United States, depending on the jurisdiction and family characteristics (Amato, et al, 2009; Kelly, 2007). Shared physical residence among more recently separated families has become more common in three U. S. states, from 30-50% of families (e.g. Melli & Brown, 2008), but this is still the exception. This article has focused on the empirical research on paternal involvement in children's outcomes, rather than shared physical residence research. However, the psychological, social, and academic benefits associated with higher levels of paternal involvement described are strikingly similar to those reported in more recent and international studies of shared physical custody. Further, the majority of children in shared residence are more satisfied with their arrangements, compared to children or adolescents in traditional mother-custody arrangements (see Bauserman, 2002; Nielsen, 2013 a, b, for reviews). Rather than dissatisfaction and themes of depletion reported by youngsters with minimal time with their fathers, youngsters in shared residences report a sense of nurturance, of relationship stability, and by and large thrive quite well in these arrangements. They report that the inconvenience of shifting residences is well worth it for the satisfaction of feeling loved and the experience



of emotional investment in their lives of both parents. Unlike an earlier report (Buchanan, et al., 1991) that shared physical custody arrangements tended to ‘drift’ from dual residence to primarily maternal care over time, recent findings three years after divorce (598 shared parenting and 595 mother custody families) found that shared physical living arrangements were as stable as sole mother custody arrangements (Berger, Brown, Joung, et al., et al, 2008).

### **Policy Implications**

The empirical research in the past 20 - 25 years on paternal involvement and shared residence clearly indicates that limited contact schedules between adequate fathers and their children is not in children’s best interests. A critical re-thinking of the adherence to traditional every other weekend parenting time arrangements is warranted. More expansive parenting time patterns between adequate fathers and their children should be the norm not the exception. Many would argue that this body of research calls for an equal 50/50 parenting time presumption, rebuttable for abuse, neglect, abandonment, and violence based on a preponderance of the evidence. Another option supported by the research is a presumption for a ‘floor’ or baseline time of 30% time for adequate non-resident parents and their children, who are indeed the majority of separating families, rebuttable for the same factors as above. An additional rebuttable factor for both arrangements is necessary, that of ‘no prior relationship with the child’.<sup>2</sup> A presumptive baseline of 30% timeshare where a prior relationship between non-resident parent and child exists would ensure that caring and appropriate parents remain sufficiently available to their children to sustain continuity and meaning in parent-child relationships.<sup>3</sup> Such a presumption would substantially diminish litigation and ill will between two adequate or better parents, and assure non-resident parents without the means to hire lawyers that they and their children have the possibility of a meaningful future. Another option would be a preference for shared residence when both parents have been highly involved and provide important psychological resources to their children, paired with a presumption for the 30%

baseline time described above.

Shared legal decision-making should be a presumption in both instances. Neither the fact of separation nor co-parental conflict should be a basis for the removal of this parental right, except where there is a history of child abuse, concurrent violence and emotional abuse, substance abuse, or criminal activity. The standard used in child protection matters is the appropriate standard to apply. Similarly, it is important to stress that separating parents should not be held to a higher standard of parenting than married families. Average ‘good enough’ and loving parenting is society’s norm, and it works. Further, parents should not be required to have a ‘co-operative’ relationship in order to ‘qualify’ for substantial contact with their children. This again is a higher standard than is applied to the larger population of cohabiting and married parents. As research has demonstrated, ‘parallel’ parenting with minimal communication and generally low conflict is the norm in the years after separation and also is beneficial for children when the quality of parenting is adequate or better (Hetherington & Kelly, 2002).

### **Conclusions**

The empirical research literature demonstrates convincingly that positive paternal involvement is beneficial for children and adolescents following separation and divorce. A majority of the studies in the United States, Australia, New Zealand, England, and Europe find that across family structures, cultures, and living circumstances, higher levels of positive father involvement are associated with cognitive, educational, social, and emotional benefits for children and adolescents, when compared to the very limited involvement typical of parenting plan arrangements of the past five decades. More recent studies indicate that the combination of time spent together and appropriate parenting styles and activities sustain meaningful father-child relationships and provide important psychological and economic resources for children in the short and longer term.

For decades, the majority of children have complained about the dramatic reduction in time with their fathers after separation, and research demonstrates

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<sup>2</sup> Young children who had no prior relationship with a biological father, or had no contact after separation for many months or years, must build a relationship with an interested adequate father. A parenting plan which starts carefully with short visits but steadily increases in amount of time as a father-child relationship develops is necessary.

<sup>3</sup> When separating parents have infants and toddlers, parenting plans that respect the young child’s limited sense of time and the need to see each parent on a regular basis to ‘refresh’ the internalizing memories of the parents are advisable. Lengthy separations from either parent to whom the child is attached are likely to create anxiety. As these young children develop, the parenting plan should change to reflect their growing capacity to tolerate separations from both parents of more than a few days (Kelly & Lamb, 2000; Lamb & Kelly, 2009; Pruett, McIntosh, & Kelly, 2014; McIntosh, Pruett, & Kelly, 2014).

the deterioration of father-child relationships over time and higher rates of father dropout when fathers have limited time with their children. It is time to take these data and children's views seriously. Instead of 'Like an Uncle But More, But Less Than a Father' (Nixon, Greene, & Hogan, 2012), the goal of practitioners and policy-makers should be to minimize known risk factors and promote factors demonstrated to be protective for children and adolescents after separation (Kelly, 2012). Resource depletion following separation is the normative experience for children but does not need to be so. Children with average, loving, adequate or better parents deserve and need continuity and stability in their relationships with their fathers as well as their mothers to the fullest extent possible. When parents possess or develop adequate or better parenting skills and are psychologically invested in their ongoing relationships with their children and their children's well-being, social and family law policy should not stand in the way of children's best interests.

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# Ambiguous Reunification: A Case Illustration and a Framework for Understanding the Aftermath of Abduction

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*Parent-child adjustment can be difficult after a lengthy family or non-family abduction. Ambiguous reunification is suggested as a way to conceptualize the process that family members go through as they become reacquainted with each other. Based on Pauline Boss's work on ambiguous loss, ambiguous reunification provides a framework for understanding how family members react to each other following a child's abduction and return. A case study, written by someone who was abducted as a child by her father and did not see her mother for 14 years, is presented by her and the first author to illustrate ambiguous reunification.*

## Introduction

When a child returns home after a lengthy abduction, it is highly likely that both the child and the left-behind family member(s) will have changed significantly. Not only will there be physical changes, but psychologically and developmentally both the child and family members may have matured in wholly new ways as a result of their separation and their experiences during the separation. At a time of celebration and often of intense media scrutiny, the various changes that have occurred can lead to a reunification process rife with uncertainty and ambiguity. This article offers ambiguous reunification as one framework to help families and mental health practitioners conceptualize what the reunited family members go through in this adjustment process. Ambiguous reunification is adapted from Pauline Boss's work on ambiguous loss and can be applied to both family and non-family abductions, though the focus in this article is primarily on family abduction. A case study, written by the second author, now in her 40s, describes the ambiguous nature of her own reunification with her mother after a 14-year abduction by her father.

## Child Abduction and the Family

It is estimated that over 200,000 children in the U.S. are abducted each year by a family member.<sup>1</sup> The vast majority of children reported missing are located or returned home.<sup>2</sup> Child abductions by family members usually last only a few days, though one in five is estimated to last for at least one month<sup>3</sup> and some may continue for years.<sup>4</sup> Behrman-Lippert and Hatcher observe that reunifications are not always happy events as the child may have become attached to the abductor and not want to be recovered or returned to the left-behind parent. In 2013, three women were recovered in Cleveland after being held by their captor for over ten years in one instance. One of the women, upon recovery, did not immediately contact her mother from whom she had been estranged prior to the abduction. These complicated cases are often infused with joy that may mask family conflict. Providing a framework for understanding how reunifications may unfold can help families and mental health practitioners to normalize the experiences of abductees and their families.

In thinking about how a child and parent will adapt after a family abduction has ended, it is important to remember the background to the time of reunification. Abductions are often contemporaneous with family disruption, such as separation and divorce.<sup>5</sup> Separation and divorce place children at risk for emotional problems,<sup>6</sup> both because of the commotion in their own lives and because their parents may be emotionally unavailable to nurture them due to stress they are experiencing from the breakup. An abduction, layered on top of a separation or divorce, increases the risk for emotional stress on the child and the parents.

The particulars of how and by whom a child is abducted are also important factors to keep in mind during the reunification process. A child old enough to be aware of being taken can be coerced or convinced to leave with a family member. A child may be taken gently by a family member or kept after

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<sup>1</sup> Hammer, Finkelhor, & Sedlak, 2002.

<sup>2</sup> U.S. Department of Justice, 2009.

<sup>3</sup> U.S. Department of Justice, 2002.

<sup>4</sup> Behrman-Lippert & Hatcher, 2009.

<sup>5</sup> Greif, 2012.

<sup>6</sup> Potter, 2010.



visitation. Alternatively, a child may be snatched in a dramatic manner from a school or other setting.<sup>7</sup> In addition to the manner in which the abduction occurs, the child may be taken by a parent (or grandparent) whom the child fears or with whom the child has a strained relationship, causing further emotional upheaval.

Experiences while in hiding can further upset an abducted child. A child can be abused or neglected,<sup>8</sup> left to fend for himself or herself at too young an age while a parent goes to work. The child may be kept out of school or moved from location to location to avoid detection. The child may be told a series of lies about the left-behind parent, including that the child is no longer wanted by that parent<sup>9</sup>. Sagatun and Barrett<sup>10</sup> (1990) interviewed clinicians who worked with families in which an abduction had occurred. The clinicians described children who had been severely traumatized and terrorized and had great trouble recovering. Returning home after such experiences would potentially make reunification difficult, especially if those experiences continued for a number of months or years.

Greif and Hegar's<sup>11</sup> (1993) survey of 371 parents whose children had been taken by a family member found that 93% believed the experience had been somewhat or very upsetting to the child. Behrman-Lippert and Hatcher<sup>12</sup> (2009) describe children who felt abandoned by the left-behind parent and, conversely, felt guilty for not trying to contact the left-behind parent. If taken out of the country, problems for children can increase as they struggle with adapting to a different culture and language upon return to their home country<sup>13</sup>. The case presented later in this article offers an example of these reactions.

A few studies have focused on long-term outcomes by following children over time. One study included interviews with 32 parents an average of 10.5 years after their child's return. Almost 40% of the parents stated their child, many of whom were young

adults, was experiencing a substance abuse, psychiatric, or legal problem. Seventy-five percent reported their child had attended therapy<sup>14</sup>. Another study<sup>15</sup> in which nine adults who had been abducted as children were interviewed, focused specifically on reunification experiences. All nine either struggled when trying to re-establish a relationship with the left-behind parent or had a sibling who had also been abducted who they believed struggled with that relationship.

Left-behind parents also may suffer from anxiety, sleeplessness, and depression while separated from their child. They struggle with how much of their life to dedicate to the search and how to balance the search with the on-going demands of other children, a job, and, at times, a new partner<sup>16</sup>. Such experiences and changes in their life may affect their response and adjustment to having their child back in their life.

Abducted children may have mixed feelings about returning to a left-behind parent, even if the time spent with the abducting parent was traumatic<sup>17</sup>. The attachment to the abductor may be strong, especially if the child was close to the abducting parent prior to the abduction.

Characterizations of the recovery and reunification process have been put forth by others. Behrman-Lippert and Hatcher<sup>18</sup> suggest that mental health practitioners examine the events that occurred during the abduction, the way the child tries to understand and cope with the abduction, and the family members' expectations about recovery. The abductor's continuing relationship with the child also needs to be considered<sup>19</sup>. Greif and Hegar describe a three stage process that families go through from a "honeymoon period" to a period of reassessment to a readjustment period, if all goes well<sup>20</sup>.

Sometimes events post-recovery can shift the reunification dynamic. Greif and Barnstone<sup>21</sup> (1999) present a case study where, after a rocky reunification, the life-threatening illness of the left-behind parent sparked an attempt to resolve a rift between the child and the parent.

<sup>7</sup> e.g., Greif, 2010.

<sup>8</sup> Finkelhor, Hotaling, & Sedlak, 1990.

<sup>9</sup> Greif, 2010.

<sup>10</sup> Satagun and Barrett 1990.

<sup>11</sup> Greif and Hegar 1993.

<sup>12</sup> Behrman-Lippert and Hatcher, 2009.

<sup>13</sup> Chiancone, Gridner & Hoff, 2001.

<sup>14</sup> Greif, 2000.

<sup>15</sup> Greif, 2010.

<sup>16</sup> Greif & Hegar, 1993.

<sup>17</sup> Behrman-Lippert & Hatcher, 2009.

<sup>18</sup> Ibid.

<sup>19</sup> Greif & Hegar, 1993.

<sup>20</sup> Ibid, p177.

<sup>21</sup> Greif & Barnstone, 1999.

## Ambiguous Reunification

Ambiguous reunification is based on Pauline Boss's work on ambiguous loss.<sup>22</sup> Boss defines ambiguous loss as "...a loss that remains unclear. The premise of the ambiguous loss theory is that uncertainty or a lack of information about the whereabouts or status of a loved one as absent or present, as dead or alive, is traumatizing for most individuals, couples, and families...Closure is impossible".<sup>23</sup> Boss uses kidnapping when a child is still missing as one example of ambiguous loss. The child is physically missing but kept psychologically present through the search process and the hope of recovery.

Given the uncertainties that accompany recovery and reunification, conceptualizing family reunification as ambiguous can be a useful framework for work with these families. As noted above, much may have changed when the child returns home. The left-behind parent may have established a new life in a new home with a new partner, and the returning child may be unsure how to fit in to the new family situation. Additionally, the child may be developmentally older but emotionally regressed and display symptoms consistent with being traumatized. The parent, though, may want and expect the child to be the same as she was three months or three years ago, when they last saw each other. Note how this is illustrated in Sarah's example detailed later in this paper. How difficult these changes are and how many uncertainties they create may be related to the length of time apart and the age of the child at separation.

Boss gives as examples of ambiguous loss people missing due to war, natural disasters, and terrorist attacks<sup>24</sup> (Boss, 2006). Ambiguous loss can also occur with drug addiction and Alzheimer's disease. Whereas with abduction the child is physically absent but psychologically present (Boss, 2010), with addiction and Alzheimer's disease the family member is physically present but psychologically absent.

The key issue in coping with ambiguous loss is developing an understanding that mastery of one's life is not achievable.<sup>25</sup> In the case of abductions, the left-behind family member has to grasp two contradictory

concepts – that a person can be simultaneously present and absent.<sup>26</sup> The missing child is here psychologically but not physically. Boss argues for normalizing ambivalence and for revising attachment to the missing person. She also recommends, when working with families, constructing narratives of hope and forgiveness,<sup>27</sup> as well as teaching clients about the concept of ambiguous loss.<sup>28</sup>

Building on Boss's ideas about counseling people with a range of ambiguous loss experiences, we see similarities not only for helping families cope during an abduction but also for coping with the ambiguous nature of the reunification process. In these dynamic situations, both or either the child and the parent may be present physically but absent psychologically. Expectations for a loving reunion, sometimes heightened by media attention, fall short of reality. Greif<sup>29</sup> describes a case in which a child was in hiding for seven years. Upon return at the age of 13, the child experienced her mother and other siblings as uninterested in talking about the abduction. The mother was psychologically absent for the daughter. For a parent who is confronted with a 13-year-old but was, on some level, expecting a six-year-old, coping with such a loss may take time and be ambiguous. Children can also be psychologically absent if they return to a parent they have feared or who they believe abandoned them, did not search for them sufficiently, or does not accept who they are. They can absent themselves from the relationship until they are ready to trust in it again. Most likely the ambiguity can be dyadic (existing only between two people) or systemic (encompassing other members of the family).

### Case Study – Sarah's Voice

*Sarah was taken from Norway to the United States by her American-born father when she was four.<sup>30</sup> She did not see her Norwegian mother until she was almost 18-years-old. Her father kept her hidden in a religious community. What follows is Sarah's account.*

Reunification is the process of rebuilding a broken relationship between a parent and a child. And this can be very painful for both. After 14 years apart, my

<sup>22</sup> Greif 2012.

<sup>23</sup> Boss, 2007, p105.

<sup>24</sup> Boss, 2006.

<sup>25</sup> Boss, 2010.

<sup>26</sup> Greif, 2012.

<sup>27</sup> Boss, 2006.2010.

<sup>28</sup> Boss, 2004.

<sup>29</sup> Greif,2012.

<sup>30</sup> Norway signed the Hague Convention in 1989 and continues to work closely with the U.S. Department of State (2011) through its U.S. Central Authority. The U.S signed the Convention in 1981.

mother and I were in no way prepared for the numerous issues that would arise, and the pressure and torment we would both feel in the early stages of rebuilding a relationship and even later on. We had no roadmap or organized support to assist us back in 1988, which is when we met for the first time after 14 years apart, living on different continents. It could have been hugely helpful if we had guidance or advice from others who had been through something similar and from experts. At least we would have had some idea of what to expect. But there was nothing out there for people in our situation, and so we had to deal with things by ourselves. It was a lonely road for both of us.

The outside world had the romantic expectation that once I was 'found' by my mother we would live happily ever after. But this was a deeply unrealistic expectation. Issues that had lain dormant for many years needed to be brought out into the open and worked on. I had wondered for years what my mother looked like, whether she missed me, what my life would have been like if I had grown up with her, and much more. I wanted to know who I resembled, why my father often wanted me to sing songs to him (he once told me that my mother 'sang like an angel'), and why my father's sister, in whispered tones so my father wouldn't hear, urged me to contact my beautiful mother. I also wanted to know why I had thin hair, why my nose was different from most people I knew (I later found out it's a perfectly typical Scandinavian nose), and what being 'half Norwegian' really meant. I wanted to know if she missed me, and to understand myself better by finding out for myself whether I was like her in any way. I wanted to feel whole again. I wanted to make peace with all of me. And yet, it was frightening to open the door to the unknown; to something so intimate and yet so foreign that it was almost impossible to reconcile the two. Reconnecting was something I had lived in dire fear of for so long. I was a wary child, always wondering whether the woman in the checkout line at the grocery store was her. I worried that I would lose myself, all that had become precious and familiar, if I let her into my life.

Letting my mother into my life meant confronting the fact that my father had done something terribly wrong, and that 14 years of running and hiding had been in vain. My father had led me to believe that my mother was a bad person, and that he had no choice but to abduct me to save me from her. When I began to realize that this was not the truth, I felt a terrible sense of pain and betrayal. Through no fault of her own my mother represented, almost embodied, the confusion and torment I felt about my relationship

with my father. This alone made it hard for me to connect with her. Letting her in would mean that I was accepting that what my father did was wrong, and that was very painful. But the hardest aspects by far were the expectations, the pressure to connect with her, and dealing with my mother's huge sense of loss and desperation. I had a hard time dealing with it when she cried on my shoulders after seeing a little jacket of mine from the time I was abducted, and when my 'new' culture and beliefs stirred a sense of estrangement and critical questions from her. I did not want to leave my entire life behind for something new. I felt guilty, overwhelmed and objectified. I was supposed to make it all better, but I couldn't. The cost would be that I lost everything all over again.

