

# INTERNATIONAL SURVEY OF FAMILY LAW 2022 ABSTRACTS

## AUSTRALIA (DEFRAGMENTING THE EVER-GROWING FAMILY LAW SYSTEM)

Australia's federal legal system has resulted in various (sometimes inconsistent) laws relating to the regulation of family relationships enacted by both the Commonwealth and the state and territory governments. The Commonwealth government has taken a number of steps over recent decades aimed at addressing this legal fragmentation. Over the same period, there has developed an increasing tendency to characterise the collection of laws pertaining to family and related matters as a 'family law system', leading to greater expectations and increasing pressure to improve consistency and coherence between those laws and the courts and other bodies that administer them. This chapter explores the extent to which defragmentation and harmonisation of laws and related processes affecting families has been achieved in Australia, including the recent amalgamation of the federal family law courts.

## AUSTRALIA (RECOGNITION OF CHILDREN'S RIGHTS AND THE HIGH COURT OF AUSTRALIA)

This chapter investigates the visibility of children's rights in family law judgments from the High Court of Australia, Australia's highest court. We explore the concept of what it means to take a substantive children's rights approach to judgments and decision-making, based on the values and principles of the United Nations Convention on the Rights of the Child. Focusing on the only two family law judgments involving children delivered in the last decade, and drawing on older cases, the authors observe that the High Court has failed to take a substantive children's rights approach. In relation to the two more recent cases, the High Court's approach to children's rights was invisible, in that it failed to engage with the concept of children's rights at all. The authors argue that this fails to acknowledge children as independent rights-bearers and contravenes Australia's international obligations. We argue that a substantive children's rights approach should be taken to ensure that Australia meets its obligations to children and in

international law, to facilitate development of the common law and the promotion of human rights, and to enable the best decisions to be made.

## BELGIUM

What is a parent? The answer to this question has become complex in recent times. The emergence of new family constellations has prompted many jurisdictions to cautiously reconsider the very concept of parenthood. In Belgium, the category of legal parenthood has become more inclusive over the last decades: the consequences of the legal sex reassignment have been regulated; co-motherhood has been introduced in the aftermath of the introduction of same-sex marriage and same-sex adoption; and in the case of medically assisted reproduction, parenthood is assigned to the intended parent(s) and not the donor(s).

Nevertheless, the law on parenthood in Belgium remains by and large inspired by the model of the 'Sexual Family'. The legislature has in fact even reinforced this by including new constellations of parenthood under existing labels, such as that of trans persons, co-mothers and other intended parents under the Act on Medically Assisted Reproduction. At the same time, parental responsibilities remain reserved for the legal parents or adopters, with an exception only for foster carers. In addition, there is currently no legal framework for surrogacy arrangements or multiple parenthood.

We suggest two modulations to Belgian law in order to accommodate the needs of all families. First, the legislature might consider introducing parenthood without parental responsibilities, and parental responsibilities without parenthood. Second, multiple parenthood and multiple parental responsibilities could replace the current dyadic approach towards both institutions. Unfortunately, however, the legislature has currently not scheduled such reforms.

## CHILE

Chile has been surprised by the flows of immigrants that have entered its territory. This situation has generated the concern of a number of institutions, which has given rise to this chapter. Specifically, we will discuss the conditions that must be met for the reception of immigrant children and adolescents who have arrived on Chilean territory unaccompanied by adults. These children constitute a particularly vulnerable group. All of this must be discussed in light of what is required by the best interests principle, which

prescribes not making distinctions based on the immigration status of children and adolescents.

## CHINA (RESEARCH ON THE NECESSITY AND FEASIBILITY OF RECOGNISING SAME-SEX COUPLES' STATUS UNDER CIVIL LAW IN CHINA)

At present, same-sex marriage has not been included in the Marriage and Family chapter of the Chinese Civil Code. Nor has China formulated laws on civil partnership or non-marital cohabitation to protect the legal rights and interests of same-sex couples. In 2020, as a volunteer, the author assisted a network of LGBT community organisations in China in conducting a survey of sexual minorities in China about their attitudes toward same-sex relationship recognition. Most respondents said that they wanted to marry their same-sex partners in China. However, some respondents said that they concealed their sexual orientation and had entered into mixed-orientation marriages. Some other respondents had entered 'contract marriages' (i.e. marriages between a lesbian woman and a gay man that have the aim of giving the outward appearance of a heteronormative spousal relationship). Some groundwork has been laid for China to recognise the status of same-sex couples. China has already decriminalised and depathologised homosexuality and legalising the civil law status of same-sex couples has a foundation of some public support. Some judicial departments hold a tolerant attitude towards LGBT groups, and there have been breakthroughs in cultural values. In 2019, Taiwan in China legalised same-sex marriage. It is recommended that enacting legislation on civil partnership or non-marital cohabitation to recognise the status of same-sex couples under civil law and thus better protect their legitimate rights and interests.

## CHINA (THE PROTECTION OF PROPERTY RIGHTS AND INTERESTS OF DIVORCED FEMALE FAMILY CAREGIVERS)

Until now, the protection of the property rights and interests of divorced female family caregivers has been neglected by the Chinese Civil Code and the Law of the People's Republic of China on the Protection of Women's Rights and Interests. Chinese law ought to expand the scope of divisible property, conditionally recognise that professional degrees and pension rights and interests obtained during marriage are divisible community property at the time of divorce, and ensure that divisible pensions are not limited to the basic

pension insurance paid into individual accounts, but also include the pension insurance supplied by employers. Chinese law should also add a relief system for support after divorce.

## CZECH REPUBLIC

This chapter deals with couples in de facto unions, especially ones formed by a man and a woman. It seeks to differentiate the rights and duties of cohabitantes from the ones connected with the status of relations between both opposite-sex couples in marriage and same-sex couples in a registered partnership. As there are seldom any kinds of agreements between cohabitantes, special attention is devoted to the relevant legal rules anchored in all the Books of the Czech Civil Code and their applicability to cohabitantes during their relationship and after the break-up of cohabitation or upon the death of one of them. It is stressed that there is no difference between children born out of wedlock and within marriage. Once parenthood is legally established, there is no discrimination between non-married mothers and non-married fathers in relation to the children: they are both holders of parental responsibility. Besides this, there are special provisions that protect the weaker party: property claims of the non-married mother from the child's father for a reasonable time and within adequate limits. However, the standard of protection of the so-called weaker party in de facto unions is much lower than that extended to married couples and registered partners.

## ENGLAND AND WALES

In this year's International Survey, the author has chosen to examine seven cases which illustrate that, in spite of the ease with which an abortion may be obtained in England and Wales, there remains an ongoing debate, both in and outside of the courts, on the complex ethical issues involved.<sup>1</sup>

In this debate, the terms foetus, child or unborn child have all been used interchangeably to refer to the being in utero. The term used may reflect a person's ethical stance on abortion or may be indicative of the fact that prior to birth the current law does not recognise the foetus as a legal being. Given this lack of legal recognition, and in an effort to remain neutral on the issue of abortion, the author has used the term foetus throughout this chapter except

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<sup>1</sup> See L. EWBANK and D. MAGUIRE, 'Understanding Trends in Use of Abortion Services in England: An Exploratory Briefing', *The Kings Fund*, September 2021; see also <<https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2020/guide-to-abortion-statistics-england-and-wales-2020>>, last accessed 25.04.2022.

where an alternative expression has been used in the cases under consideration.