It took a long time for me to contact my mother after being abducted, almost fourteen years. I was four when I was abducted and nearly 18 when I called her for the first time. I was terrified when I picked up the phone and said, 'Hello, this is your daughter calling', to the person who answered the phone. I had absolutely no idea what to expect. A long, stunned, yet relieved silence, was followed by my mother's first words to me. 'Are, are you okay?' It was good to know that she cared. We talked for a little while, both of us tentative and unsure, and arranged to meet a few months later.

That first meeting was really hard. My mother was devastated at the loss of a child and the years of searching. I was devastated by the betrayal of my father and life on the run. Both of us were depressed and had unrealistic expectations of one another. I wanted my mother to be cheerful all the time, untroubled by the past and accepting of the emotional walls that I put up. My mother wanted to shower me with love and be a part of my life. She wanted to give all the pent-up love she had inside. But I wasn't even sure I wanted a mother. After our first meeting I wrote my mother a letter asking her for some space, saying that I needed the relationship to go more slowly. It was very hard to accept my mother's love and interest. In my eyes she was living a fantasy, hoping to reclaim the sweet little four-year-old who had been abducted. I was a very different person from that little girl. I felt she loved someone else, not the person I had become. It was deeply disturbing on an existential level. I felt bad about who I was, guilty, confused, torn apart. I wasn't sure who I was anymore, and what I was supposed to believe about my very own self-defined self. It had all been turned upside down.

I had the uncomfortable feeling that I was 'supposed' to be someone else. If I hadn't been abducted my name, religion and language would have

been completely different from what they were. Meeting my mom forced me to confront the fact that if I hadn't been abducted I would be a very different person. I worried that my mom wasn't happy with whom I had become, or that she wished that I were someone else. I know that my mom thought that I felt the same way about her, that I wished she was a different person, more like me. It was painful for both of us.

I was raised in the United States by my father, and my mom is Norwegian. Although my mom speaks English really well, we had trouble at times understanding each other's contexts, frames of reference, and nuances. I remember telling my mom that she is 'special' on one occasion. I simply meant it as an affectionate compliment. However, my mother responded angrily and bitterly by saying, 'Yes, I am very special', while looking away, clearly rattled. I was shocked. Her response was impossible for me to fathom and I felt crushed and angry that my attempt to connect was rebuffed. It turns out that in Norwegian, the word for special, 'Spesiell', has a shading of negativity attached to it. It would be used to patronizingly describe an eccentric neighbor who never talks to anyone and wears outdated clothes, or such. It took me a few years, and a Norwegian course, to understand that one! Until we felt more comfortable questioning one another and asking for clarification (something we are still not very good at, unfortunately for us), we often got into hot water. I felt threatened by my mother's questioning of my religious beliefs and practices, and was sure that my mother hated Jews because my father is a Jew. My mother was sure that I held it against her that she was non-Jewish. It turns out that neither of our assumptions was true. We valued one another regardless of our belief systems, and there is ample room to learn and grow together in our differences. But we were both on the defensive for a long time.

With the years against us, it was going to take a long time for my mom and me to build a relationship. To put it mildly, there were many issues to deal with. But in spite of it all, my mom and I are doing fairly well today, 25 years later. It wasn't easy, but it has been well worth it. At one point we almost gave up. One day, after the wall between us had gotten so thick that neither of us could bear it, my mom turned to me and, with tears in her eyes, asked me if it would be easier not to have her in my life at all. I was shocked, but realized that she had reason to ask this. Things had been getting worse and worse between us. I also felt

hopeless about our relationship, but after doing some soul searching, I knew that I couldn't live life without her. There was emptiness in my life that could only be filled by her. I needed my mom.

There were times in the early days of our reunion that I resented my mom's push for closeness. It would have been easier had my mother been prepared for the feelings of rejection that she felt from me at first, and to have been able to let go a little, and if I had felt less guilty for needing as much time and space as I needed.

Things changed once we began to go to therapy, both together and individually (something I highly recommend). We were both so focused on the past, and so hurt by it, that it was hurting our relationship. It was all we had to connect us at first, but was too painful a connection. We needed to connect in other ways. Once we started healing, we were able to move forward and start building on the present.

My mom and I are close today, although we still struggle at times. She is a wonderful person. I only wish she didn't live in the pain and self-doubt as much as she does. It's painful to feel like the source of so much hurt. I understand that I didn't cause the pain, but on an emotional level it's hard not to take it personally. Please, parents, take care of yourselves physically and emotionally and don't be afraid to ask for lots of help and support!

Why did it take so long for me to call home? I was traumatized and needed time to sort things out. I worried about feeling manipulated into giving up too much of myself and my identity. It was a coping or survival reaction. Contacting the left-behind parent required challenging everything I had believed, which can be very painful. My mother was a wonderful mom to me for the first four years of my life, yet it took me 14 years to call. I had been insidiously yet powerfully brainwashed against my mom. First, I was told she didn't care about me; that's why she wasn't coming to see me. I must have felt abandoned and angry at her. Then I was converted to another religion and alienated towards hers. To cement the negativity towards her, the simple passage of time, especially in the life of a little child, caused memories of her to fade away. She became little more than a stranger, one whom I grew to fear as the person who would take me away from everything that had become familiar.

I couldn't have called earlier. I wasn't ready. It had taken me until then to begin to question the abduction and my father's motives, and to summon up the courage to deal with what might end up being a big event.

## Applying Ambiguous Reunification and Finding New Narratives

Using Boss's work treating ambiguous loss as a guide for how to treat ambiguous reunification, five steps need to be considered that can be helpful to therapists and families. As Sarah writes above,

It could have been hugely helpful if we had guidance or advice from others who had been through something similar and from experts. At least we would have had some idea of what to expect.

Boss's<sup>31</sup> (2010) work includes:

1. Allowing for time to grieve;
2. Accepting that mastery of the situation is not possible;
3. Learning to live with ambiguity;
4. Teaching that new attachments can be forged; and
5. Instilling hope about the future.

Given the length of time Sarah and her mother were separated, a period much longer than most family abductions, more potential roadblocks to reunification were built. At close to 18-years-old, Sarah was on the cusp of adulthood with, as she notes, an identity that she was not willing to give up in order to meet her mother's need to have her be a young girl again. Yet, Sarah felt enormous pressure to connect with her mother, to make up for lost time and to be the child/person her mother wanted her to be. Helping a left-behind parent and reintegrating child to grieve means explaining that some things are lost and cannot be resurrected as they once were. This can be a painful yet potentially helpful conversation to have with the family as it brings the past and present together and builds the possibility of a healthy future. Ambiguous loss often refers to physical absence and psychological presence, and Boss recommends grieving the loss as the first step in coping. With family reunification, allowing time for grieving the lost time upon the return of the child needs to be explored. The physical loss is over, but a new loss, one not always acknowledged as a loss to be mourned, emerges. Sarah and her mother struggled to master the situation and to take charge of their relationship. Simply understanding that mastery of the situation in the way the family members initially envision it may be impossible can reduce the pressure that family members feel to make it their relationship perfect.<sup>32</sup>

As Sarah writes,

The outside world had the romantic expectation that once I was 'found' by my mother we would live happily ever after...

With the expectation that everything would be wonderful and the reality that it was not, any unresolved issues clouded their ability to work through things at a pace that was appropriate for them. It is the expectation that they should have a model relationship that further hindered them from accepting what they could and could not change.

Accepting that mastery is impossible is related to living with ambiguity. The more Sarah tried to connect with her mother, the more it raised ambiguity about how she had spent her previous years and what those years meant to her. As she writes,

Letting my mother into my life meant confronting the fact that my father had done something wrong.

She questioned what she had been told by her father about her mother and she began to understand why her father asked her to sing. She considered the whispers from her aunt. Building a relationship with her mother meant examining her relationship with her father, which was increasingly making little sense to her. But there were no easy answers as her mother was also pulling on her to be someone else.

Ambiguous feelings are normal between parents and adult children.<sup>33</sup> Acknowledging that they are also a typical component of reunification can help to normalize a family's journey in trying to connect. If family relations have been portrayed in black-and-white terms in the past – Dad is good; Mom is bad – it can be hard to accept that many relationships and most people are complicated.

Another part of Sarah's experience is a clear final illustration of learning to live with ambiguity. Among the recommendation that Sarah makes to ease the process of reunification as it unfolds over years is for parents to take care of themselves, in part because their own ambiguous feelings and thoughts can compound the child's feelings and thoughts. When Sarah sees her mother in pain, she links it to her own behaviour in not contacting her mother sooner, even though she also realizes she is not responsible for the events that unfolded. She wants her mother to feel better, yet she feels responsible and guilty while also being cognitively aware that she is not responsible.

<sup>31</sup> Boss, 2010.

<sup>32</sup> Greif, 2012.

<sup>33</sup> Pillemer, Munsch, Fuller-Powell, Riffin, & Suito, 2012.

These kinds of contradictory feelings and thoughts are signs of the normal feelings of ambiguity that arise with reunification, and learning to accept and live with them is key for managing ambiguous reunification.

The fourth element is forming new attachments, which for these families requires a reconfiguring of old attachments. Sarah writes that her mother pushed for closeness, seeking the relationship that they had 14 years before. The push by her mother to connect as they had once been attached was rejected by Sarah, who needed to find herself at her own pace, not her mother's pace. The attempt at closeness was a threat to Sarah's need to establish her identity as she was continuing to understand what she had experienced as an abducted child. She also was confronted with wondering who she could have been if she had not been abducted: she was supposed to be someone else. Such an understanding of one's self unfolds over time as new insights occur and more information is gained from both parents. As Sarah remembers, the push for closeness was too painful for her. Forming a new attachment was difficult given the number of years that had elapsed and what Sarah had come to believe about her mother, that she was someone to fear on a number of levels. Her statement, 'We needed to connect in other ways', is an example of how Boss's recommendation to build new attachments as part of the healing process can be applied with ambiguous reunification.

Creating hope is the fifth and final element needed in coping with ambiguous loss or ambiguous reunification. In the case of Sarah and her mother, their reunification was made more difficult by their culture clash. This clash reached across countries, language, and religion. For example, Sarah and her mother had to work through their miscommunication with the word 'special', a compliment in English and an insult in Norwegian. Not long after that miscommunication, her mother questioned whether or not Sarah would be happier if they did not have a relationship. Sarah writes,

Things had been getting worse and worse between us. I also felt hopeless about our relationship, but after doing some soul searching, I knew that I couldn't live life without her'.

Sarah's feeling of hopelessness was overcome through therapy and rebuilding their relationship with a focus on the present and the future, not the past.

Sarah learned Norwegian, and thus why her mother had reacted badly to Sarah's intended 'special' compliment. Hope looks forward, not back. Sarah had to find ways to look forward, to find hope, and to rebuild their relationship. Both Sarah and her mother appear to have come a long distance, given their obstacles. They endured a difficult period where Sarah's mother questioned whether it was worth working on the relationship. Mental health practitioners can instill the hope that, with time, and using this case as an example, relationships can be worked through to a comfortable level.

## Conclusion

As Sarah, now a parent herself, notes in other communication with the first author,

I can only imagine that it is deeply painful when parents who have had every inclination to have a warm relationship with their children, instead have to face a degree of mixed feelings which limit the closeness they hoped to have with their children.

In further analyzing her experiences, she writes about choice and fitting in.

- 'Children who grow up with both parents in their lives do not need actively to choose whether or not to have a positive relationship with their parents. It just happens, in a manner of speaking. Having been abducted and kept from my mother, I was forced into the position of having to make a conscious choice regarding whether or not to pursue a relationship with my mother. This was a heavy burden, and resulted in feelings of guilt and great uncertainty'.

- Do I measure up to the possibly self-imposed burden of "fitting the picture" I thought my mother had of me? I struggled with feeling that I was not the person she had hoped to meet'.

- 'Mixed feelings about identity, and what I call the push-pull factor: balancing my need to be cautious in reconnecting, with my mother's natural desire to connect and be intimately involved in the details of my life immediately, even upon our first meeting. I needed time, and this was painful for both of us. Mom felt rejected, I felt guilty'.

While the end of abduction may mean for many that their period of painful separation is over, it is

important to recognize that another type of separation, one that is psychological and not physical, may begin. Using an ambiguous reunification framework may hold the promise for family members of normalizing their experiences and guiding them through their time together. It can also be a framework within which mental health practitioners can prepare family members for the reunification and work with them as it unfolds. It is a dynamic process that, as is evidenced by Sarah's story, changes with time and new insights. Research into the reunification process is in its infancy and is often constrained by the highly idiosyncratic nature of the abduction experience. We provide one case study of an international abduction from Norway to the United States by a U.S. citizen as an example of how a framework of healing may apply.

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# Family Law in the European Union

## Family Law in the Case Law of the European Court of Justice

Judge Allan Rosas\*

### 1. Introduction

At first sight, the title of this article may seem surprising. Is not family law outside the reach of European Union (EU) law, and thus also outside the jurisdiction of the Court of Justice of the European Union (European Court of Justice)?<sup>1</sup> True, Article 82(3) of the Treaty on the Functioning of the European Union (TFEU), as amended by the Treaty of Lisbon, recognizes explicitly an EU competence to adopt measures concerning family law with cross-border implications. It is within this context that the EU legislator has, in the area of family law, adopted legislative acts relating to jurisdiction and the recognition and enforcement of judgments as well as rules on applicable law.

However, outside this cross-border, and to a large extent procedural, framework, there is no explicit legal basis for harmonizing family law generally. Does this mean that this area of law falls completely outside the domain of Union law, also taking into account the principle of conferral, which, according to Article 5(2) of the Treaty on European Union (TEU), implies that the Union 'shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'? The answer is No.

Let me recall, first of all, that the provisions of the TEU and the TFEU relating to competence and legal basis are not as a general rule founded on the traditional concepts of national law relating to different areas of law (administrative law, procedural law, civil law, etc.).<sup>2</sup> There is, for instance, no legal basis for 'administrative law' as such. Yet a large part of EU

legislation may be said to regulate matters of an administrative law character (competition law, public procurement, environmental law, asylum and refugee law . . .). The competences and powers of the EU are based on some very general objectives (such as an area of freedom, security and justice, the internal market, a high level of protection and improvement of the environment, combating social exclusion and discrimination and promoting economic, social and territorial cohesion, establishing a monetary union ...) and some more specific competences and legal bases specifying such general objectives rather than on traditional areas of law so defined. Thus, the fact that 'family law' as such does not appear as a separate legal base does not mean the end of the story.

That said, the existing objectives and legal bases do not seem to allow for any general competence to harmonize family law matters such as marriage, parental rights and inheritance. On the other hand, EU law in many ways regulates, or at least touches upon, matters which fall within the area of family law. True, this often relates to cross-border situations, such as free movement rights of Union citizens (for instance, the right of family members to accompany a Union citizen moving from one country to another) or of third country nationals (such as the right to family reunification). But there is also a vast area of EU legislation that applies to the Member States generally and not only in cross-border situations. Examples include agricultural law, environmental law, some parts of social law as well as non-discrimination law.

To the extent that a situation falls within the scope of Union law, EU fundamental rights and notably the

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<sup>1</sup> The Court of Justice of the European Union consists, in fact, of three judicial bodies, the Court of Justice, the General Court (formerly the Court of First Instance) and, as a specialized court, the Civil Service Tribunal. The EU judicial system, seen as a whole, of course also consists of the national courts of the 28 Member States, see Allan Rosas, 'The National Judge as EU Judge: Opinion 1/09' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System*, Oxford, Hart Publishing, 2012, 105.

<sup>2</sup> Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction*, 2nd rev edn, Oxford, Hart Publishing, 2012, 20-25.



Charter of Fundamental Rights will be applicable as well.<sup>3</sup> The Charter, of course, contains several provisions of relevance for family law. Suffice it to mention here Article 7 (respect for private and family life), Article 9 (right to marry and right to found a family), Article 14 (referring, in the context of the right to education, to the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions), Article 24 (The rights of the child), Article 32 (Prohibition of child labour and protection of young people at work) and Article 33 (family and professional life). And among provisions of more general application but which may be particularly relevant also in family law contexts may be mentioned Article 20 (equality before the law) and Article 21 (non-discrimination, including discrimination based on sex, birth, age or sexual orientation). By the way, Protocol No 30 annexed to the TEU and the TFEU on the application of the Charter to Poland and to the United Kingdom does not exclude the application of the Charter in the UK. Rather, the Protocol, to cite one of its pre-ambular paragraphs, serves to clarify certain aspects of the application of the Charter.<sup>4</sup>

There is an important limitation concerning the application of the Charter, however. According to its Article 51, its provisions are addressed to the Member States 'only when they are implementing Union law'. The applicability of the Charter thus presupposes that there is another rule of Union law than one contained in the Charter that is directly relevant in the case at hand.<sup>5</sup> In some of the cases to be discussed or mentioned below, one of the issues has, in fact, been whether Union law, including fundamental rights, is applicable or whether the case or a specific question falls outside the scope of application of Union law.

## 2. Examples of case law addressing questions of a family law nature: general

As already indicated above, issues of family law may become relevant in a number of different situations involving the application of EU law.<sup>6</sup> It is

impossible within the confines of this short article to provide a full account of the relevant case law. I shall limit myself to give a few examples of cases decided by the European Court of Justice where the family law context is particularly conspicuous.

Leaving aside here the very extensive case law of the court on equality between men and women and special protection provided for pregnant women and parents with small children in particular, I shall mention first some cases relating to gender issues more generally, including the prohibition of discrimination based on sexual orientation.

In *KB*,<sup>7</sup> the European Court held that the refusal to grant a widower's pension to a couple on the basis that they were not married came in principle within the purview of Union law. The couple in question were not married as a result of the refusal under national law to recognize that gender reassignment (change of sex) could result in the classification of a couple as heterosexual (a condition for marriage). While the right to marry as such was a question for national law, the case was held to constitute unequal treatment as regards a necessary precondition for the grant of a pension, a matter of Union law. As this inequality of treatment resulted from a breach of the right to marry under Article 12 of the European Convention on Human Rights (ECHR), the national legislation at issue was to be regarded as being, in principle, incompatible with the requirements of the then Article 141 (now Article 157 TFEU) on equal pay.<sup>8</sup> To sum up, in view of the fact that marriage was a *sine qua non* for the right to a pension, and that the right to a pension belonged to the sphere of Union law, there was jurisdiction, for the purposes of pension rights, to consider a breach of the right to marry as well.

The question of gender and marriage was also relevant in two more recent cases relating to alleged discrimination based on sexual orientation (such discrimination is prohibited by Article 21 of the Charter of Fundamental Rights and Directive 2000/78 establishing a general framework for equal treatment in employment and occupation).<sup>9</sup> In *Maruko*,<sup>10</sup> it was held that the surviving partner in a registered

<sup>3</sup> See Angélique Thurillet-Bersolle, *Droit européen et droit de la famille: Contribution à l'étude de la dynamique du rapprochement*, thèse, Dijon, Université de Bourgogne, 2011, 56-67, cf Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, Oxford, Hart Publishing, 2010, which is focused on the relationship between family law and the European Convention on Human Rights.

<sup>4</sup> See Joined Cases C-411/10 and C-493/10 *NS and ME* et al, judgment of 21 December 2011, paras 116-122.

<sup>5</sup> See Allan Rosas, 'The Applicability of the EU Charter of Fundamental Rights at National Level', 13 *European Yearbook on Human Rights*, 2013, 97 at 105.