## FRANCE

French family law has been marked this year by the entry into force of several new laws in very different areas. A law of 24 August 2021 called the 'Law Consolidating the Principles of the Republic' strengthened the principle of the reserve portion of the estate in an international succession by re-establishing the possibility of a right of levy on property located in France in certain cases (section 1). A special code on juvenile criminal justice has also come into force (section 2). The Bioethics Law was finally adopted on 2 August 2021. It put an end to the anonymity of gamete donors (section 3) and authorised access to medically assisted procreation for female couples and single women (section 4). It also amended Article 47 of the French Civil Code on the probative value of foreign civil status records to force the Cour de Cassation to change its jurisprudence on the transcription of birth certificates of children born abroad by surrogacy (section 5). Regarding parenthood, another case should be noted that allowed a transsexual man to be registered as the mother of the biological child he had had with his wife (section 6). The question of taking gender into account was also the subject of a circular aimed at staff working in schools (section 7). The evolution of French case law is particularly marked regarding the content of French public policy in international matters. On the one hand, the French Cour de Cassation has modified its position on the recognition of foreign unequal divorce judgments (section 8) and, on the other hand, has ruled that a foreign decision refusing to take account of a French prenuptial agreement was in conformity with French public policy in international matters (section 9). The Cour de Cassation, however, maintained its previous position on the question of bone tests to determine the age of persons claiming to be minors (section 10) and on the conditions under which a judge may refuse to hear a minor who requests such a test (section 11). The Court was also confronted with the question of whether freedom of expression went so far as to allow an extramarital dating website to advertise using posters in public places (section 12). The final conclusions of the Committee on the Rights of Persons with Disabilities on French legislation relating to vulnerable persons call for some observations (section 13).

## HONG KONG

This chapter is an edited extract from research conducted on behalf of the Hong Kong Committee on Children's Rights (HKCCR) and reviews the implementation of Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) in Hong Kong thus far. While the HKCCR's commissioned research extends across multiple settings, from education and healthcare to constitutional policy-making, to leisure and culture, amongst others, this chapter offers a critical analysis of how children's voices are heard in Hong Kong's legal setting. The research findings suggest that, although child participation in the legal setting is in many ways better than that in the other Hong Kong settings considered in the HKCCR study, child participation in the legal setting remains consultative at best and at worst exists on paper rather than in practice. Having identified key factors standing in the way of better child participation, the chapter offers recommendations for improvement.

## IRELAND

This chapter outlines and critically analyses the treatment of LGBT+ families in Irish law. While recent changes to Irish law through the commencement of Part 2 of the Children and Family Relationships Act 2015 now allow parental status to be granted to parents who have used particular forms of assisted reproductive technology, these new pathways to parenthood are very narrow. LGBT+ families continue to face legal barriers to the recognition of parent-child links. It is argued that the unequal treatment of parent-child dependency within LGBT+ families in Irish law is caused both by inadequate reform and by fundamental incoherence as to what the status of legal parent is actually for.

## ITALY

The following chapter assesses the recent reform of Italian family law, provided for by Law No. 206 of 26 November 2021, which has come into force on 22 June 2022 and will be fully operational on 31 December 2024.

In addition to establishing a unified family court that is competent for all matters relating to children, separation, divorce and protection of the weak, the legislator has drastically changed the rules of civil procedure, in order to facilitate the management of family litigation and to encourage effective collaboration between the parties and their lawyers.

Through the filter of comparative private law, the objectives, timing and tools of the Italian reform are compared with the different solutions adopted abroad in the field of family law, and in particular with predictive and analytical artificial intelligence systems already used in common law, which have proved especially useful for recurring and numerically assessable issues like the determination of the amount of alimony owed to the former spouse, the quantification of child support, the definition of the calendar of visits, and the division of property and assets at the time of family break-up.

## NORWAY

This chapter assesses the Norwegian implementation of the right to self-determination – following from the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and other human rights treaties. International law seems to consider deprivation of legal capacity to be a serious intrusion into the right to respect for private and family life as well as the right to self-determination. As such, the chapter concludes that deprivation should be replaced by support measures. Nonetheless, deprivation may still be a lawful remedy when used as a last resort and provided there is a proper balance between preventing abuse and ensuring rights, will and preferences. International law also demands that interference must be proportional, tailored to the applicant's circumstances and subject to review by competent, independent and impartial bodies.

This chapter also describes how Norway, through ongoing reforms, has tried to implement the right to self-determination and how legal capacity is regulated in relevant family law matters – such as entering into marriage, cohabitation, divorce and parenthood. The need for further development and cooperation with persons with disabilities and their organisations, are pointed out as the way forward to ensure a lasting paradigm shift.