<sup>6</sup> See, generally, Thurillet-Bersolle, n 3 above, Case C-256/09 *Purrucker* I [2010] ECR I-7352, paras 70-71e.

<sup>7</sup> Case C-117/01 *KB* [2004] ECR I-541. See also Rosas-Armati, n 2 above, 165-166.

<sup>8</sup> In the case of *Goodwin v UK* and *I v UK*, judgment of 12 July 2002, which was cited in the case of *KB* (para 33), the European Court of Human Rights had held that the fact that it was impossible for a transsexual to marry a person of the sex to which he or she had belonged prior to gender reassignment was a breach of the right to marry.

<sup>9</sup> Council Directive 2000/78/EC of 27 November 2000, [2000] OJ L303/16.

<sup>10</sup> Case C-276/06 [2008] ECR I-1757.

partnership for life could not be denied a survivor's benefit based on an occupational pension scheme established under a collective agreement in a situation where, on the one hand, national law precluded marriage between persons of the same sex but on the other, the national statutory old age pension scheme had extended the right to a widow's or widower's pension to unmarried persons living in a partnership for life.

In *Römer*,<sup>11</sup> the Court arrived at a similar result concerning a supplementary retirement pension scheme established under regional legislation. In the latter case, however, it was left to the national court to make a definitive determination as to the comparability of the legal and factual situation of the life partner as regards the pension in question. The Court also observed that, 'as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States.'<sup>12</sup> The Court thus refrained from declaring that, under Union law, persons of the same gender have the right to marry and, in line with recent case law from the German Constitutional Court<sup>13</sup> and the US Supreme Court,<sup>14</sup> based itself on a general trend towards a gradual harmonization in national law between registered life partnerships and marriage.

To take another subject area than gender-related discrimination, the concept of Union citizenship has brought in its wake various issues involving aspects of family law as well. Whilst name legislation is a matter for national legislators, a refusal under national law to accept a certain family name may in some instances be considered a hindrance to free movement rights. In *Garcia Avello*<sup>15</sup> and *Grunkin Paul*,<sup>16</sup> the inconveniences resulting from the imposition of different family names for Union citizens in two different Member States

amounted to an unlawful restriction, while in *Sayn Wittgenstein*<sup>17</sup> and *Runevic-Vardyn*,<sup>18</sup> such inconveniences were not considered so serious that they could not be justified.

Union citizenship, including the free movement rights of workers, has, of course, also generated case law relating to the corresponding rights of family members who are not Union citizens.<sup>19</sup> In exceptional situations, such rights may be invoked even in situations where the Union citizen concerned has never exercised his or her free movement rights.<sup>20</sup> Even in cases all family members are third country nationals, they may be able to invoke Union legislation concerning family reunification and the status of third country nationals in general.<sup>21</sup> The rights of asylum seekers and refugees also give rise to issues concerning the right to family life and children's rights.<sup>22</sup> In such contexts, too, the right to respect for family law, recognized in Article 7 of the EU Charter of Fundamental Rights, may, of course, become relevant.

Finally, let me as a further example mention issues relating to the right to the integrity of the person, notably in the fields of medicine and biology. For example, in *Brüstle*,<sup>23</sup> the European Court of Justice was called upon to interpret the notion of the human embryo, in the context of a prohibition to grant patents covering 'uses of human embryos for industrial or commercial purposes' contained in a Directive on the legal protection of biotechnological inventions.<sup>24</sup>

To sum up, whilst Union law does not provide for any general competence to legislate on matters belonging to the core of family law such as the right to marry, the broad range of today's Union law implies a number of principles and rules which will affect or at least touch upon family law-related issues. The

<sup>11</sup> Case C-147/08 [2011] ECR I-3591. See also Case C-81/12 *Consiliul National pentru Combaterea Discriminarii*, judgment of 25 April 2013.

<sup>12</sup> Case C-147/08, n 11 above, para 38.

<sup>13</sup> BVerfG, 1 BvL 1/11 of 19 February 2013, Absatz-Nr.(1-110), [http://www.bverfg.de/entscheidungen/ls20130219\\_lbv1000111.html](http://www.bverfg.de/entscheidungen/ls20130219_lbv1000111.html).

<sup>14</sup> 570 U.S. *United States v Windsor* (2013). See also 570 U.S. *Hollingsworth v Perry* (2013).

<sup>15</sup> Case C-148/02 [2003] ECR I-11613.

<sup>16</sup> Case C-353/06 [2008] ECR I-7639.

<sup>17</sup> Case C-208/09 [2010] ECR I-13693.

<sup>18</sup> Case C-391/09 [2011] ECR I-3787.

<sup>19</sup> To mention but one fairly recent judgment, see Case C-127/08 *Metock* [2008] ECR I-6241.

<sup>20</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177. Compare Case C-256/11 *Dereci*, judgment of 15 November 2011.

<sup>21</sup> See, e.g. Council Directive 2003/86/EC of 22 September 2003 on the right of family reunification, [2003] OJ L251/12 and Case C-540/03 *Parliament v Council* [2006] ECR I-5769; Case C-578/08 *Chakroun* [2009] ECR I-1839; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] OJ L16/44 and Case C-517/10 *Kamberaj*, judgment of 24 April 2012; Case C-502/10 *Singh*, judgment of 18 October 2012. Observe that these two Directives are not applicable in Ireland and the United Kingdom.

<sup>22</sup> It is not possible here to give an account of the by now extensive EU legislation and case law relating to asylum seekers and refugees, see, e.g. Rosas and Armati, n 2 above, 188-189.

<sup>23</sup> Case C-34/10, judgment of 18 October 2011.

<sup>24</sup> Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, [1998] OJ L213/13. See also Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079.

European Court of Justice has thus had to deal with a number of such issues and in different contexts. This is not owing to any particular desire of the members of the Court to enter into this field. On the other hand, the Court simply cannot refuse to rule on matters which are regulated within Union law and are brought before it, normally by national courts within the framework of the preliminary ruling procedure.

Let me now turn to a question of a more procedural nature, namely the question of the jurisdiction of national courts and execution of their judgments in a family law context, which also, as already noted above, finds an express legal basis in Article 82 TFEU.

### 3. Jurisdiction of courts and execution of judgments

Within the context of Title IV TFEU on the area of freedom, security and justice, and, to be more precise, its Chapter 3 on judicial cooperation in civil matters, a certain number of legislative acts have been adopted relating to the jurisdiction of national courts and execution of their judgments as well as on applicable law. With respect to family law, the following regulations should be mentioned: Regulation 2201/2003 (the so-called Brussels II bis Regulation) concerning jurisdiction and the recognition and enforcement of judgments<sup>25</sup>, Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations,<sup>26</sup> Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession<sup>27</sup> and Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce.<sup>28</sup>

The following discussion will be limited to the

Brussels II bis Regulation, which has already given rise to a fairly extensive case law and, unlike some of the other legislative acts in question, is applicable to Ireland and the UK as well (these two Member States have exercised their right of opting in on legislation which would otherwise be the subject of an opt-out).<sup>29</sup> Whilst some cases have concerned jurisdiction in matters relating to divorce,<sup>30</sup> ten cases have related to various aspects of parental responsibility. In the following, I shall focus on case law relating to parental responsibility, as these cases considered by the European Court of Justice have brought up a number of problems concerning the interpretation and application of Regulation 2201/2003.

Apart from questions of the application of the Regulation *rationae temporis* and *rationae materiae*<sup>31</sup> and of the relationship between the Regulation and the 1980 Hague Convention on the Civil Aspects of International Child Abduction,<sup>32</sup> substantive issues considered so far include the concept of habitual residence of children (with a view to determining the jurisdiction of courts in matters of parental responsibility), questions related to custody, judgments ordering the placement of children in institutional care or in a foster family in another Member State, and, last but not least, the enforcement of judgments ordering the return of the child and mainly in that context, the interpretation of Article 20 of the Regulation on provisional measures.

To begin with the question of the concept of habitual residence, the Court of Justice has provided some criteria for establishing the habitual residence of a child. In the case of *A*, the Court held that, in addition to the physical presence of the child in a Member State, other factors must be chosen which are capable of showing that the presence is not in any way temporary or intermittent and that the residence of the child 'reflects some degree of integration in a

<sup>25</sup> Council Regulation (EC) No 2201/2003 of 10 February 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L338/1.

<sup>26</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L7/1.

<sup>27</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, [2012] OJ L201/107.

<sup>28</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L343/10.

<sup>29</sup> See Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to the TEU and the TFEU. See also Rosas and Armati, n 2 above, 115-118, 185.

<sup>30</sup> Case C-68/07 *Sundelin Lopez* [2007] ECR I-1043; Case C-168/08 *Hadadi* [2009] ECR I-6871. In Case C-319/09 *Ioannou-Michalia*, order of 17 June 2010, not reported, Regulation 2201/2003 was considered not to be applicable.

<sup>31</sup> See, in particular, Case C-435/706 C [2007] ECR I-10141.

<sup>32</sup> See, eg Case C-195/08 PPU *Rinau* [2008] ECR I-5271, paras 53-54, 66; Case C-400/10 PPU *MiB* [2010] ECR I-8965, para 36, where it is recalled that according to Article 60 of Regulation 2201/2003, the Regulation takes precedence over the Convention.

social and family environment'. In particular, factors such as the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State should be taken into consideration.<sup>33</sup>

As to questions of custody more generally, the Court, in *MiB*, was called upon to rule on the interpretation of the notions of 'rights of custody' and 'wrongful removal' of a child and on the question of identifying the person who has rights of custody. The Court held that whether a child's removal is wrongful for the purposes of the Regulation is dependent on the existence of the rights of custody. Determining the persons who have rights of custody, again, depends on the law of the Member States where the child was habitually resident immediately before its removal or retention.<sup>34</sup> This, on the other hand, did not prevent taking into account provisions of the EU Charter of Fundamental Rights (Articles 7 and 24), but then only for the purposes of interpreting Regulation 2201/2003, that is, interpreting the Regulation as meaning that whether a child's removal is wrongful is entirely dependent on the existence of rights of custody, conferred by national law, and not to assess national law as such.<sup>35</sup>

A particular problem of interpretation arose in the case of *SC* and *AC*, relating to the execution of an Irish judgment ordering that the placement of a child in institutional care in the UK should be executed in the latter country.<sup>36</sup> Without going into all the questions formulated by the Irish judge for a preliminary ruling, the Court of Justice gave some guidance on the notion of the competent authority which in the receiving State should give its consent to the placement and ruled that the judgment ordering placement in a secure care institution situated in

another Member State must, before its enforcement in the latter State, be declared to be enforceable by a court of that State.

This requirement of a declaration of enforceability does not, according to Article 40 of Regulation 2201/2003, apply to judgments concerning rights of access and, under certain conditions, judgments which require the return of a child wrongfully removed or retained. The latter eventuality has been the subject of several important judgments. It is futile to try to do justice to the complexity of these cases and I shall in the following limit myself to some observations of a general nature.

Maybe the most important observation to make is that the Court has repeatedly emphasized the special nature of the procedure in question and the need to ensure the intended outcome and effectiveness of a system based on mutual recognition and trust, designed to ensure the objective of the immediate return of a child wrongfully removed.<sup>37</sup> There should be confidence in the court ordering the return of a child and its judgment should be automatically enforceable in another Member State, supposing that the conditions, such as the issuance of a special certificate for this purpose, are met. To cite one of the judgments (*Zarraga*):<sup>38</sup>

Accordingly, it is apparent from Articles 42(1) and 43(2) of Regulation No 2201/2003, interpreted in the light of the recitals 17 and 24 in the preamble to that regulation, that a judgment ordering the return of a child handed down by the court with jurisdiction pursuant to that regulation, where it is enforceable and has given rise to the issue of a certificate referred to in the said Article 42(1) in the Member State of origin, is to be recognized and is to be automatically enforceable in another Member State,

<sup>33</sup> Case C-523/07 A [2009] ECR I-2805, paras 36-40, citations from paras 38 and 39. See also Case C-497/10 PPU *Mercredi* [2010] ECR I-14309, para 52-54.

<sup>34</sup> Case C-400/10 *MiB*, n 32 above, paras 41-44.

<sup>35</sup> *Ibid* paras 45-52.

<sup>36</sup> Case C-92/12 PPU *SC* and *AC*, judgment of 26 April 2012.

<sup>37</sup> See, eg Case C-195/08 PPU *Rinau* [2008] ECR I-5271, notably paras 50-52, 68, 81-83; Case C-403/09 PPU *Deiček* [2009] ECR I-12193, para 45; Case C-211/10 PPU *Porse* [2010] ECR I-6673, paras 40, 73; Case C-256/09 *Purrucker I* [2010] ECR I-7352, paras 70-71; Case C-491/10 PPU *Zarraga* [2010] ECR I-14247, paras 44, 48. See also Case C-92/12 PPU *SC* and *AC*, n 35 above, paras 100-104 (in a context other than the return of a child wrongfully removed).

<sup>38</sup> Case C-491/10 PPU *Zarraga*, n 37 above, para 48.

there being no possibility of opposing its recognition (see, to that effect, *Rinan*, paragraph 84, and *Povse*, paragraph 70).

The emphasis is on the court of the Member State of origin where the child was habitually resident immediately before the wrongful removal, and on questions concerning the merits of its judgment as such, including the question whether the necessary conditions enabling that court to hand down the judgment are satisfied, and on challenges to its jurisdiction, which should be raised before this court, in accordance with the rules of its legal system.<sup>39</sup>

An important question in this context is the interpretation of Article 20 of Regulation 2201/2003, which authorizes courts of a Member State which, under the Regulation, do not have jurisdiction to rule on issues of parental responsibility, including the return of a child unlawfully removed, to take, in urgent cases, 'such provisional, including protective, measures in respect of persons or assets ... as may be available under the law of that Member State'. Without going into the details of the relevant case law,<sup>40</sup> it should be noted that the European Court of Justice has stressed that Article 20 cannot be regarded as a provision which determines substantive jurisdiction,<sup>41</sup> and that the system of recognition and enforcement provided for by the Regulation is not applicable to provisional measures under Article 20. The court has also held that because of their provisional nature, the measures in question cannot involve a change of parental responsibility where a court of another Member State, which has jurisdiction under the Regulation as to the substance of the dispute, has already delivered a judgment declared enforceable and provisionally giving custody of the child to another parent.<sup>42</sup>

And what about the respect for fundamental rights, such as the right to respect for private and

family life, expressed in Article 7 of the EU Charter of Fundamental Rights, and the rights of the child, including the obligation of public authorities and private institutions to base themselves on the child's best interests, recognized in Article 24 of the Charter? The court of the Member State of origin should certainly take into account the best interests of the child and in that context also the Charter of Fundamental Rights<sup>43</sup> but, as stated in *Zarraga*, 'it is solely for the national courts of the Member State of origin to examine the lawfulness [of the judgment ordering the return of the child and issuing a certificate to that effect] with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation No 2201/2003'.<sup>44</sup>

It is in view of this emphasis on the responsibility of the court of the State of origin, and its obligation to apply Regulation 2201/2003, that recent case law of the European Court of Human Rights may give rise to some concern. In *Šneerson and Campanella*,<sup>45</sup> the Court of Human Rights, in finding that ordering the return of a child from Latvia to Italy, in application of Regulation 2201/2003, constituted a violation of Article 8 of the European Convention on Human Rights (right to respect for the family), embarked upon a substantive analysis of the Italian judgment to determine whether it was in conformity with Article 8, taking into account also the Hague Convention on the Civil Aspects of International Child Abduction – but, it would appear, without paying much attention to Regulation 2201/2003. The Court observed that '[a] child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child'.<sup>46</sup> This approach seems

<sup>39</sup> Case C-211/10 *Povse* PPU, n 37 above, para 74; Case C-491/10 PPU *Zarraga*, n 37 above, para 51.

<sup>40</sup> See notably Case C-523/07 A, n 33 above, para 65; Case C-403/09 PPU *Deiček*, n 37 above, paras 38-61; Case C-256/09 *Purrucker I*, n 37 above, paras 57-100; Case C-297/10 *Purrucker II* [2010] ECR I-11163, paras 69-86.

<sup>41</sup> Case C-256/09 *Purrucker I*, n 37 above, para 71; Case C-297/10 *Purrucker II*, n 40 above, para 70.

<sup>42</sup> Case C-403/09 *Deiček*, n 37 above, paras 41-61. On the practical problems which may arise as to whether a certain court decision has been taken under Article 20 or under another provision of Regulation 2201/2003, see Case C-297/10 *Purrucker II*, n 40 above.

<sup>43</sup> See, eg Case C-403/09 PPU *Deiček*, n 37 above, paras 53-55; Case C-400/10 PPU *McB*, n 32 above, paras 45-63; Case C-491/10 PPU *Zarraga*, n 37 above, paras 58-69.

<sup>44</sup> Case C-491/10, n 37 above, para 69, cf para 51. See also Case C-403/09 *Deiček*, n 37 above, para 60.

<sup>45</sup> Case of *Šneerson and Campanella v Italy*, Application no. 14737/09, judgment of 12 July 2011. See also the case of *Raw et al. v France*, Application no. 10131/11, judgment of 7 March 2013, where the principal question, however, concerned the failure of national authorities to ensure the return of a child to another Member State.

<sup>46</sup> *Ibid*, para 85(vi).

to fly in the face of the case law of the European Court of Justice. This case law, of course, is primarily based on Regulation 2201/2003, which, according to its Article 60, 'shall take precedence' over, *inter alia*, the Hague Convention.<sup>47</sup>

That said, in *NS* and *ME*, the European Court of Justice accepted that, the Dublin Regulation on determining the Member State responsible for examining an asylum request<sup>48</sup> notwithstanding, a Member State may, under certain strict conditions, refuse to send an asylum-seeker back to the Member State of first entry. This may arise where the authorities of the first Member State 'cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions . . . amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.<sup>49</sup> It may be surmised that this reserve would apply in other situations of mutual recognition as well, including child abduction cases under Regulation 2201/2003, although it is even more unlikely that in the latter context, the existence of similar 'systemic deficiencies' could be determined. Be that as it may, it is to be hoped that an EU accession to the European Convention on Human Rights<sup>50</sup> would help to dissipate the risk of conflict between the respective case law of the Luxembourg and Strasbourg Courts and encourage the latter to pay more attention to the fundamental difference which exists between the relations between EU Member States, on the one hand, and their relations with third

State, on the other.

Finally, given that the European Court of Justice has stressed the need for efficient and rapid procedures especially in the difficult context of child abduction, it would be regrettable if the Court was not itself able to deal with such cases without delay. Similar problems may arise in connection with persons who are deprived of their liberty, in the context of such procedures as the European arrest warrant or asylum-seekers. To enable the Court to deal with such matters expeditiously, it proposed the possibility of an urgent procedure to be applied in the context of the area of freedom, security and justice and such a special procedure entered into force in 2008.<sup>51</sup> Most of the cases on child abduction dealt with above have been processed under the new urgent procedure, which normally enables the Court to conclude a case in something between two to three months.

To sum up, Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in a cross-border context has provoked a number of judgments interpreting various aspects of the Regulation. It is to be hoped that this case law has contributed to a clarification of the meaning of the Regulation. Undoubtedly some problems remain and wait to be clarified. In any case, the developments of the last ten or so years demonstrate that the members of the European Court of Justice cannot ignore family law and that we have to follow further developments both nationally and at the European level in order to be able to tackle family-related questions, as one of many areas with which the Court is today faced.