## POLAND

Polish family law features norms concerning the legal effects of incapacitation that excessively interfere with personal autonomy of the will and the right to freedom and respect for private life. However, it also lacks adaptability to specific individual needs. Legal incapacitation is an institution of Polish law, the substance, the scope and primary legal effects of which are governed by the Polish Civil Code (PCC). The Polish Civil Code distinguishes between two types of legal incapacitation: full legal incapacitation (Article 13 of the PCC) and partial legal incapacitation (Article 16 of the PCC). The Polish Code of

Civil Procedure (PCCP) regulates the judicial procedure for incapacity in Article 554. At the same time, other laws, such as the Polish Family and Guardianship Law (PFGC), detail other legal effects of incapacity, directly or indirectly. In this chapter, the impact of legal incompetence in family law will be evaluated in terms of these laws. Within the context of the UN Convention on the Rights of Persons with Disabilities framework, a detailed assessment will also be made of the compatibility of the provisions of the PFGC in terms of human rights and their compliance with the basic principles of Polish civil law. These norms, as mentioned above, conflict with the obligations arising from applicable international law, including the UN Convention on the Rights of Persons with Disabilities, and also do not comply with the fundamental principles of Polish civil law. However, the legal consequences of incapacitation under family law have been constituted adequately in other areas. They therefore do not unreasonably interfere with the incapacitated individual's civil rights associated with marriage or starting a family.

## SEYCHELLES

In Seychelles, divorce is governed by Part II of the Matrimonial Causes Act. On 4 January 2021, the Civil Code of Seychelles Act (Civil Code) came into force. Part II of the Matrimonial Causes Act was reproduced verbatim as Articles 230–237 of the Civil Code, although the Civil Code does not repeal the Matrimonial Causes Act. Before January 2021, the Supreme Court relied on the Matrimonial Causes Act to deal with divorce petitions. Since January 2021, the Supreme Court has relied on either the Civil Code or the Matrimonial Causes Act. In this chapter, the author refers to the Supreme Court jurisprudence to demonstrate how the Court has interpreted the grounds of divorce and the requirement that reconciliation attempts have to be made before a marriage is dissolved. The author demonstrates, *inter alia*, that the Supreme Court has not been consistent in the way it has interpreted some of the divorce grounds; in some cases it is not clear on which basis the marriage was dissolved and the Court has been inconsistent in requiring the parties to attempt reconciliation before divorce is granted.

## SLOVENIA

In March 2020, Slovenia introduced measures to reduce the spread of COVID-19. The COVID-19 pandemic has had an immediate and profound impact on all areas of our lives (e.g. the economy, human mobility, education and health care). There is no doubt that COVID-19 has also impacted family



relationships. This chapter aims to analyse the legislative measures and court decisions adopted during the COVID-19 pandemic in Slovenia. Special attention is given to parent-child relations, including adoption and marriages.

## SOUTH AFRICA

This chapter focuses on the succession rights and testamentary freedom of male (gay) and female (lesbian) homosexuals in Islam and in South Africa. It highlights that, although the practice of male homosexuality and same-sex marriage, rather than a mere homosexual sexual orientation, are prohibited in Islam, Muslim scholars and religious authorities (*ulama*) hold opposing views in this regard. Contrarily, the final Constitution of South Africa (1996) protects homosexuals from unfair discrimination on grounds of sexual orientation regardless of religion or gender. Judicial intervention has also resulted in male sodomy being decriminalised, same-sex marriages being legalised and succession laws being amended, to protect homosexuals in unrecognised permanent same-sex partnerships from unfair discrimination. A homosexual orientation and homosexuality may not be treated as impediments to inheritance because of the heteronormative nature of the Islamic law of succession. It is a dominantly held (conservative) belief of *ulama* that when homosexuals publicly advocate alternative (progressive) views disagreeing with the default Islamic position, claiming an Islamic basis therefor is regarded as an act of unbelief and that such persons are apostates. In the Western Cape Province, an *ulama* body issued an Islamic legal opinion (*fatwa*) to this effect and declared a gay Muslim cleric (imam) to be beyond the fold of Islam on these grounds. This is problematic because apostasy (*ridda*), usually limited to a voluntary or deliberate renunciation of Islam, is a ground for disqualification, and therefore exclusion, from inheritance. Therefore, it would impact both on the rights of homosexual 'Muslim' beneficiaries to receive an inheritance and the freedom of homosexual 'Muslim' testators to bequeath an inheritance. Since this *ulama* body provides guidance and assistance in marriage and succession matters which may be enforced in South Africa, this chapter analyses the possible implications for this role of its stated position on homosexuality and same-sex marriages. Since the rights of heterosexual testators and homosexual beneficiaries are also guaranteed by the Constitution, this chapter analyses the as-yet judicially untested constitutional implications of a potential disqualification by Muslim testators of homosexual beneficiaries on the basis of their sexual orientation, homosexuality or religious conviction (apostasy).