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<sup>47</sup> See also the case law cited in n 32 above.

<sup>48</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1.

<sup>49</sup> Joined Cases C-411/10 and C-493/10 *NS* and *ME*, n 4 above, para 94.

<sup>50</sup> According to Article 6(2) TEU, the Union 'shall accede' to the European Convention but according to Protocol No 8 relating to Article 6(2), and Article 218(8) TFEU, accession presupposes the conclusion of an accession agreement to be concluded between the High Contracting Parties to the Convention and the EU. Negotiations on the content of such an agreement were concluded in April 2013 (see Fifth Negotiating Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Council of Europe doc 47+1(2013)008 of 5 April 2013) but the entry into force of the agreement requires a unanimous decision by the EU Council as well as ratification by the States which are High Contracting Parties to the Convention.

<sup>51</sup> See Articles 107-114 of the new Rules of Procedure of the Court, [2012] OJ L265/1. See also Allan Rosas, 'Justice in Haste, Justice Denied? The European Court of Justice and the Area of Freedom, Security and Justice', 11 *Cambridge Yearbook of European Legal Studies* (2008-2009), 1.

# LGBTI Discrimination and parent-child relationship. The national case law on cross border mobility of rainbow families in the European Union

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## 1. Introduction

One of the fundamental principles guaranteed by the European Union system is the freedom of movement of persons and their families within its borders. Among them there are individuals involved in a same-sex relationship with children. However, each Member State recognizes different levels of legal protection to rainbow families, and this circumstance could affect the effective application of the principle of freedom of movement.

The expression 'rainbow families' concerns family groups composed of LGBTI (lesbian, gay, bisexual, transgender, intersexual) parents and their children. There are many kinds of them: the relationship between adults and children could be established in the case of a LGBTI couple through adoption, single or joint, step-parenting or second parent adoption, as well as assisted reproductive technology and surrogacy. However, LGBTI parenthood is still perceived as a contradiction in terms because gay and lesbian people have been historically portrayed as paedophiles, moral degenerates or criminals, and nowadays the right of homosexuals and transgenders to raise a family is controversial in both scholarship and public opinion.<sup>1</sup>

Indeed, discrimination based on sexual orientation is forbidden by Article 21 of the Charter of Fundamental Rights of the European Union, which distinguishes discrimination based on sex from that related to sexual orientation. Even if there is not an official definition of sexual discrimination, it is widely accepted that it covers discrimination related to a lesbian, gay, bisexual, transgender, intersexual or heterosexual individual. Regarding the legal regulation of the parent-child relationship for parents involved in a rainbow family, 15 of the 28 EU Member States (Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania,

Slovakia) have no explicit provision on access to in vitro fertilization techniques and on joint or second parent adoption for same-sex couples. In fact, only Belgium, Denmark, the Netherlands, Spain, Sweden and the United Kingdom would allow homosexual parents to access all the three ways of recognition of a parent-child relationship. Finland recognizes access to in vitro fertilization and the second parent adoption, Austria allows only the first of these three ways, while Portugal and Germany allows the last one and France has admitted adoption for same-sex couples after the reform of spring 2013. Instead altruistic surrogacy is regulated in Greece, The Netherlands, Belgium and in the United Kingdom. In Croatia (the latest EU Member State from 1 July 2013) a constitutional referendum held on 1 December 2013 banned same-sex marriage and adoption.<sup>2</sup>

## 2. The European Framework

The process of integration of the European Union should improve the freedom of movement of LGBTI families despite the differences in Member States' family law which are allowed within the "area of freedom, security and justice".<sup>3</sup> There are two elements in apparent contradiction: on one hand the issue of human rights protection and non-discrimination, and on the other hand the economic access and treatment guaranteed by EU laws. Hence, the promotion of migration, especially for economic reasons, claims mutual recognition and harmonization of the treatment of persons, including LGBTI families.

According to Article 6 of the Treaty of Lisbon, the European Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'.<sup>4</sup> In this sense the case law developed by the ECtHR, about the best interest of the child<sup>5</sup>, non-discrimination<sup>6</sup>, and the recognition of 'family

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<sup>1</sup> See International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Case Book*, Geneva, 2011, p 253.

<sup>2</sup> D Cepo, 'Same-sex marriage experiences a major setback in Croatia', *Washington Post*, (4 December 2013).

<sup>3</sup> See A R Ziegler, *LGBT Rights and Economic Migration: Will the Liberalization of the Movement of Persons in Economic Integration Agreements Increase the Need for Common Regional Standards Regarding Civil Status Rights?*, Equality and Justice. Sexual Orientation and Gender Identity in the XXI Century, (A Schuster, ed.), Forum Editrice Universitaria Udinese, Udine, 2011, p 230.

<sup>4</sup> See K L Mathisen, *The Impact of the Lisbon Treaty, in Particular Article 6 TEU, on Member States' Obligations with Respect to the Protection of Fundamental Rights*, 2010, <http://dx.doi.org/10.2139/ssrn.1650544>.

<sup>5</sup> See ECtHR, 22 April 1997, *X. Y. and Z. v. United Kingdom*, App. n. 21830/93; ECtHR, 22 January 2008, *E. B. v. France*, App. N. 43546/02; ECtHR, *Schalk and Kopf v. Austria*, 24 June 2010, App. n. 30141/04.

<sup>6</sup> See ECmmHR, 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96; See ECtHR, 30 November 2010, *V. P. v. Spain*, App. n. 35159/09; See ECtHR, *J. M. v. United Kingdom*, 28.9.2010, App. n. 37060/06.

life<sup>7</sup> (also operating in favour of rainbow families) is an important starting point to verify the guarantee of equality and protection of children inserted in such contexts.

The most relevant EU law instruments on the interpretation of the concept of 'family member' are the Free Movement Directive<sup>8</sup>, the Family Reunification Directive<sup>9</sup>, and the Qualification Directive.<sup>10</sup> The two key situations addressed by these regulations are the position of same-sex spouses, same-sex civil or registered partners, and the durable relationships of *de facto* partners.<sup>11</sup> Nevertheless, the protection of families in EU law is related to the achievement of broader European Union projects, such as curbing the demographic decline through the maximization of participation to the labour market by introducing more flexible employment policies, and encouraging the ongoing circulation of people and services by extending mobility rights to family members as well.<sup>12</sup>

Under the Free Movement Directive, 'For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage' (see n5) but this means that an EU Member State is not obliged to recognize the validity of same-sex marriages or registered partnerships unless these are recognized under national law.<sup>13</sup> In the EU regulations the child in rainbow families is not a primary consideration. In fact, in those countries which do not recognize the validity of a registered partnership of a same-sex couple, it does not seem possible to create legal ties between the natural or adopted child of the partner and his or her partner. The result is that in case of death of his or her natural or adoptive parent, the child could lose the availability of a second bond with a relevant member of the family, missing his or

her family environment and violating his or her right to protection of family life.

How does the principle of mutual recognition work? In this regard, a short analysis of the terminology used by the EU legislator in drafting the guidelines under consideration could be proposed. Several references are related to marriage<sup>14</sup> and registered partnerships,<sup>15</sup> but almost none to parenthood and adoption.<sup>16</sup> On the contrary there are some to 'direct descendants'<sup>17</sup> and 'minor child(ren)'<sup>18</sup>, especially related to family reunification that 'should apply in any case to members of the nuclear family, that is to say the spouse and the minor children'.<sup>19</sup>

Even in the case of disruption of the rainbow family some problems related to the recognition of the parent-child relationship may arise if the members of the former family move within the borders of the European Union. Circulation within the European Union and judicial decisions concerning separation and divorce, and the consequent discipline of parental responsibility, are covered by the Regulation 'Brussels II' (Council Regulation (EC) No 2201/2003)<sup>20</sup>.

Article 1 is related to divorce, legal separation or marriage annulment, but there are some doubts about the applicability of this rule to registered partnerships. Article 1(2) concerns the right of custody and rights of access to the child, his/her guardianship and curatorship, his/her placement in a foster family or in institutional care and the measures for the protection of the child's property. The choice about neutrality promoted by the Regulation 2201/2003 on legal language and legal terms is self-evident in Article 2, relating to 'parental responsibility' (that 'shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an

<sup>7</sup> See ECtHR, 18 December 1986, *Jobstson v. Ireland*, App. n. 9697/82; ECtHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom* 28 May 1985, App. n. 9214/80; ECtHR, 26 May 1994, *Keegan v. Ireland*, App. n. 16969/90; ECtHR, 13 July 2000, *Elsbolz v. Germany*, App. n. 25735/94.

<sup>8</sup> See European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

<sup>9</sup> See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>10</sup> See Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

<sup>11</sup> See European Union Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity*, Luxembourg, 2010, p 45.

<sup>12</sup> See European Union Agency for Fundamental Rights, *Developing indicators for the protection, respect and promotion of the rights of the child in the European Union*, <http://fra.europa.eu/en/publication/2012/developing-indicators-protection-respect-and-promotion-rights-child-european-union>, 2010, 30.

<sup>13</sup> See European Union Agency for Fundamental Rights, *Fundamental Rights: Challenges and Achievements in 2011*, Luxembourg, 2012, p 134.

<sup>14</sup> Twelve references in the Free Movement Directive; seven references in the Family Reunification Directive and none in the Qualification Directive.

<sup>15</sup> Twelve references in the Free Movement Directive; six references in the Family Reunification Directive and none in the Qualification Directive.

<sup>16</sup> Three references in the Family Reunification Directive and three references in Qualification Directive.

<sup>17</sup> See Article 2.2, point (c) of the Free Movement Directive.

<sup>18</sup> See Article 13 of Family reunification Directive, Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership.

<sup>19</sup> See Family Reunification Directive, n. 9.

<sup>20</sup> See Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.



agreement having legal effect'), or the 'holder of parental responsibility' (that 'shall mean any person having parental responsibility over a child').

Article 23 of the Regulation 2201/2003 states the '(G)round of non-recognition of a judgment relating to parental responsibility'. Regarding the parent-child relationship recognition for a homosexual person, the main assumption of Article 23 is that a judgment relating to parental responsibility shall not be recognized if it is manifestly contrary to the public policy of the Member State in which recognition is sought, taking into account the best interests of the child. However, the ECtHR has stated that when 'the existence of a family relationship with a child is established, the State must act in such a way as to allow this link to develop and provide legal protection making possible the integration of the child into his family'.<sup>21</sup> In such cases judges could have a possible solution in terms of 'social parenthood',<sup>22</sup> as in some cases such as an Italian<sup>23</sup> or a French one.<sup>24</sup>

In the Italian case, the judges recognize the juridical value of the relationship established between the surrogate mother and the children, consolidated in a situation of coexistence and affection persisting for more than ten years, concluding that this situation does not violate international public order. In this case, social motherhood grants stability to the family life established between the woman who raised the children, even if she did not give birth to them, and the children themselves, pursuing the protection of the best interest of the children in preserving their family relationships that have permanently accompanied them in their growth and development.

The French case is related to the recognition of an adoption of the biological children of her partner formalized in the United States by a French woman. The French judges stated that this kind of foreign adoption does not clash with the basic principles of the French law.

In the *Tadao Maruko*<sup>25</sup> and *Römer*<sup>26</sup> cases, the Court of Justice of the European Union recognized the equality between married heterosexual couples and homosexual

couples living together, whenever national law regulates both cases by applying in full the principles of the Charter of Fundamental Rights of the European Union, especially Article 21, in conjunction with the principle of the protection of the intimacy of the parties' personal life, and Articles 7 and 9, protecting the right to marry and to found a family.

### 3. Rainbow families and freedom of movement in the European Union: the national case law<sup>27</sup>

The protection of family life has a close link with the opportunity to become parents, even though it is not a strictly necessary requirement, given the possibility of becoming parents either through adoption or by surrogacy (as in the case where the homosexual couple is composed of two men). As stated by the case law of the European Court of Human Rights, 'the right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family',<sup>28</sup> or at the very least the potential relationship between a child and his or her different-sex or same-sex parent's partner. The protection of the best interest of the child is fundamental, but neither the principle of non-discrimination, nor the protection of the family life of rainbow families, can be excluded from the balance of interests.

National courts have been addressing the issues relating to same-sex parenthood in the last decade. On the contrary, cross-mobility issues have been dealt with only in recent years. Meanwhile, national courts have begun to implement the principles developed by the European Court of Human Rights in their own legal systems.

Focusing on domestic law is a key issue because the national courts of some EU member states such as England<sup>29</sup>, Spain<sup>30</sup> and The Netherlands,<sup>31</sup> have recognized a cultural and social change in public opinion on same-sex issues earlier than others, especially on same-sex parenthood.<sup>32</sup>

<sup>21</sup> ECtHR, 28 June 2007, *Wagner et J.M.W.L. v. Luxembourg*, App. n. 76240/01.

<sup>22</sup> See M K Miller, *How Judges Decide Whether Social Parents Have Parental Rights: A Five-Factor Typology*, 49 (2011) Fam. Ct. Rev. 49:72, p 80.

<sup>23</sup> See Corte Appello di Bari, 13 February 2009.

<sup>24</sup> See Court of Appeal of Paris, 27 January 2011.

<sup>25</sup> See European Court of Justice, 1.04.2008, C 267/06.

<sup>26</sup> See European Court of Justice, 10.5.2011, C 267/06.

<sup>27</sup> This empirical research was carried out through consultation of the national databases of the superior courts as well as through the research tools made available online by the EU member states through the Portal: <https://e-justice.europa.eu/home.do?plang=it&action=home>.

<sup>28</sup> See ECtHR, *E. B. v. France*.

<sup>29</sup> See *Re G (Residence: Same-Sex Partner)* [2005] EWCA Civ 462.

<sup>30</sup> See Tribunal Superior de Justicia, Sala do Social, Zaragoza, 11 July, 2007.

<sup>31</sup> See *Hoge Raad*, R99/026HR, 26 November 1999; *Gerechtshof 's-Hertogenbosch*, HV 200.095.878, 2 February 2012; *President Rechtbank Bred*, 195241 FA RK 08-4647, 10 June 2010; *Rechtbank Bred*, 213861 FA RK 10-126, 27 November 2011.

<sup>32</sup> See *Re P (A minor) (Custody)* (1983) 4 FLR 401; *C v C (Custody appeal)* [1991] 1 FLR 223; *B v B (Minors) (custody care and control)* [1991] 1 FLR 402; *AB (Adoption: Joint Residence)* [1996] 1 FLR 27; *Re W (a minor) Adoption: Homosexual adopter* [1997] 2 FLR 406; *G v F* [1998] 3 FCR 1; *Re M (Sperm Donor: Father)* [2003] Fam Law 94. See more recently: *D (Contact and PR: Lesbian mothers and known father) No.2*, *Re* [2006] EWHC 2 (Fam) (12 January 2006); *Re B (Role of Biological father)* [2008] 1 FLR 1015; *R v E and F (female parents: known father)* [2010] 2 FLR 38; *P & L (Minors)*, *Re* [2011] EWHC 3431 (Fam) (20 December 2011); *A v B & Anor* [2012] EWCA Civ 285 (14 March 2012); *S v D & E* [2013] EWHC 134 (Fam) (31 January 2013).

### (a) Surrogacy

Surrogacy is the agreement by which 'a woman agrees to bear and give birth to a child so that another person or couple may raise it as legal parent(s).<sup>33</sup> Male homosexual couples find in surrogacy the possibility of having a child in those jurisdictions where the practice is not prohibited. The main issue is the recognition of the national citizenship of the surrogate parents to the child born from the surrogacy. This transmission of status has many legal consequences such as the exercise of parental authority, the duties of assistance in case of need, the recognition of mutual rights of inheritance between parents and children, the enjoyment of social and welfare provisions.

One of the most controversial cases happened to a married couple of Belgian homosexuals: men, whose son, born to a surrogate mother in Ukraine, was abandoned in an orphanage by her after his birth because the Belgian consul in Kiev refused to grant a passport to the child, assuming that the lack of a Belgian regulation on surrogacy prevented the acknowledgment of his birth certificate. This case found a solution two years after the child's birth: his Belgian passport was issued when the Tribunal de Grande Instance of Brussels ascertained the blood relationship between the father who donated the sperm used for surrogacy and his son.<sup>34</sup>

Although the law regarding same-sex marriage and adoption has been changed, in France surrogacy is still prohibited. Courts have ruled several times on the exequatur of foreign judgments, mainly American, related to birth certificates of children born by surrogacy procedures. Almost all these situations were considered to be against French public order,<sup>35</sup> regardless of whether the children had a genetic bond with parents or not. Nevertheless, there was a partial exception for a surrogacy relating to a child for whom the parent-child relationship was recognized by the French court on account of his genetic father.<sup>36</sup> In this case the surrogacy was to fulfill the wish for parentage of a homosexual couple. The courts affirmed that such a kind of agreement, signed abroad and related to a surrogacy contract with the

French prospective parents and the foreign surrogate mother, is not recognized by French law, thus the transcription of foreign documents will be ordered by omitting the name of the second parent and mentioning only the father's identity, since his paternity was not questioned<sup>37</sup>.

A similar case occurred to a homosexual couple (a Belgian and an English man, married in Belgium and registered partners in the United Kingdom) who became parents through a surrogacy<sup>38</sup> in India.<sup>39</sup> Both parties, the prospective parents and the surrogate mother, signed a contract dealing with terms and expenses, which was evaluated as reasonable *ex post facto* by the High Court. Two days after the birth, the couple took custody of the twins, but the surrogate mother did not sign the agreement drawn up within six weeks after the birth, as required by the Human Fertilisation and Embryology Act 2008 (HFEA) and disappeared, reducing to naught the attempts to track her down. However, the court authorized the parental order because it incorporated the conditions of its eligibility:

- (1) the Applicants, having been through a ceremony of marriage in Belgium, were to be treated as civil partners in [the English] jurisdiction;
- (2) the application for parental orders was made within six months of the birth of the twins.
- (3) at the time of the application the twins' home was with the Applicants;
- (4) at the time of the application both Applicants had attained the age of eighteen;
- (5) that the first Applicant was the father of the twins'.<sup>40</sup>

Recently, in another case, the High Court granted a parental order under the HFEA to a male same-sex couple who entered into a surrogacy agreement with an Indian surrogate mother through a surrogacy clinic in India. The couple (a Polish and an American citizen) met and entered into a domestic partnership in California, but

<sup>33</sup> See D Gruenbaum, *Foreign Surrogate Motherhood: mater semper certa erat*, 60 Am. J. Comp. L. 475, (2012), p 479.

<sup>34</sup> Tribunal de Grande Instance de Bruxelles, (7e ch.), RV NR: 09/4362/B, 15 February 2011. A similar case occurred to an English heterosexual couple in *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

<sup>35</sup> See Cour de Cassation, 6 April 2011; Cour d'Appel de Rennes, 4 July 2002; Cour d'Appel de Rennes, 29 March 2011; Cour d'Appel de Paris, 26 February 2009; Cour d'Appel de Rennes, 20 January 2012.

<sup>36</sup> See Tribunal de Grande Instance de Nantes, 10 February 2011.

<sup>37</sup> See Tribunal de Grande Instance de Nantes, 10 February 2011.

<sup>38</sup> German judges did not recognise in the German legal system the effects of similar cases of surrogacy accomplished in India: Oberverwaltungsgericht Berlin-Brandenburg, 6 July 2011, OVG 5 S 13.11; VG Berlin, 15 April 2011 - 23 L 79.11; VG Berlin 11. Kammer, 26 November 2009, 11 L 396.09. In Germany surrogacy is prohibited and the parent-child relationship could be changed only with an adoption, see OLG Stuttgart, 7 February 2012, 8 W 46/12.

<sup>39</sup> For contrasting surrogacy tourism Indian law has been changed in 2010. The new Indian Assisted Reproductive Technology (Regulation) Bill 2010 restricts the access to surrogacy only to heterosexual couples married for two years. See R Deonandan, A Bente, India's Assisted Reproduction Bill and the Maternal Surrogacy Industry, *International Review of Social Sciences and Humanities*, Vol. 4, No. 1 (2012), pp 169-173.

<sup>40</sup> See *D and L (Surrogacy)* [2012] EWHC 2631 (Fam).

after four years they moved to the UK because of the debate on the recognition of such agreements there and their wish to live and raise a family in a society that accepted their way of life. They organized their new life, renting a property, running a new business together and paying taxes in the UK. They were also able to demonstrate that they would remain in the UK indefinitely with their child. The health and social services' reports were positive about the applicants' care of the child born from the surrogacy agreement. The welfare of the child demanded life-long security and stability and that was best met by a parental order securing his legal relationship with the applicants, so the Court granted the Parental Order.<sup>41</sup>

In a similar case, a British male same-sex couple became parents through a surrogacy agreement concluded in California. It is a relevant case even if it is not strictly regarding EU law. The Court stated that the payment of the expenses to the surrogate mother was proportionate, the couple acted in good faith and developed a close relationship with the surrogate mother, so they had properly respected all the steps to comply with the legal parenthood requirements both in the UK and in the USA<sup>42</sup>.

#### **(b) *In vitro* fertilisation**

The technology of *in vitro* fertilization through sperm donation is one of the most widely used methods of procreation by female same-sex couples. In this case, most situations are related to an anonymous sperm donor; otherwise there are some cases where one of the lesbian partners of the same-sex couple conceives through sexual intercourse, regulated by a contract<sup>43</sup>.

In an Irish case, two lesbian women had lived together as a couple since 1995, formally solemnized by a civil union in the United Kingdom in 2006. The couple planned to have a child, thus they signed an agreement with a male friend of theirs who donated the sperm for *in vitro* fertilisation. In that agreement, the sperm donor would give up all parental rights and be known by the child as an 'uncle', while the two women would retain all parental rights for themselves.

During the pregnancy and the early days after the child's birth, the relationship between the parties continued amicably, until the couple declared their decision to move to Australia with the baby. In opposition

to this decision, the father claimed the guardianship of the child. At first instance the Irish High Court<sup>44</sup> recognized that the couple, having lived together for so long and having established an almost exclusive relationship with the minor, had the right to be considered as *de facto* family under Article 8 ECHR. Therefore the father, being only a sperm donor, had no constitutional rights prevailing over the right to continuity of family life of the child. Challenged before the Supreme Court of Ireland, this decision was overturned because Irish law does not recognize the *de facto* family and does not consider a contract for the donation of sperm and the waiver of the parental role as valid<sup>45</sup>.

In the German legal system the hypothesis of the death of the biological mother was at the core of the recognition of the second parent adoption of a child born through IVF with an anonymous sperm donation in Denmark. The case concerned two women who entered into a *Lebenspartnerschaft* (registered partnership). One of them, the partner of the child's mother, applied to obtain an adoption by the second parent. In case of adoption in a registered partnership, German law states that the couple must pass a trial period of a year to evaluate the establishment of the relationship between the new parents and the child. However, the lesbian couple refused to do so and claimed recognition of the second parent adoption by the court. The *Amtsgericht* of Elmshorn<sup>46</sup> recognized the common intention of the lesbian partners in becoming partners and having a child from the outset of the project, which involved going to Denmark and effecting a medically assisted procreation. Further, denying the legal recognition of adoption by the second parent to the partner of the child's mother could be incompatible with the best interest of the child, especially in case of injury or death of the biological mother.

In a recent similar case, a female same-sex couple, (an Austrian and a German national) involved a *Lebenspartnerschaft* registered in Germany, although they lived in Wels, Austria. They were denied to access to IVF and so sued the local authorities in the Austrian courts because of the discrimination suffered based on sexual orientation. This circumstance constituted an interference with their family life protected by article 8 ECHR and a breach of the principle of equality under Article 7 of the Austrian Constitution. In a decision

<sup>41</sup> See *Re A & B (Parental Order Domicile)* [2013] EWHC 426 (Fam).

<sup>42</sup> See *J v G* [2013] EWHC 1432 (Fam) (26th March 2013).

<sup>43</sup> See *Re D (Contact and PR: Lesbian mothers and known father) (No.2)* [2006] EWHC 2 (Fam) (United Kingdom); AU9726, Hoge Raad, R05/044HR (Holland).

<sup>44</sup> See *Mc D. -v- L. & Anor* [2008] IEHC 96 (16.4.2008).

<sup>45</sup> See *McD. -v- L. & Anor* [2007] IEHC 81 (10.12.2009).

<sup>46</sup> See *AG Elmshorn*, 20 December 2010 – 46 F 9/10. In this decision the court has ruled that in the access to the second partner adoption procedure, the sexual orientation of the registered same-sex couples cannot justify a different treatment from heterosexual married couples in the second partner adoption procedure.

delivered on 19 December 2013, the Austrian Oberste Gerichtshof (the Supreme Court, hereinafter OGH) stated that 'the desire to have a child represents a very important aspect of human existence and personal identity.'<sup>47</sup> The OGH followed the ECtHR's *Schalke and Kopf* decision, which stated that a same-sex couple living together with children are protected by the notion of 'family life' according to Article 8 of the ECHR. Therefore, the exclusion of a same-sex couple from IVF cannot be justified by the need to protect the 'family' as same-sex couples are no different from married heterosexual couples, rather are complementary to the same constitutional definition of family.<sup>48</sup> Moreover, the OGH stated that the IVF prohibition to same-sex couples could not be justified according to the principle of the child's best interests, because, regardless of the mode of his or her procreation and the circumstances of his or her life, for the child it is certainly 'better to exist than not exist' (*besser ist, überhaupt zu sein als nicht zu sein*) and that there are no valid studies that claim that a child will grow up worse with parents of the same sex than of the opposite sex.

In an Italian case related to a couple of lesbian mothers (one Italian and one Spanish, married in Spain according to Spanish law) applied for registration of their son at the registry office of Turin. The child was born through a process of *in vitro* fertilization with a sperm donor and the fertilized egg had been donated by the Italian woman, while the Spanish one had given birth to the child. Italian law forbids such techniques of assisted reproductive technology as heterologous fertilization, but there is an additional problem: the child is the son of two mothers, the one that gave birth to him naturally, according to the traditional rule '*mater semper certa est*', and the biological one that donated the fertilized egg. The municipality of Turin refused the inscription of that child on the basis of two reasons. First of all, heterologous fertilization is not allowed in the Italian system. Secondly, Italian law does not recognize either same sex marriage celebrated abroad, or any kind of parent-child

relationship founded on same-sex parenthood. Therefore, that child was not eligible for Italian citizenship from his biological mother. It seems that this child did not exist both for the municipal administration of Turin and for the Italian legal system, on behalf of which the office of the public prosecutor delivered the negative legal advice to the register office.<sup>49</sup>

### (c) Joint Adoption

The following example was to obtain recognition of the U.S. adoption in the legal national system of the same-sex couple, a male homosexual couple united in a partnership under the laws of New Jersey, both having dual citizenship (U.S. and Slovenian), who had adopted a girl in the U.S. The couple tried to register the adoption in Slovenia in order to obtain Slovenian citizenship for the child<sup>50</sup>. The Slovenian public prosecutor argued for rejection because the recognition of an adoption by a same-sex couple was contrary to international public order. After a wide debate, the Slovenian Supreme Court<sup>51</sup> recognised the adoption into the domestic Slovenian legal system. The Court argued on one hand that this corresponded to the protection of the best interest of the child because the same-sex adoptive parents were now her only parents; on the other hand, the Court affirmed that international public order is made up of provisions issued by both the Council of Europe and the European Union, in which Slovenia took part, thus assimilating them as legal sources. Moreover, even though there was no agreement among the member countries of both institutions on the admissibility of adoptions and marriages for same-sex couples, the presence of other legal recognition of such rights confirmed that this was the only way to protect the best interest of the child adopted by the applicant couple.

In France, the Conseil Constitutionnel<sup>52</sup> confirmed the constitutionality of the new French law 'mariage pour tous', allowing same-sex marriage and adoption. The new law superceded all previous objections about the

<sup>47</sup> See OBH, 19 December 2013 – 3Ob224/12f.

<sup>48</sup> See M. Gattuso, Austria: viola i diritti umani impedire la procreazione assistita ad una coppia di donne, <http://www.articolo29.it/2014/austria-viola-diritti-umani-impedire-la-procreazione-assistita-ad-una-coppia-di-lesbiche/> (19.01.2014, last access 20.01.2014)

<sup>49</sup> Procura della Repubblica presso il Tribunale di Torino, 2 August 2012.

<sup>50</sup> See R Uitz, *Lessons from Sexual Orientation Discrimination in Central Europe*, 60 Am. J. Comp. L. 235, (2012), p 246.

<sup>51</sup> See Supreme Court of the Republic of Slovenia (28 January 2010). See International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*, Geneva, 2011, p 274

<sup>52</sup> See Conseil Constitutionnel, decision n. 669 of 17 May 2013.

contrariety to the very essential principles of French family law related to an *exequatur* of a previous decision on same-sex adoption, having the effect of a birth certificate granted by French courts<sup>53</sup>. Indeed, the French judges observed that the legal obstacles made by the former prohibition of same-sex couples seeking adoption abroad encouraged fraud on the French law. The Constitutional Council reiterated that to lay down the rules relating to status and capacity pursuant to article 34 of the French Constitution was the task of their Parliament, and not of the Court itself. Moreover, the Court stated that the sex of the adopters was not, in itself, an obstacle to the establishment of adoptive parenthood. However, in compliance with article 2 of the Declaration of 1789, and relating to respect for private life, and to the principle of equality, the Conseil stated that opposite sex couples, as well as those of the same sex, were subject to a process to evaluate their capacity to care for a minor on its adoption.

#### (d) Second-parent adoption and step-parent adoption

Second-parent adoption (or co-parent adoption) means adoption by the non-biological, but social, parent of the child, normally the same-sex partner of the child's parent.

Under German Adoption Law, a registered partner is only allowed to adopt the biological children of her or his partner, but not the adopted children of her or his partner. Relating to this peculiar situation, the *Oberlandesgericht* Hamburg (Court of Appeal) decided to ask the *Bundesverfassungsgericht* (the Federal Constitutional Court) about a specific case that concerned a man, who had entered into a *Lebenspartnerschaft* with another man, who had adopted a Romanian child. The applicant wished to adopt the child as well. Only married couples, then heterosexuals, could adopt the spouse's adopted

child. According to the judges this prohibition is incompatible with article 3 of the German Basic Law, relating to equality before the law, and the protection of the best interest of the child requires the equal recognition of both parents, heterosexuals or homosexuals, as well as the possibility for the child to grow up with two legal parents rather than one<sup>54</sup>.

To overcome juridical questions conflicting with Dutch law about same-sex parenting and anonymity of sperm donation, a Dutch same-sex couple claimed to adopt an unborn child conceived in Belgium with a Danish anonymous sperm donor. By agreement between the parties and the hospital in Belgium, the declaration of the anonymity of the donor preserved the parties from being in conflict with Dutch legislation on IVF. The Court<sup>55</sup> considered that this adoption followed the interests of the unborn child, but the adoption would take effect at the time of his or her birth, even if the adoption request was made beforehand.

## 5. Conclusion

The reconstruction of both European and national case law shows that the effectiveness of freedom of movement and mutual recognition of the parent-child relationship within rainbow families is very fragmentary. However, the most recent examples of this change are, for instance, the French law 'mariage pour tous',<sup>56</sup> followed by the UK Marriage (Same Sex Couples) Bill, now Act of 2013,<sup>57</sup> concerning access to marriage by homosexuals. Indeed, the German *Bundesverfassungsgericht* had already extended the second parent adoption to same-sex couples joined in a *Lebenspartnerschaft*. Each EU Member State is involved in this process, although the evidence of cultural and religious resistance is very strong, for example in Greece, Ireland and Italy.<sup>58</sup> In these situations, the intervention of the courts is still necessary to eliminate cases of discrimination, but the direction is marked.

<sup>53</sup> See Cour d'Appel de Paris, 24 February 2011, 10/08848; Cour d'Appel de Paris, 24 February 2011, 10/08810.

<sup>54</sup> See OLG Hamburg, 22 December 10.

<sup>55</sup> See LJN: BL4565, Rechtbank Groningen, 114907, 16 February 2010.

<sup>56</sup> See LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

<sup>57</sup> See <http://services.parliament.uk/bills/2012-13/mariagesamesexcouplesbill.html>.

<sup>58</sup> See Corte costituzionale, 15 April 2010, n. 138; Corte di Cassazione, 15 March 2012, n. 4148; Corte di Cassazione 11 January 2013, n. 601; Trib. Reggio Emilia, 13 February 2012.

# The EU regime on child abduction: is some ‘compression’ of fundamental rights acceptable?

Laura Carpaneto\*

## 1. The EU regime on child abduction

Since the entry into force of Brussels II-*bis* Regulation,<sup>1</sup> child abductions within the EU are subject to ‘a body of rules consisting of the provisions of the 1980 Hague Convention as complemented by those of Regulation No 2201/2003, though the latter takes precedence on matters within the scope of that regulation’.<sup>2</sup>

The most innovative features of the EU’s regime are (i) the tightening of the operation of the summary return mechanism and (ii) the primary role given to the judges of the State of habitual residence, having final control of an abducted child’s future, with the purpose of reducing and deterring child abduction within the European Union.

Therefore, in cases of breach of custody rights,<sup>3</sup> the return remedy of article 12 of the 1980 Hague Convention operates amongst Member States as well as all the exceptions provided in the Convention itself,<sup>4</sup> but these rules are now complimented by articles 10 and 11 of the Brussels II bis Regulation.

More precisely, in compliance with the general rule of article 8 of Regulation 2201/2003, stating the jurisdiction of the forum of the habitual residence of the child in matters regarding parental responsibility, article 10 gives jurisdiction to the judge of the State of habitual residence also in abduction cases.<sup>5</sup>

Article 10 envisages two exceptions to this rule and therefore gives jurisdiction to the judge of the State of refuge when: (i) the child has obtained the habitual residence in that State and those having his/her custody have accepted the abduction; (ii) the child (a) has obtained the habitual residence of that State, (b) has been staying there for one year since the knowledge of the illicit abduction and (c) those having his/her custody did not start (or have started, but unsuccessfully) any proceedings for the return of the child.

Besides the provisions on jurisdiction, article 11 lays down specific rules on the abduction procedure, which may be distinguished into two categories: those aimed at granting the respect of fundamental procedural guarantees and those aimed at overcoming the problems occurring in the application of the Hague Convention.<sup>6</sup>

The rules falling within the first category are (i) article 11.2 on the hearing of the child, (ii) article 11.5 on hearing of the person asking for the return of the child and (iii) article 11.3 providing the six weeks rule.

Whilst no specific problems arise from article 11.5, expressly giving the opportunity to be heard to the person asking for the return of the child, who may even state his or her case by written testimony,<sup>7</sup> the hearing of the child is of course a delicate issue.<sup>8</sup>

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<sup>1</sup> Reference is made to Regulation n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation n° 1347/2000, in OJ L 338, 23 December 2003, p. 1. The Regulation entered into force on 1 March 2005, though in the case of the newly acceding States of Bulgaria and Romania it has been in force only since their accession on 1 January 2007.

<sup>2</sup> Decision 5 October 2010, C-400/01 PPU, *J.M.B c. L.E.*, para. 36.

<sup>3</sup> See art. 2 for autonomous definitions of rights of custody, rights of access and wrongful removal or retention.

<sup>4</sup> Therefore, the child unlawfully retained or abducted shall be returned to the State of origin (i.e. the State of habitual residence) and the return may be refused: (i) under article 12 when a period of one year since the abduction is expired and the child is now settled in its new environment; (ii) under article 13 when a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation or when in case of objections from the child to be returned, when he has attained an age and degree of maturity at which it is appropriate to take account of its views; (iii) under article 20 when such return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedom. This exception should not tend to arise amongst Member States, which given also the achievement of the Lisbon Treaty share a solid common block of values. See E. Pataut, Article 11, in U. Magnus – P. Mankowski, (eds) *Brussels II bis Regulation*, 2012, Munich, p127, at 141.

<sup>5</sup> Habitual residence is considered in this field a better jurisdictional title than citizenship (the classical one used in the family context), since it better satisfies the need of proximity as well as the child’s best interest). See recital number 12.

<sup>6</sup> It is to be considered that, statistical data do not show poor functioning of the Hague Convention (see N. Lowe, S. Armstrong, A. Mathias, *A Statistical Analysis of Applications made in 1999 under the Hague Convention on the Civil Aspects of International Child Abduction, Preliminary document n° 3 for the attention of the Special Commission of March 2001 on the Practical Operation of the Hague Convention of 25 October 1980* (Revised November 2001), Hague Conference of Private International Law). Many Member States were quite happy with the previous regime (Austria, Finland, Germany, Ireland, Netherlands, Sweden and UK) whilst other Member States were in favour of the EU’s intervention in this field (Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain).

<sup>7</sup> See E. Pataut, Article 11, in U. Magnus – P. Mankowski, (eds) *Brussels II bis Regulation*, 2012, Munich, 139.

<sup>8</sup> See N. Lowe, *EU family law and children’s rights: a better alternative to the Hague Conference or the Council of Europe?* Presentation for the Children and the European Union: Legal, Political and Research Prospective Conference, Liverpool, 21 April 2009, p4.

In compliance with article 24 of the Charter of Fundamental Rights of the EU, article 11.2 states that when applying the return remedy (under articles 12 and 13) of the Hague Convention, ‘it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity’.

In the *Aguirre Zarraga* case<sup>9</sup>, the Court made it clear that it is not a requirement for the judges of the State of origin to obtain the views of the child in every case by means of a hearing, and therefore national judges retain a degree of discretion. However, where they decide to hear the child, they have to take all measures which are appropriate to the arrangement of such hearing in order to ensure the effectiveness of EU law and to offer the child a real and genuine opportunity to express his or her views.<sup>10</sup>

Scholars are critical of this rule: given the summary nature of the return proceedings, in which there is a presumption of return save in exceptional circumstances, the hearing of the child might create some problems in the normally inflexible application of the return mechanism<sup>11</sup>.

It is however difficult to coordinate both article 11.2 and article 11.5 with the mandatory rule provided by article 11.3 stating that the case shall be decided quickly and within the (potentially unrealistic) term of six weeks. Application of the six weeks rule is frequently not feasible in child abduction cases<sup>12</sup>.

The most ‘significant’ rules are those aimed at overcoming the problems encountered in the application of the Hague Convention and, therefore, to make the return of the child to the country of habitual residence

‘the rule’ and the non-return ‘the exception’.