## SOUTH KOREA

Eleven years ago, the Korean Supreme Court rendered its first decision on grandchild adoption. The case dealt with a petition for full adoption, and the Court was sceptical of grandchild adoption. In an *en banc* decision rendered late 2021, however, the Court declared that grandchild adoption should be accepted in principle. The case dealt with a petition for simple adoption, and it did not overrule the precedent, which dealt with full adoption.

From a comparative law perspective, it can be observed that different jurisdictions deal with grandchild adoption differently. For example, the US appears to be favourable towards grandchild adoption, while Germany and France do not. In Japan, grandchild full adoption is not granted in principle, while grandchild simple adoption is accepted without any screening.

The Korean Supreme Court relied strongly in the above *en banc* decision on the agreement to grandchild adoption between the adoptive parent and the adoptive child and on familial autonomy. The ruling is not agreeable, though. grandchild adoption is typically the adoption of a minor where consent to the adoption needs to be given not by the adoptee but by his or her legal representative, that is, the birth parent. There is no family autonomy for the adoptee here, and the court cannot presuppose the validity of the agreement to adopt. The family court should examine whether the petition for adoption is entirely in the best interests of the child. In this regard, grandchild adoption is rarely in the best interests of the child, especially when the main motivation for the petition is to give the birth parent another chance to remarry without a child.

## SWEDEN

A steadily increasing 'Europeanisation' of family law is occurring, co-existing with the tensions between the EU and its Member States. This trend is reducing legal difficulties for individuals and State actors in Sweden and throughout the EU within a broader context of ongoing legal, economic and cultural globalisation. Family law, no longer taking a back seat to other European Union legal areas, is today playing a remarkably prominent role. This chapter provides family law experts worldwide with a glimpse into this evolution and an update on the latest changes in top-down, EU-law-derived 'European family law'. It aims to overview ongoing (and indeed ever-present) tensions between autonomy and uniformity interests within the EU and to introduce non-EU scholars to this growing, rather complex legal area by analysing a selection of several notable recent changes and their impacts on Sweden, contributing to the significant existing literature on the present state

of and future possibilities for 'European family law', including in the Swedish context. The chapter focuses specifically on conflict-of-law rules for resolving EU cross-border family law cases, most notably those regarding responsibility for children, marital dissolution and distribution of assets after death. Examined are EU-level legal developments affecting cross-border family relationships within the 27 nations of the European Union that have been introduced primarily through significant new EU legislation and by recent case decisions by the Court of Justice of the European Union. The changes' impacts at the national level on substantive and procedural family law and on national and personal (party) autonomy are examined using published reports on experiences across the EU and specifically in Sweden. Sweden's experience is described as an example of how EU-level, increasingly harmonised family law (primarily that in the 'private international law' or 'PIL' sub-field of EU law) is being negotiated and implemented, both between and within EU Member States.

## UNITED STATES OF AMERICA

The three potential economic remedies at divorce under US law are property division, child support (if there are minor children) and spousal support. Because divorce rules are promulgated at the state level, they obviously vary in some ways. But there is general agreement regarding standards for the division of property and the award of child support. There is much less agreement about various issues relating to the award of spousal support. In this chapter the author will note those areas where there appear to be general agreement as well as the other matters where there is more conflict.