The first of these rules is article 11.4, asking the EU’s courts not to refuse the return of the child on the basis of grave risk under article 13(b) of the Hague Convention ‘if it is established that adequate arrangements have been made to secure the protection of the child after his or her return’. The step forward made by the Regulation is to extend the obligation to order the return of the child in cases where a return could expose the child to physical or psychological harm or put him/her in an intolerable situation. In other terms, article 11.4 is aimed at strengthening the strict interpretation of the grave risk exception under article 13 of the Hague Convention, by encouraging the adoption of practical measures and solutions.<sup>13</sup>

Article 11.6 (transmission of documents between courts) and article 11.7 (notification of documents to the parties) organize the cooperation between the national courts involved, a key aspect for the good functioning of the European child abduction regime.<sup>14</sup>

The most original and innovating rule - the real added value of the EU child abduction regime - is, of course, article 11.8, which expressly provides for the replacement of a Hague non-return order by a subsequent judgment (the so called ‘trumping order’) prescribing the return of the child made by the courts of the State where the child was habitually resident prior to the wrongful removal or retention. This subsequent judgment has the power to overcome the order denying return and, together with the certificate under article 42, has to be recognized and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.<sup>15</sup>

<sup>9</sup> *Aguirre Zarraga v. Pelz* C-491/10 PPU, 22 December 2010, para 37. See H. Muir Watt, *Enlèvement international d'enfant et ordre de retour: compétence et vie privée*, in *Revue critique de droit international privé*, 2012, p.172-189; V. Mitsilegas, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, in *Yearbook of European Law*, 31 (2012), p. 319-392, at 349.

<sup>10</sup> See para 66 of the decision in *Aguirre Zarraga v. Pelz*. The Court also stated that, to this purpose, national judges shall use all means available under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided by Regulation No 1206/2001 (as expressly indicated by recital number 20 of Brussels II-bis Regulation). Article 10 of Regulation No1206/2001 expressly envisages the use of video conferencing and teleconferencing (i.e. communications technology): these means, as pointed out by the Commission in the Practice Guide for the application of the new Brussels II regulation (Updated version 1 June 2005, p. 33), could be particularly useful for taking evidence in abduction cases.

<sup>11</sup> See N. Lowe, *The current experiences and difficulties of applying Brussels II revised*, in *IFL*, 2007, at p. 197 expressly states: Given the summary nature of such proceedings, in which there is a presumption of return save in exceptional circumstances, beyond establishing perhaps wholesale opposition of the child, what is the purpose of hearing the child?; for a general criticism of art. 11.2 of the Regulation No 2201/2003 see R. Lamont, *The EU: protecting children's rights in child abduction*, in *IFL*, 2008, pp. 110-112.

<sup>12</sup> See K. Trimmings, *Child Abduction within the European Union*, Oxford and Portland, Oregon, 2013, p. 95.

<sup>13</sup> These measures are frequently adopted in common law systems. For one example of such measures, under the 1980 Hague Convention, see report on the Convention itself at p. 6-7 and Justice Carl Eberhard, *International Communications between judges – Direct international communications between judges*, in *Judges' Newsletter*, Vol. IV/Summer 2002, pp. 16-17.

<sup>14</sup> More precisely, article 11.6 imposes an obligation upon the courts rejecting the return (immediately, and, however, within a month) to send a copy of their decision, together with the relevant documents, to the judge of the former habitual residence of the minor, whilst article 11.7 requires the central authority or the national court to notify the decision to the parties involved and to invite them to make submissions to the court within three months of the date of notification. In case no submissions have been received, the court shall close the case.

<sup>15</sup> It is worth saying that, as expressly envisaged in the *Practical Guide* (in its June 2005 updated version), if a child were in the meantime moved to another Member State, the decision (as evidenced by the certificate) would be enforceable there as well, without any need to commence any *exequatur* procedure for the child's return from that third country.

Thanks to article 11.8 the parallel proceedings that the parents of a minor ‘internationally disputed’ - i.e. the one started in the State of origin and the other started in the State of destination - are coordinated and ‘channeled’ into a single one, within which the national courts are under a specific duty to cooperate, knowing in advance that (i) the return decision of the courts of the State of habitual residence will at the end prevail and that (ii) the non-return decision (made by the courts of the State of refuge) may also be confirmed by the courts of the State of habitual residence, which at the same time will definitively lose their jurisdictional competence over the child.

In other words, the ‘final say’ on the return of the child rests with the courts of the State of habitual residence. And the priority conferred on return judgments by article 11.8 is further supported by art. 42,<sup>16</sup> providing the ‘fast track’ procedure for the recognition and enforcement of these judgments: after having fulfilled their duty to hear the child and the parties, and after having considered the reasons underlying the non-return order under article 13 of the Hague Convention, the courts of the State of origin are obliged to certify their return decision in compliance with article 42 itself and, as a consequence, the decision will be immediately recognized and enforced in another Member State without any opportunity to oppose its recognition. The certificate replaces the *exequatur* procedure and each Member State has to treat a ‘certified’ return made in another Member State like a domestic title.<sup>17</sup>

This is a major change from the Hague Convention, which definitively shifts the balance, originally reached between courts of the State of origin and courts of the State of refuge, in favour of the former.

## **2. The trumping order in practice: when mutual trust works and when it does not**

Recently two cases have been decided by Italian judges applying article 11.8 in opposite ways, with opposite effects, showing how - at this stage of the European integration - the solution of EU child abduction cases really depends on mutual trust.

More precisely, the first decision is the one rendered by the Italian Supreme Court (Corte di Cassazione, 14 July 2010, number 16549)<sup>18</sup> in a case of child abduction

where the Spanish mother of a child, born and resident in Italy (near to Palermo, in Sicily), suddenly decided to go back to her country of origin (Cordoba) with her daughter (one and half years old).

The Italian father started two sets of proceedings: one before the Italian Youth Court (Tribunale per i minorenni) in Palermo (Sicily) asking for the sole custody of the child and one before the Spanish judicial authority asking for the return of the child, under article 12 of the 1980 Hague Convention.

The Italian Youth Court, once it had verified its jurisdiction on the case, issued a provisional order (without hearing the mother) stating that the child had to stay with the father.

The Spanish judicial authority, on the other hand, rejected the father’s request for return on the basis of the grave risk exception under article 13(b) of the Hague Convention and, in compliance with article 11.6 of the Brussels II-*bis* Regulation, sent the documents of the proceeding to the Italian Youth Court for the final say on the return of the minor. Within the terms of article 11.7, the father started proceedings before the Italian judicial authority to obtain the trumping order for return under article 11.8.

At this stage the Italian judges, relying on the evidence collected by their Spanish colleagues and on the conclusions reached by them, decided not to pronounce the trumping order. More precisely, the Youth Court not only rejected the father’s application, but also revoked the previous provisional measure (giving the sole custody to the father) owing to its lack of jurisdiction on the matter of custody following the denial of return. Against this decision, the father appealed before the Italian Supreme Court, which confirmed the decision held by the judges of first instance.

The second case is the well-known *Kampanella* case, and ended with the judgment of the European Court of Human Rights of the 12 July 2011.<sup>19</sup> It concerned a child, Marko (eight years old) born from the relationship between a Latvian woman and an Italian man. The couple, who separated when Marko was one year old, had frequent disagreements which made shared custody not feasible. The father started proceedings in order to have joint or sole custody of the child, being afraid of a possible child abduction by the mother, and the mother started proceedings in order to be authorized to obtain

<sup>16</sup> See U. Magnus, Article 42, in U. Magnus – P. Mankowski, (eds) *Brussels II-bis Regulation*, 2012, Munich, p. 361, at 362 emphasises that fast track enforcement is extended also to judgments which are provisionally enforceable even where the law of the judgment State does not provide for such a possibility.

<sup>17</sup> See U. Magnus, Article 42, at 363 and at 365 where it is emphasised that article 42 does not apply to authentic documents and agreements, since article 11.8 requires a judgment.

<sup>18</sup> The decision is published in *Rivista di diritto internazionale privato e processuale*, 2011, p. 443.

<sup>19</sup> *Sneersone Kampanella v. Italy*, Application n° 14737/09.



issue of a passport for Marko. The father's request for sole custody was rejected, whilst the mother was authorized to obtain a passport for the child.

Although the father had to make child support payments, he failed to do so and at the same time the only financial support for Marko and his mother, which was the money sent by Marko's grandmother from Latvia, was no longer available. This was the main reason why in April 2006 Marko's mother went to Latvia with her son and established their residence there.

Following the application of the father, the Italian central authority issued a request for Marko to be returned to Italy and civil proceedings were started before the Latvian judges. Technical opinions were asked both of the Orphans' court and of a psychologist: both concluded that the child's return to Italy would have been incompatible with the child's best interests and moreover the psychologist pointed out that severance of contact between Marko and his mother was not to be allowed, in that it could negatively affect the child's development and could even create neurotic problems and illness.

Although the Italian central authority confirmed that if any of the circumstances mentioned in article 13(b) of the Hague Convention applied, Italy would have been able to activate a wide-ranging child protection network which could ensure that Marko and his father received psychological help, the child's return to Italy was refused, specifically because of non-fulfillment of article 11.4 of the Regulation (based on one side on the absence of financial resources from the mother, which made it impossible for her to follow Marko to Italy, and on the other on the fact that the guarantees provided for by Italy were not adequate in the specific case).

The father then started proceedings before the Italian Youth Court in Rome, asking for the return of the child. With specific regard to the guarantees under article 11.4, it was noted that the father had proposed that Marko should stay with him, while his mother would have been authorized to use a house for a period of fifteen days during the first year and subsequently for one summer month every other year (the mother however covering her own travel expenses and half of the rent of the house) during the time that Marko stayed there with her, while the father would have retained the right to visit him on a daily basis. Furthermore, Marko would have been enrolled in a kindergarten which he had attended before his removal from Italy; he would also have attended a swimming pool he had used before his departure from Italy and would also have received adequate psychological help and attended Russian language classes for Russian children.

Considering the arrangements proposed to be

adequate under article 11.4, the Youth Court in Rome then issued the trumping order under article 11.8 of the Regulation, deciding for the immediate return of the child to Italy. The issue of hearing the child was expressly considered by the Youth Court which stated that it was not appropriate to question him, taking into account his young age and level of maturity.

Some conclusions may be drawn by the two decisions mentioned.

In the first case, mutual trust worked: the Italian Supreme Court relied on the evaluation of the facts made by the Spanish judicial authority and on its non-return order and did not pronounce the trumping order under article 11.8 of the Regulation. A very good example (unique up to now) of mutual trust in such a delicate field.

In the other case, mutual trust did not work properly: the Latvian judges issued a non-return order on the basis of the grave risk exception, but the Italian courts – relying on the measures proposed under article 11.4 in order to minimize the potential 'grave risk' – issued the trumping order.

The trumping order was of course created for the precise purpose of solving this sort of EU child abduction case, where some lack of mutual trust between the judges and the countries involved existed.

When mutual trust works, the courts of the State of refuge take jurisdiction over the minor; when mutual trust does not work, it is 'imposed': the courts of the State of habitual residence make use of the 'cut and dried' procedural device of the trumping order, in full compliance with the Brussels II-*bis* Regulation, and the courts of the State of refuge have to enforce the trumping order and return the child, relying on the evaluation of the facts and of the appropriate measures to adopt made by the judge of habitual residence, who is the closest to the child and therefore in the best position to decide.

So far, the *Kampanella* case was therefore an 'ordinary' EU child abduction case. However, the question was whether this use of the trumping order gave rise to an infringement of fundamental rights of the persons involved and, in particular, of the child.

The further involvement of the EU Commission and of the European Court of Human Rights (the 'ECtHR') on the issue regarding the respect of human rights made this case a very important and, at the same, critical one.

### **3. The trumping order and the respect of human rights' test**

After the trumping order was issued, the Republic of Latvia brought an infringement procedure against Italy before the Commission. In its reasoned opinion, the

Commission stated that it could only review matters of procedure, not of substance, and that it had to respect the decision of the Italian judicial authorities in the exercise of their discretionary power. In other words, the Commission confirmed that article 11.8 provided a ‘cut and dried’ procedural device, leaving little space for merits and this little space is however left to the discretion of national judicial authorities, which cannot be questioned by the EU institutions.

The case then arrived before the ECtHR, where the mother and the child (represented by the mother herself) complained that the trumping order was contrary to the best interest of the child as well as in violation of international and Latvian law.

The ECtHR was thus for the first time called upon to consider whether the functioning of the EU abduction regime, and of the trumping order in particular, might give rise to a breach of the fundamental rights protected by the European Convention on Human Rights.

It must be noted that the *Kampanella* case was brought before the ECtHR after the contested decision in *Neulinger* where the Court stated that in Hague cases there should be an in-depth examination of the entire family situation and that the full examination; should take into account a number of factors and ‘*in particular of a factual, emotional, psychological, material and medical nature and make a balanced and reasonable assessment of the respective interests of each person*’.<sup>20</sup>

As regards the *Kampanella* case, the ECtHR did not hesitate to recall the principles stated in *Neulinger* and to apply them also to EU child abduction cases. The Court then considered the compatibility of the return order with article 8 ECHR.

There is no doubt that the return order interfered with family life, as confirmed by the report made by the psychologist, that is in accordance with the law, and it pursued a legitimate aim (the father’s right to respect for family life as well as the safeguarding of the best interest of the child).

Problems arose when determining whether such an order, and such interference, was ‘*necessary in a democratic society*’ and therefore whether a fair and proportionate balance between the competing interests at stake – those of the child, of the two parents and of public order – was struck, within the margin of appreciation afforded to States in such matters (bearing in mind that the interest of the child is, in these cases, the primary consideration).

The ECtHR then considered whether the Italian courts – in applying the rules of the Convention and of the Regulation – secured the guarantees set forth in article 8 ECHR, particularly taking into account the child’s best interests.

On the one hand, the Court emphasized that it is essential to keep in mind that the Hague Convention is an instrument of a ‘procedural nature’ and not a human rights treaty protecting individuals on an objective basis,<sup>21</sup> but, on the other, pointed out that the reasoning contained in the Italian return decisions was ‘rather scant’ and, in particular, failed to address the risks identified by the Latvian authorities and in the psychologists’ reports.

Not persuaded that the Italian courts sufficiently appreciated the seriousness of the difficulties the child was likely to encounter in returning to Italy, the ECtHR concluded that the interference with family life was not necessary in a democratic society and therefore that it amounted to a violation of article 8 ECHR.

#### **4. Is some ‘compression’ of human rights acceptable under the EU child abduction regime?**

The EU child abduction regime is grounded on the mutual trust principle, on the idea that the legal systems of the Member States share the same values and are therefore able to provide the same level of protection for children all over the EU.

Starting from the mutual trust principle, the EU has been able to strengthen the Hague return mechanism through the immediately enforceable trumping order, to avoid an excessive recourse to the grave risk exception through article 11.4 and to give the judge of habitual residence major control over the abducted child.

In this way, the principle of mutual trust has been transformed into an imperative: the judges of the State of refuge have of course to point out the existing reasons for not returning the abducted child, but in the end they are bound to rely on the appreciation of the case made by the judges of the State of habitual residence and to respect their final say on the return.

It is of course possible and desirable that the final say of the judges of the State of habitual residence are ultimately consistent with the decision - to return or not to return the abducted child - made by the judges of the State of refuge, as happened in the case decided by the Italian Supreme Court.

<sup>20</sup> For a criticism of *Neulinger*, see L. Silberman, ‘The Hague Convention on Child Abduction and Unilateral Relocation by Custodial Parents: Has the European Court of Human Rights Overstepped Its bounds?’ (2013) 4 *Family Law and Practice* 2, p. 26; L. Walker, ‘The Impact of the Hague Abduction Convention on the Rights of the Family In the Case-law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of *Neulinger*’, (2010) *JPIL*, pp. 649-682(34); L. Walker & P. Beaumont, ‘Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice’ (2011) *JPIL*, pp. 231-249(19).

<sup>21</sup> See point 92 of the *Kampanella* decision, as well as the decision in *Neulinger* and *Shuruk*, at point 145.

However, at least at this stage of European integration, case law on article 11.8 often presents a different scenario (much more similar to the one in the *Kampanella* case): in the majority of EU abduction cases, the decision of the judges of the State of refuge not to return the child is trumped by the one of the judges of the State of habitual residence and the judges of the State of refuge try to find all possible ways not to enforce the trumping order.

The human rights issue usually takes place at this stage, when it is of course possible to complain about a 'compression' of fundamental rights (such as the right to family life, the right of the child to be heard, the right to a fair trial).

Thinking about the decision in the *Kampanella* case, the Italian trumping order issued without an in depth examination and not providing sufficient reasoning on the grave risk exception, has been considered by the ECtHR in breach of the right to family life.

However, it is here submitted that a 'compression' of fundamental rights is inherent in the EU child abduction procedure and is inevitable in order to reach the immediate goal of restoring the *status quo ante* the abduction and the more general goal to deter abduction within the European judicial area. Therefore, it is submitted that the ECtHR's decision in the *Kampanella* case is too severe and is also inconsistent with the EU child abduction procedure for the following reasons.

Firstly, the principle of mutual trust itself leaves very little room for any check on the compliance of a legal system with the respect of fundamental human rights. In this regard, it should be considered that if this was true at time of the entry into force of Brussels II-bis Regulation, any room for such a check is *a fortiori* smaller today, when all Member States are bound to respect the European Charter of Fundamental Rights, which has been given by the Treaty of Lisbon the same 'primary' value of the fundamental treaties of the EU.<sup>22</sup>

Secondly, the EU child abduction procedure is of a summary nature: within the six weeks' term, the judges concerned are asked to check whether extraordinary reasons exist in the interest of the child in order to overcome the presumption that the return of the abducted child in his/her country of habitual residence is in his/her best interest.

The check has of course to be as punctual as

possible, but still very quick and, however, focused on the idea of returning the child any time this is possible, even when grave risks of harm exist but may be ameliorated by specific measures (article 11.4).

Thirdly, there is a proper place where the check on the respect of fundamental rights may take place: whilst the procedure for the return of the child, being summary in nature, is aimed at restoring the situation as it was before the abduction, it is within the following custody procedure that all relevant controls should properly be activated, including by granting the child the right to be heard in the process. It is therefore at this stage that an investigation into fundamental rights should be made.

Furthermore, the deterrent effect of the EU return mechanism should not underestimated: the potential abducting parent - knowing that, even when exceptional circumstances are at stake, the judges of the State of origin may order the return of the child within a short time - will not be encouraged to take away the child, rather he/she will be encouraged to try to solve the problems within a mediation procedure or to search for a solution in the State of habitual residence of the child.

The whole EU child abduction regime may, of course, work and get better,<sup>23</sup> however it should be considered as a procedural device aimed at restoring the *status quo ante* the abduction and at deterring further abductions within the European judicial space.

Accordingly, since the application of the *Neulinger* principles to 1980 Hague Convention cases has been already criticized and considered inadequate<sup>24</sup>, *a fortiori* the decision in the *Kampanella* case of extending *Neulinger* principles to all abduction cases and therefore also to cases falling within the EU child abduction regime, seems to be too severe and capable of prejudicing the good functioning of the 'cut and dried' trumping order.

## 5. Recent developments: the Grand Chamber in *X v. Latvia*

In one of its most recent decision the ECtHR has mitigated and clarified its approach *vis à vis* child abduction procedure. Reference is made to the decision of the Grand Chamber in the Hague case *X v. Latvia*.<sup>25</sup>

The facts of the case are similar to those in *Kampanella*: the mother of a three-year-old child moved from Australia to Latvia (her country of origin) without the consent of the father, who then made an

<sup>22</sup> In this view and after the entry into force of the Lisbon Treaty, article 20 of the Hague Convention – providing for the refusal of return when it would not be permitted by the fundamental principles of the requested State – should not be applied any more within the EU.

<sup>23</sup> A stronger connection and cooperation between EU judges would help as well as a proper use of the tools provided by the Regulation (as, for example, the measures to exclude the grave risk exception under article 11.4, which are often considered 'adequate' by the judge of habitual residence of the child and inadequate by the one of refuge). Furthermore, the rule provided by article 11.3 should be amended: return procedures have been speeded up by the entrance into force of Brussels II-bis Regulation, but they are still far from the six weeks term.

<sup>24</sup> See n 20.

<sup>25</sup> Application n° 27853/09, decision of 26 November 2013.

application for return. The mother's principal defence not to return the child to Australia was the grave risk of harm exception: she argued that she had always been the sole guardian – in law and in practice – of the daughter, who was also well established in Latvia, Latvian being her sole mother tongue and, as a consequence, as also confirmed by a psychological report, the return to Australia would have been dangerous for the child. However, in the end, the Latvian courts ordered the return of the child to Australia with the father.

The mother lodged an application before the ECtHR, alleging that the Latvian courts' order to return the child to Australia was in breach of her right to family life under article 8 of the ECHR. The third section of the ECtHR found that there had been a violation of article 8<sup>26</sup>. The Grand Chamber, to which the case had been referred, took a decision by a (very strict) majority of 9 judges (out of 17), and confirmed the previous decision, declaring that there had been a violation of art. 8.

The decision is a very important one for two reasons. First of all, in clarifying the scope of the *Neulinger* decision, the Grand Chamber has mitigated the impact of that leading case. More precisely, the majority of the judges took the view that the *Neulinger* test should not be considered a 'principle' for the application of the Hague Convention by domestic courts and that in order to provide a harmonious interpretation of the ECHR and of the Hague Convention two conditions should be observed: (a) the factors capable of constituting an exception to the child's immediate return on application of article 12, 13 and 20 of the 1980 Hague Convention, must genuinely be taken into account by the requested court (the decision on this point must be sufficiently reasoned); (b) these factors must be evaluated in the light of article 8 ECHR.<sup>27</sup> This means that national

courts should pay due consideration to the allegations of the parties with reference to the exceptions to the return, demonstrated by a reasoning which should not be automatic and stereotyped.<sup>28</sup>

With specific reference to the existing problem of reconciling the duty of providing comprehensive reasoning with the duty to act expeditiously (which becomes an imperative to respect the six weeks' term, under article 11.3 of the Brussels II-*bis* Regulation), the Grand Chamber also pointed out that the existence of a short time-limit must not exonerate national judges from undertaking effective examination of allegations made by a party on the basis of one of the exceptions for return.<sup>29</sup>

Secondly, the (very significant) minority of the judges (8 out of 17) agreeing with the mitigation of the *Neulinger* principle went even further, stating that that the Latvian judges in the return order had sufficiently complied with the procedural requirements in providing sufficient reasoning on the allegations made by the mother and therefore no violation of article 8 ECHR arose in that case.

Despite the fact that *X v. Latvia* is a Hague case, the conclusions reached by the ECtHR have to apply also to cases falling within the Brussels II-*bis*' scope of application: if the mitigation of the impact of the *Neulinger* decision is correct for a Hague case, it has to be *a fortiori* correct for an EU child abduction case, where a temporary compression of fundamental rights should be accepted, given (i) the mutual trust among EU countries, as well as (ii) the inherence of such a compression to the summary character of the EU return proceeding and (iii) the possibility of carrying out an in depth evaluation of all factors, in the respect of fundamental rights, during the following custody proceedings. This, it is here submitted, should be the correct approach to be followed in the interpretation of the 'cut and dried' trumping order.

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<sup>26</sup> See Application n° 27853/09, decision of 13 December 2011.

<sup>27</sup> See points 105-18 of the decision.

<sup>28</sup> See point 107.

<sup>29</sup> See point 118.

# Modernisation of Family Justice

## Background Note to the Forthcoming Reports of the Children and Vulnerable Witnesses' Working Group. Children as witnesses in criminal proceedings: should there be a minimum age for children appearing court?

Nicole Tytler\*

### Introduction

This note addresses some of the issues raised by allowing children to appear as witnesses in criminal proceedings under English law and identifies some of the problems that are now likely to be addressed by the new Working Group, headed by Hayden, J and Russell, J to look at issues in taking evidence from Children and Vulnerable Witnesses (including alleged victims) in family proceedings. Across the years, not only judges and academic writers in the legal field, but also philosophers and psychologists, have questioned the competence of children in giving testimony, especially very young children. The Working Group set up to consider Children and Vulnerable Witnesses will be considering, *inter alia*, evidence in public law (care) cases and in private law (domestic abuse) cases.

### Scope of the potential problems: is it simply age?

Influential philosophical points of view, academic commentaries and judges' *dicta* all shed light on the perception of the ability and competence of children to give evidence: these observations can usefully be compared with recent academic commentaries and judicial decisions where children have been allowed to give evidence in court despite their age. Early cases and academic commentaries considered that very young children should *not* be allowed to give evidence because of their age: it seems that this position has now changed and that age is no longer a bar to giving evidence and appearing in court, at least in criminal

cases. There is now some specific statutory provision, and academic and judicial positions have been updated in support. It is, accordingly, an opportune time to summarise the current position of this area of law, and to make a comparison with the law in, for example, Canada for suggestions of possible reform.

There have been uncertainties and inconsistencies in this area of law, which have resulted in competing judicial decisions over a period of years. The key objective of this analysis is to demonstrate the importance of child witnesses in the judicial system and to consider how children should best be allowed to give evidence and to appear in court.

### Historical background

Historically, witnesses had to take an oath: this was a solemn promise, sworn on the Bible to tell the truth; a deliberate lie was punishable by both divine and secular sanctions. Therefore it was essential that a person, before taking the oath, understood its nature and consequences.<sup>1</sup> It was generally believed that children lack this understanding because of their age (especially children below the age of seven who were considered more vulnerable);<sup>2</sup> therefore, they were more likely to be prevented from giving evidence. This underestimation of children's capacities is reflected in historical texts and statements of the law. For instance, Kant suggested that a child must reach the age of ten before 'reason appears'<sup>3</sup>, and Aristotle claimed that children's 'deliberate faculty is immature'.<sup>4</sup>

Formerly, the 'well recognised and long-standing

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<sup>1</sup> I. Dennis, *The Law of Evidence* (4th edn, Sweet and Maxwell, Cornwall 2010) 557; G. Durston, *Evidence Text & Materials* (2nd edn, Oxford University Press, New York 2011) 357; R. Glover, P. Murphy, *Murphy on Evidence* (12th edn, Oxford University Press, New York 2011) 553.

<sup>2</sup> J. McEwan, 'Child evidence: more proposals for reform' (1988) *Crim. L.R.* 813, 818; W. Cassel, D. Bjorklund, 'Developmental patterns of eyewitness responses to repeated and increasingly suggestive questions' (1995) *Law and Human Behavior*, 19, 507-531; Ben-Porath Y, Hall G.G.N., Hirschman R, Graham J.R, Zaragoza M, (eds), *Memory and Testimony in the Child Witness* (Vol. 1, Sage Publications, Thousand Oaks 1995) 241.

<sup>3</sup> Kant, cited by B. Franklin, *The New Handbook of Children's Rights: Comparative Policy and Practice* (1st edn, Routledge Chapman & Hall, London 2001) 22.

<sup>4</sup> Aristotle, cited by B. Franklin, *The New Handbook of Children's Rights: Comparative Policy and Practice* (1st edn, Routledge Chapman & Hall, London 2001) 22.

authority<sup>5</sup> was Lord Goddard CJ in *R v Wallwork*<sup>6</sup> where the judge criticised the calling of a five-year-old child who had been sexually abused by her father: the child said nothing in court. Lord Goddard CJ asserted: 'The court deprecates the calling of a child of this age as a witness... The jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could'.<sup>7</sup> The words 'deprecates' and 'ridiculous' clearly indicate the court's reluctance to allow young children to appear in court, on the presumption that children could not be regarded as being as reliable as adults. The judge's dicta demonstrate how age was an essential factor in determining witnesses' competence at that time. Subsequently, in *R v Wright*, Ognall J reaffirmed the validity of Lord Goddard CJ's proposition.<sup>8</sup> In the latter case, the complainant was six years old when she gave evidence of alleged indecent assault by the appellants.

Even in the 1990s the unreliability of children's evidence in court was asserted by psychologists, who pointed out the danger of trusting what children said. Burt emphasised that 'children are dangerously vulnerable to coaching and erroneous leading questions'.<sup>9</sup> Davies claimed four 'problems' of child witnesses: they are inaccurate, liable to fantasy, prone to suggestion, they lie.<sup>10</sup> Furthermore, Heydon focused on the fact that children may invent some situations; he also criticised children's behaviour by pointing out that 'sometimes [they] behave in a way evil beyond their years'.<sup>11</sup> These statements reveal a strong negative prejudice against child witnesses, which is apparently later rejected by others.

Only in recent years has there been a change in the general perception of children appearing as witnesses in criminal proceedings.<sup>12</sup> It was recognised that the exclusion of children's evidence caused significant difficulties in the administration of criminal justice. In fact, it often happens that children may be the only witnesses, especially in offences of sexual abuse and

domestic violence against themselves.<sup>13</sup> Court procedures and legal practices have therefore been improved to facilitate the testimony of a child witness (the following section analyses this point further). Subsequent cases show a more flexible and open approach to this topic, which is reflected also in later judges' decisions and a number of academic commentaries.

## Methods of interview for children

The enactment of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 created a sea change in the criminal courts' approach to children, clarifying the competence rules of witnesses in criminal cases.

Before the enactment of the YJCEA 1999, Bridge LJ in *R v Hayes* made a thoughtful statement concerning the competence of children, showing that he had already moved towards a more open-minded position: 'the all-important matter is to see and hear the witnesses, and only one who has seen and heard, particularly child witnesses, can have a basis for a rational conclusion as to whether their evidence is reliable or not'.<sup>14</sup>

The YJCEA 1999 ss 23-27 provide special measures for witnesses when giving evidence: s.23 'screening witness from accused' (as amended by s104 of the Coroners and Justice Act (CJA) 2009), s24 'evidence by live link' (as amended by s102 CJA 2009), s25 'evidence given in private', s26 'removal of wigs and gowns', s27 'video recorded evidence in chief' (as amended by s108 CJA 2009), s29 'examination of witness through intermediary', and s30 'aids to communication'. Since 1989 in English courts children in criminal proceedings have had the possibility of giving evidence by live television link or by means of a videotaped interview.<sup>15</sup> However, these methods were criticised as depriving the accused 'of the benefits of seeing and hearing the witnesses give evidence live in court' (analysed in more detail below).<sup>16</sup>

Assessment of witnesses' competence is provided

<sup>5</sup> *R v Wright* (1990) 90 Cr. App. R. 91, 94 (Ognall J).

<sup>6</sup> (1958) 42 Cr. App. R. 153.

<sup>7</sup> *Ibid.* 160.

<sup>8</sup> (1990) 90 Cr. App. R. 91, 94.

<sup>9</sup> H.E. Burt, *Applied Psychology* (1st edn, Prentice-Hall Inc, New York 1948).

<sup>10</sup> Flin, R.H., Stevenson Y, Davies G.M, 'Children's knowledge of court proceedings' (1989) *British Journal of Psychology*, 80, 285-297.

<sup>11</sup> J.D. Heydon, *Evidence: Cases and Materials* (2nd edn, Butterworth & Co Publisher Ltd, Belfast 1984) 84.

<sup>12</sup> *Re Z* [1990] 2 Q.B. 355, 361 (Lord Lane CJ); *R v Barker* [2010] EWCA Crim 4 [36] (Lady Justice Hallett, Mrs Justice Macur); A. Brammer, P. Cooper, 'Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems' (2011) *Crim. L.R.* 925; J.R. Spencer, 'Child witnesses and cross-examination at trial: must it continue?' (2011) *Arch. Rev.* 7

<sup>13</sup> J. McEwan, 'Child evidence: more proposals for reform' (1988) *Crim. L.R.* 813, 815; J. R. Spencer, 'Children's evidence: the Barker case, and the case for Pigo' (2010) *Arch. Rev.* 5, 7; I. Dennis, *The Law of Evidence* (4th edn, Sweet and Maxwell, Cornwall 2010) 557.

<sup>14</sup> [1977] 1 W.L.R. 234, 238.

<sup>15</sup> Criminal Justice Act 1988 s 32.

<sup>16</sup> D. J. Birch, D. Tausz, 'Evidence: evidence via television link and video recording of interview with a child' (2001) *Crim. L.R.* 473, 476.

for by s 53(3):

‘A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—

- (a) understand questions put to him as a witness, and
- (b) give answers to them which can be understood.’<sup>17</sup>

This applies equally to both adults and children, but it was enacted in response to modern psychological research which showed that little children are capable of giving truthful evidence.<sup>17</sup>

In *R v Powell* (2006)<sup>18</sup> the evidence in chief of a child under four years, concerning indecent assault, was given by way of video recording (admitted in evidence under YJCEA 1999 s27(1)), but on cross examination it appeared that the child was incompetent as a witness because of a lack of ability to answer questions put to her). Scott Baker J found in that case that YJCEA 1999 s53(3) makes clear that the age of a witness does not determine competence to give evidence,<sup>19</sup> also emphasised in 2009 by Richards LJ and Forbes J.<sup>20</sup> Other judges have reiterated that the young age of the child ‘was not in itself necessarily an insurmountable obstacle for the prosecution’.<sup>21</sup> It was held, *inter alia*, that the judge should have reconsidered the question of whether the complainant was a competent witness at the conclusion of the complainant’s evidence.<sup>22</sup> *R v Powell* is thus an effective example of the objective application of the law under the YJCEA 1999, s54 of which clarifies that the burden of proving the competence of a witness, on the balance of probabilities, is on the party calling the witness.

In *G v DPP* (1998) it was held that expert evidence was not appropriate in deciding the question of the competence of a child witness.<sup>23</sup> Now YJCEA s54

specifies that expert evidence may be called for this purpose. *R v Brasier*,<sup>24</sup> *R v Hayes*,<sup>25</sup> *R v Campbell*<sup>26</sup> raised the issue of child witnesses being sworn. Now YJCEA s55 specifies that a witness under fourteen years may not be sworn.

In addition, YJCEA 1999 s16 concerns ‘witnesses eligible for assistance on grounds of age or incapacity’: witnesses under seventeen are eligible under this section (CJA 2009 s98 has raised the age to eighteen) and s17 concerns ‘witnesses eligible for assistance on grounds of fear or distress about testifying’,<sup>27</sup> and states, *inter alia*, that the court must take into account the age of the witness.

These points demonstrate that the age of the witness was deliberately included in some provisions, with the aim of placing child witnesses in a fairer position under the law than in the past.

The primary purpose of an interview with a child witness is to make a deposition which is rich in information and detail. Hudson, Fivush, Frizon and Tully, in their psychology texts, state that younger children have not yet learned the conventional framework for recounting the past, and therefore depend on the adult’s questions to guide their recall.<sup>28</sup> Nevertheless, Zaragoza *et al* emphasise that the types of information that children recall do not change over time, nor does the total amount of information recalled.<sup>29</sup> This is a substantial change from the former belief that children’s memories are not reliable.

All these analyses were incorporated in the report ‘Interviewing Child Witnesses under the Memorandum of Good Practice: A research review’.<sup>30</sup> This document outlined core principles to be followed by police officers and social workers when conducting interviews. Now the Memorandum has been replaced by: ‘Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and

<sup>17</sup> J.R. Spencer, ‘Children’s evidence: the Barker case, and the case for Pigo’ (2010) Arch. Rev. 5, 7.

<sup>18</sup> [2006] 1 Cr App R 31.

<sup>19</sup> Ibid. [18].

<sup>20</sup> *R v Malicki* [2009] EWCA Crim 365 [12]; *R v MacPherson* [2006] 1 Cr. App. R. 30 [18].

<sup>21</sup> [2006] 1 Cr App R 31 [42].

<sup>22</sup> *R v Powell* [2006] 1 Cr App R 31 [34].

<sup>23</sup> [1998] QB 919, 925 (Phillips LJ).

<sup>24</sup> (1779) 1 Leach 199.

<sup>25</sup> [1977] 1 W.L.R. 234.

<sup>26</sup> (1983) 147 J.P. 392.

<sup>27</sup> The Child and Vulnerable Witnesses Working Group is also going to be looking at witnesses who might be vulnerable in public law family cases. J. Hudson, R. Fivush, *Knowing and Remembering in Young Children*, (1st edn, Cambridge University Press, Cambridge 1990) 243; K. Frizon, B. Tully, *Resource Manual of Specialised Investigative Interviewing: Obtaining Testimony from Children and Psychologically Vulnerable Adults Who are Suspected of Being Perpetrators or Victims of Crime or Abuse* (1st edn, Psychologist at Law Group, London 1996) 232.

<sup>28</sup> M. S. Zaragoza, J. R. Graham, G. C. N. Hall, R. Hirschman, Y. S Ben-Porath, *Memory and Testimony in the Child Witness* (Vol. 1, Sage, Publications, Thousand Oaks, 1995) 178.

<sup>30</sup> G. M. Davies, H. L. Westcott, ‘Interviewing Child Witnesses under the Memorandum of Good Practice: A research review’ (Police Research Series, Paper 115, Policing and Reducing Crime Unit 1999, London 1999).

<<http://lx.iriss.org.uk/sites/default/files/resources/040.%20Research%20Review%20of%20the%20Memorandum%20of%20Good%20Practice.pdf>> accessed on 10 January 2013.

guidance on using special measures,<sup>31</sup> (ABE) because it also incorporates studies on the YJCEA 1999.

ABE offers guidance 'to assist those responsible for conducting video-recorded interviews with vulnerable, intimidated and significant witnesses, as well as those tasked with preparing and supporting witnesses during the criminal justice process.'<sup>32</sup> ABE encompasses child witnesses in the wider categorisation of 'intimidated and vulnerable witnesses', who have been recognised also under statute; it contains specific sections also for 'disabled children and children with learning difficulties'.<sup>33</sup> This section supports the position that there is no presumption against child witnesses appearing in court, even in these situations.

On this analysis, the words of Brammer and Cooper seem correct: 'the introduction of special measures has had some success in its objective of facilitating better evidence from vulnerable and intimidated witnesses'.<sup>34</sup>

### Child witnesses and the effect on trial

The trial process has a great effect on the child, the accused, and the trial itself. Witnesses, both children and adults, often have a significant fear of giving testimony in the physical presence of the accused; the special measures enacted in the YJCEA 1999 are designed to reduce this possible trauma, as it might affect the integrity of their testimony. Nevertheless, there is a considerable debate about the imbalance between the protection of child witnesses and the rights of the defendants. In 1995 it was stated: 'To protect child witnesses as well as innocent defendants, it is essential to determine the ways in which the use of closed-circuit technology affects children and their testimony, as well as the degree to which jurors' duties as fact finders may be inhibited or

enhanced by use of closed-circuit testimony'.<sup>35</sup>

Attention should be paid to the appellant's submission in *R v Powell* (considered above) as regards the application of YJCEA s27(1), where it was stated, *inter alia*, that the interview was poorly planned and conducted, and it was undertaken in an environment ill-suited for the purpose.<sup>36</sup> The issue was that the child had not been interviewed promptly and appropriately, and the trial took place nine months after the event.<sup>37</sup>

Spencer, in the 2010 Archbold Review, provides an insightful critique of *R v Barker*<sup>38</sup> (this case is analysed in the following paragraph).<sup>39</sup> He argues that a closer inspection of the current system would reveal that the requirement that the child has to be brought to the trial court for a live cross-examination has great disadvantages. The child has to re-live the incident, many months afterwards, in circumstances that are certain to be stressful. More significantly, counsel for the defendant in these circumstances will mostly engage in 'communication...likely to be rudimentary and give him little chance to probe the allegation'.<sup>40</sup>

Hall points out the implications that special measures do not adequately take into account the child's wishes and the views about their use.<sup>41</sup> Moreover, McEwan, in 1988, argued that usually 'defence lawyers have no pre-trial contact with the child and yet by cross-examination must seek to undermine his evidence without alienating the jury'.<sup>42</sup> Even though this statement might be correct in some situations, this does not imply that the child is in a better position than the accused.

The above examples demonstrate there are criticisms of special measures.<sup>43</sup> It is questionable whether special measures, in truth, put the accused at a greater disadvantage or fail to address child-witness issues. Legislation and all relevant court procedures are implemented to ensure that there is always a balance between the right of the defendant to have a hearing

<sup>31</sup> Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures' (March 2011). <[http://www.cps.gov.uk/publications/docs/best\\_evidence\\_in\\_criminal\\_proceedings.pdf](http://www.cps.gov.uk/publications/docs/best_evidence_in_criminal_proceedings.pdf)> accessed on 10 January 2013.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* Appendix E.

<sup>34</sup> A. Brammer, P. Cooper, 'Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems' (2011) *Crim. L.R.* 925, 929.

<sup>35</sup> M. S. Zaragoza, J. R. Graham, G. C. N. Hall, R. Hirschman, Y. S Ben-Porath, *Memory and Testimony in the Child Witness* (Vol. 1, Sage Publications, Thousand Oaks 1995) 215.

<sup>36</sup> [2006] 1 Cr App R 31 [24].

<sup>37</sup> *Ibid.* [41].

<sup>38</sup> [2010] EWCA Crim 4.

<sup>39</sup> J. R. Spencer, 'Children's evidence: the Barker case, and the case for Pigot' (2010) *Arch. Rev.* 5.

<sup>40</sup> *Ibid.* 7.

<sup>41</sup> M. Hall, 'Children giving evidence through special measures in the criminal courts: progress and problems' (2009) 21(1) *Child and Family Law Quarterly* 65.

<sup>42</sup> J. McEwan, 'Child evidence: more proposals for reform' (1988) *Crim. L.R.* 813, 814.

<sup>43</sup> *R v Malicki* [2009] EWCA Crim 365 [15]; *R v MacPherson* [2005] EWCA Crim 3605 [25] (Forbes J).



in accordance with the legislative purpose, the interests of the child witness and the interests of justice. A correct procedure will reduce or prevent the possibility of unfair and unjust outcomes for the accused, without favouring one party or the other.

On the other hand, there are also cases where ‘the child fails to communicate at all, and when no cross-examination is possible, the prosecution – however well founded – usually has to be abandoned.<sup>44</sup> The occurrence of these circumstances demonstrates how the trial, *per se*, can have a ‘harmful’ impact on a child who is very vulnerable, and this undoubtedly has a bad effect also on the trial process, because it cannot be continued without the child’s testimony.

The rationale of *R v Smith*, concerning S’s conviction of rape and gross indecency with a 12-year-old child, makes clear the judge’s task of ordering a procedure which reduces the strain on child witnesses, without prejudicing the defendant’s interests. It also highlights that anyone providing comfort and support to a child witness should not talk to the complainant while he/she is giving evidence, because this might prejudice the regularity of the trial.<sup>45</sup>

In former years, the competence of a child was normally determined in the presence of the jury, on the basis that this would also assist jurors when it came to weighing their testimony, if they were permitted to give evidence.<sup>46</sup> Now, under YJCEA s54, any proceedings held for the determination of a witness’s competence take place in the absence of the jury (if there is one).

This is an important development: it appears to be a more objective assessment, and it ensures that the jury is not influenced in any way by presumptions about the validity of witnesses, especially young witnesses.

In *R (D) v Camberwell Green Youth Court and Regina (G) v Camberwell Green Youth Court (Conjoined Appeals)*<sup>47</sup> the issue before the House of Lords was whether the new scheme providing for how child witnesses are to give their evidence in criminal cases is compatible with the right of the defendant to a fair trial under Article 6

of the European Convention on Human Rights (ECHR), in particular when that defendant is also a child. Lord Rodger of Earlsferry asserted that ‘the use of the special measures will maximise the quality of the children’s evidence in terms of its completeness, coherence and accuracy’;<sup>48</sup> so Parliament had not enacted provisions incompatible with the ECHR.<sup>49</sup> On this basis the appeals were dismissed. This case is another illustration of how ‘the modification is simply the use of modern equipment to put the best evidence before the court, while preserving the essential rights of the accused to know and to challenge all the evidence against him’.<sup>50</sup> Hence, it is unlikely that a defence will successfully rely on an ‘imaginary’ imbalance between the right of the defendant to have a hearing in accordance with the norm and the interests, not only of the child witness, but also of justice.<sup>51</sup> Doak in his case comment states: ‘...this decision is to be welcomed in that it expressly acknowledges the strong public interest in ensuring that vulnerable witnesses are empowered to give the best possible evidence at court.’<sup>52</sup>

It should be emphasised that a right to a fair trial applies uniformly and in its entirety to everyone, adults as well as children: ‘...it is essential to consider the individual nature of the child and the case, and to reconcile those factors with the interest of judicial expedience and the other parties’ interest of legal protection’.<sup>53</sup> In fact, a fair trial can be achieved only if the rights of all the parties are protected.

The paramount importance of a fair criminal trial is also represented by the Police and Criminal Evidence Act (PACE) 1984 s78, which provides that the court may exclude evidence which would have an adverse effect on the fairness of the proceedings: s78 has been considered in different cases,<sup>54</sup> such as *DPP v M*, where it was stated that it applies not only to child witnesses, but to all witnesses.<sup>55</sup>

In practice, there are different opinions on the effect that a child witness has on the trial. However, it seems that judicial decisions have shown a sensible and practical approach, which seems to result in appropriate outcomes.

<sup>44</sup> J.R. Spencer, ‘Child witnesses and cross-examination at trial: must it continue?’ (2011) Arch. Rev. 7, 9.

<sup>45</sup> [1994] Crim. L.R. 458.

<sup>46</sup> *R v Reynolds* (1950) 34 Cr. App. R. 60.

<sup>47</sup> [2005] UKHL 4.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* 21 (Lord Brown of Eaton-under-Heywood).

<sup>50</sup> *Ibid.* 18 (Baroness Hale of Richmond).

<sup>51</sup> *Ibid.* 16 (Baroness Hale of Richmond).

<sup>52</sup> J. Doak, ‘Child witnesses: do special measures directions prejudice the accused’s right to a fair hearing?’ *R v Camberwell Green Youth Court, ex p. D; R v Camberwell Green Youth Court, ex p. G* (2005) International Journal of Evidence and Proof, 291, 294.

<sup>53</sup> Council of Europe, ‘Hearing of Children in Criminal procedure according to Article 6 of the European Convention on Human Rights’ <[http://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper5\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper5_en.asp)> accessed on 12 April 2013.

<sup>54</sup> *R v Barker* [2010] EWCACrim 4; *G v DPP* [1998] QB 919; *DPP v M* [1998] Q.B. 913;

<sup>55</sup> [1998] Q.B. 913 (Phillips L.).

## Not every child is the same: the new position in *R v Barker*

Franklin, in his handbook on children's rights, focuses on the fact that children are still often regarded as 'irrational and incompetent in the public consciousness'.<sup>56</sup> The main point in this underestimation, he asserts, is that: '...(in) denying children the right to participate and make decisions for themselves, society's motives are allegedly benign, seeking only to protect children from harmful consequences of their own incompetence'.<sup>57</sup> Notwithstanding the increase of children being able to testify, this negative idea is still present, and needs to be recognised.

*R v Barker*,<sup>58</sup> decided only few years ago, is a significant case in this area of law, because it makes it clear that children, even if very young, have the right to be heard in court. The case concerned Barker, who was convicted of anal rape of a girl who was less than three years old at the time of the offence and was four-and-a-half years old when she gave evidence. Lady Hale and Mrs Justice Macur, who gave the seminal judgment in the Court of Appeal, affirmed Barker's conviction.

Their Ladyships clarified that there are no presumptions or preconceptions when assessing the competence of an individual witness; as they said, 'the question is entirely witness or child specific'.<sup>59</sup> These *dicta* are in accordance with Lord Lane CJ's judgment in *R v Z*,<sup>60</sup> and they realistically recognise that not every child is the same.

The judges acknowledged that 'the chronological age of the child will inevitably help to inform the judicial decision about competency'; however, this is not the crucial element<sup>61</sup>, as it was thought to be in *R v Wallwork*<sup>62</sup> and *R v Wright*.<sup>63</sup>

Their Ladyships stated that, in instances where the child might be lying or mistaken in giving evidence, the solution is to formulate short, simple questions for the witness to answer.<sup>64</sup> This means questions that are developmentally appropriate to the young witness.

The appellant submitted, *inter alia*, that the evidence should have been stopped because of the lapse of time: this point was supported by reference to the earlier decisions in *R v Powell*<sup>65</sup> and *R v Malicki* (above).<sup>66</sup> Nonetheless, in the present case, the judges refused this ground of appeal and emphasised that 'in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute'.<sup>67</sup>

Their Ladyships were very clear and precise in giving their reasoning throughout the judgment. The judgment highlights the importance of the statutory criteria for assessing witnesses' competences and recognises the realities of children's cognitive abilities.<sup>68</sup>

Spencer, in critically analysing *Barker*, comments: 'it is difficult not to feel some sympathy with the defence counsel's argument that the cross-examination did not really produce much meaningful exchange'.<sup>69</sup> Similarly, in a previous case comment, Spencer stated that *Barker* 'shows that there is still much amiss in the way the criminal justice system deals with little children who have the misfortune to be witnesses'.<sup>70</sup> However, as a decision about the competency of child witnesses and the weight to be accorded to their evidence, the decision in *Barker* is surely welcome.<sup>71</sup> Henderson criticises *Barker*, by pointing out that the court 'hugely underestimates' the complex task of cross-examination. In fact, formulating 'short, simple questions', as suggested by the judges, does not in

<sup>56</sup> B. Franklin, *The New Handbook of Children's Rights: Comparative Policy and Practice* (1st edn, Routledge Chapman & Hall, London 2001) 23.

<sup>57</sup> *Ibid.* 22.

<sup>58</sup> [2010] EWCA Crim 4.

<sup>59</sup> *Ibid.* [38].

<sup>60</sup> [1990] 2 Q.B. 355, 360; Plotnikoff, R. Woolfson, 'Cross-examining children - testing not trickery' (2010) *Arch. Rev.* 7, 8.

<sup>61</sup> [2010] EWCA Crim 4 [39].

<sup>62</sup> (1958) 42 Cr. App. R. 153.

<sup>63</sup> (1990) 90 Cr. App. R. 91.

<sup>64</sup> [2010] EWCA Crim 4 [42].

<sup>65</sup> [2006] 1 Cr App R 31.

<sup>66</sup> [2009] EWCA Crim 365.

<sup>67</sup> *Ibid.* [50].

<sup>68</sup> *Ibid.* [39].

<sup>69</sup> J.R. Spencer, 'Child witnesses and cross-examination at trial: must it continue?' (2011) *Arch. Rev.* 7, 9.

<sup>70</sup> J.R. Spencer, 'Children's evidence: the Barker case, and the case for Pigo' (2010) *Arch. Rev.* 5

<sup>71</sup> *Ibid.* 7.

itself resolve the problem of how cross-examination can be ‘unnecessarily traumatic and a threat to the safety of the evidence’.<sup>72</sup>

Even though there are some concerns about the rulings in *R v Barker*, the importance of this case cannot be denied;<sup>73</sup> it provides a more flexible approach upon broader principles.

### **Need for children in the trial process**

Witnesses, especially primary victims, are the main source of evidence in the criminal justice system through which justice can be achieved. In fact, if witnesses withdraw from the criminal justice process, this would result in cases failing to be successfully prosecuted. Where children are needed to testify in court, they should be admitted without any prior prejudices, examining their competence and their evidence through the formal procedures. In truth, there are children who are not suitable to appear in court because their testimony would not help the process; however, this does not imply that every child is unsuitable. In some circumstances interviewing a child, cross-examining and calling him/her back may be more difficult than interviewing an adult; but this should not be a barrier to allowing them to give evidence. In fact, the evidence that emerges in the interview often has significant value.

Jones reports the evidence of a three-year-old child in the late 1990s in the USA.<sup>74</sup> The interviews conducted by the police and by the author, at different times after the occurrence of the event, showed that a child as young as three can provide a convincing account of a traumatic event. The main point that justified the conclusion was that the child could correctly identify her assailant on different occasions; the defendant himself, just before the trial, confessed what happened.<sup>75</sup> This case adds support to the thesis that there should not be a minimum age to testify, because even very young children may be adept at

recalling events they have witnessed.

Therefore, it is clear that ‘the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults, some children will provide truthful and accurate testimony, and some will not’.<sup>76</sup>

In *R v J*<sup>77</sup> the trial judge admitted hearsay evidence under the CJA 2003 s114 (and mentioning PACE 1984 s78), of what a thirty-month-old child said to her mother, and convicted the appellant for assault by penetration of a child under the age of thirteen and unlawful wounding. The Court of Appeal (CA) upheld the conviction. Hooper LJ, giving the leading judgment in the CA, referred to s114 as the ‘the safety-valve provision’, which was introduced to deal in part with this type of case.<sup>78</sup> Moreover, in addition to the hearsay evidence, ‘there was very strong circumstantial evidence that the appellant committed this dreadful offence’.<sup>79</sup>

By s114 courts are permitted to admit hearsay evidence where they are satisfied that it is in the interests of justice for it to be admitted: this includes cases where the child is as young as thirty months old.<sup>80</sup> The illustrations above confirm that the traditional perception of children’s value as witnesses is not accepted by the courts any more. The courts, where appropriate, have been seen to use their discretion in an effective way.

### **Conclusion - Possible Reforms**

English Law has seen a historical development of the law governing the assessment of children’s competency to testify in criminal cases, both under common law and through legislation. It is clear that the initial scepticism of possible fantasy, suggestion or malice on the part of children has not been borne out.

There are now more services and support available to child witnesses than previously. Interviewers play a key role, as they are often the first key-contact with a

<sup>72</sup> E. Henderson, ‘Root or branch? Reforming the cross-examination of children’ (2010) C.L.J. 460, 462.

<sup>73</sup> A. Brammer, P. Cooper, ‘Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems’ (2011) *Crim. L.R.* 925, 931; A. Roberts, ‘Evidence: young child alleging sexual abuse - whether competent witness’ (2011) *Crim. L.R.* 233, 236.

<sup>74</sup> D. P.H. Jones, ‘The evidence of a three-year-old child’ (1987) *Crim. L.R.* 677.

<sup>75</sup> *Ibid.* 680.

<sup>76</sup> A. Brammer, P. Cooper, ‘Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems’ (2011) *Crim. L.R.* 925, 931.

<sup>77</sup> [2009] EWCA Crim 1869.

<sup>78</sup> [24].

<sup>79</sup> [38].

<sup>80</sup> J.R. Spencer, ‘Child witnesses and cross-examination at trial: must it continue?’ (2011) *Arch. Rev.* 7, 8.

child who later gives evidence: it is important that interviewers have extensive skill and understanding on how to approach such witnesses, otherwise this may cause children to provide unreliable accounts.

Bala *et al* offer a detailed analysis of the Canadian Law on child witnesses, also making a comparison with English Law.<sup>81</sup> They state: ‘Canadian judges are satisfied that the changes to the laws governing the assessment of child witness competency do not interfere with the rights of an accused to a fair trial and facilitate the search for the truth’,<sup>82</sup> and this seems to apply equally to English Law, as can be seen from the decided cases analysed above.

The Canada Evidence Act R.S.C. 1985 s16.1, enacted as S.C. 2005, is similar to the provisions of YJCEA 1999 relating to children. However, under the Canadian Act, there are more provisions aimed specifically at children under the age of fourteen, whilst under English law these special measures are for everyone who falls within the category of vulnerable or intimidated witnesses.

Bala *et al* criticise the fact that present English law fails to require a child to promise to tell the truth, as is required under Canadian Law.<sup>83</sup> The authors suggest that the English reforms do not reflect the current psychological research which is very important. They assert that having the child promise to tell the truth increases the likelihood that they will tell the truth.<sup>84</sup> Whilst it is acknowledged that this point might be an improvement in the treatment of child witnesses, it is not clear whether it would make a great difference.

Perhaps, significant changes should be made in respect of the lapse of time between the occurrence of the event and the beginning of trial: this would make it easier for the child to offer a more detailed and meticulous testimony. More detailed guidance on how to approach cross-examination would be useful, as Henderson argued (above). This is an important stage in the trial process, and it is crucial that it be dealt with in the best way. Intermediaries should be used more often, and questions should be phrased in a neutral way. These suggestions are made in light of the increase in the number of child witnesses across England and Wales. Figures obtained by the BBC show that in England and Wales 1,116 child witnesses were recorded in 2008/9.<sup>85</sup>

In conclusion, even though there are still weaknesses in and limitations on the legal procedures for child witnesses under English law, the courts have demonstrated that the old prejudices which affected some decisions have been swept away. Now the duties of the judges are clear and established by different statutes, which have positively dealt with the issues of child witnesses’ varied development.

It would therefore appear that it is fair for even young children to appear as witnesses in criminal proceedings. There is no credible social, psychological or legal reason for there to be a minimum age for child witnesses to appear in court or against using their testimony as a basis for the potential conviction of the accused. The state of English law may not be perfect, but it is much more likely to produce justice than was the case previously.

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<sup>81</sup> N. Bala, K. Lee, R.C.L. Lindsay, V. Talward, “The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform” *International Journal of Children’s Rights* 18 (2010) 53.

<sup>82</sup> *Ibid.* 68.

<sup>83</sup> *Ibid.* 74.

<sup>84</sup> *Ibid.* 76.

<sup>85</sup> A. Crawford, “NSPCC urges more support for child court witnesses” (November 2009) <<http://news.bbc.co.uk/1/hi/uk/8375293.stm>> accessed on 10 April 2013.

# **International Family Law, Policy and Practice**

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Schedule 1 to the Children Act 1989

rule 4.1 of the Family Proceedings Rules 1991

Article 8 of the European Convention for the Protection of Human Rights 1950 (European Convention)

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Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

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