European Family Law Series

Published by the Organising Committee of the Commission on European Family Law

Prof. Katharina Boele-Woelki (Utrecht)
Prof. Frederique Ferrand (Lyon)
Prof. Cristina Gonzalez Beilfuss (Barcelona)
Prof. Maarit Jantera-Jareborg (Uppsala)
Prof. Nigel Lowe (Cardiff)
Prof. Dieter Martiny (Frankfurt/Oder)
Prof. Walter Pintens (Leuven)
FAMILY LAW AND CULTURE IN EUROPE

Developments, Challenges and Opportunities

Edited by
Katharina Boele-Woelki
Nina Dethloff
Werner Gephart

intersentia
Cambridge – Antwerp – Portland
PREFACE

The fifth conference of the Commission on European Family Law (CEFL) on ‘Family Law and Culture in Europe: Developments, Challenges and Opportunities’ was held in Bonn in August 2013 in collaboration with the University of Bonn and the Käte Hamburger Center for Advanced Study in the Humanities ‘Law as Culture’, which aims to contribute to an understanding of the cultural dimension of law and the promotion of the research on law from the perspective of the humanities. The participation of more than 200 participants from around 33 countries made the conference a valuable experience and fostered a stimulating discussion during the three conference days.

The discussions were introduced by eminent conference speakers from all over Europe. Additionally, twelve young researchers from eight different countries were selected after a call for papers. They presented their research in four parallel working groups which addressed Cross-Border Family Relationships, Transnational Families, The (Un-)Wanted Child, and the Relationship Breakup. Their papers are also included in this volume.

The book consists of five parts. It starts with four presentations of the CEFL Principles on Property Relations between Spouses. Part 2 examines the breakup of (non-)formalized relationships with special reference to unmarried cohabitation and the current debate on its legislation. It also addresses alternative instruments of conflict resolution in family law like the Irish collaborative law approach. Part 3 analyses the interdependence between legal, social and biological parenthood. It also deals with the problems of cross-border surrogacy as well as mechanisms for the anonymous relinquishment of children and baby boxes. It ends with a contribution on legal issues concerning stepfamilies. Part 4 addresses the legal aspects on international family relationships and contains a critical view on the 2011 Proposal for a Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. It also analyses the notion of ‘habitual residence’ in European family law and refers to the criteria of nationality and domicile as a connecting factor for private international law questions regarding same-sex relationships. Finally, Part 5 reveals interesting aspects of transnational families such as the EU citizenship. It also reports about recent research on the effects of the new Moroccan Family Code on Moroccan nationals living abroad. The last contribution on family sociology explores the question why and to what extent culture matters in family law either as a constraint or as a condition. Moreover, it
critically investigates the concept of European universalism which might bridge
the gap between different legal cultures as far as family law is concerned.

The conference organizers and editors of the book are very grateful to the
German Federal Ministry of Education and Research, the Alexander von
Humboldt Foundation and the Käte Hamburger Center for Advanced Study in
the Humanities 'Law as Culture' who generously supported the conference.
Thanks are also due to the University of Bonn for making it possible for
international and comparative family lawyers in Europe and from abroad to
meet again in order to exchange ideas and to discuss new developments. Cordial
thanks are owed to Dr. Steffen Mehlich from the Alexander von Humboldt
Stiftung and Ramona Pisal, president of the German Women Lawyers
Association, who both addressed the participants during the conference. Finally,
without the valuable support of the staff of both the Institute for German,
European and International Family Law and the Käte Hamburger Center for the
Advanced Study in the Humanities 'Law as Culture', the conference could not
have taken place. Many thanks for all their dedication and enthusiasm!

Katharina Boele-Woelki, Nina Dethloff and Werner Gephart
Bonn and Utrecht, April 2014
CONTENTS

Preface .................................................................................................................. v
List of Authors ...................................................................................................... xv

PART ONE
THE CEFL PRINCIPLES ON PROPERTY RELATIONS
BETWEEN SPOUSES

General Rights and Duties in the CEFL Principles on Property Relations
between Spouses
Katharina Boele-Woelki ....................................................................................... 3
1. A New Set of Principles of European Family Law ........................................... 3
2. General and Specific Structural Issues ............................................................. 4
3. CEFL’s Aims and Objectives ........................................................................... 5
4. Brief Commentary on each Principle of Chapter I ........................................... 7
5. A Comprehensive Primary Regime ................................................................... 11

Marital Property Agreements
Nigel Lowe ........................................................................................................... 13
1. Introduction ..................................................................................................... 13
2. The Specific Principles ..................................................................................... 16
3. Some Final Remarks ....................................................................................... 22

The Participation in Acquisitions Regime
Dieter Martiny ...................................................................................................... 25
1. The Participation in Acquisitions Approach .................................................... 25
2. Concept of Participation in Acquisitions ......................................................... 27
3. Debts and the Administration of Property ....................................................... 31
4. Dissolution and Liquidation ........................................................................... 31
5. Participation .................................................................................................... 34
6. Conclusion ....................................................................................................... 35
Contents

The Community of Acquisitions Regime
Frédérique Ferrand ................................................................. 37
1. Introduction ................................................................. 38
2. Personal and Community Property, Assets and Debts .................. 42
3. Administration of Property .............................................. 51
4. Dissolution, Liquidation and Distribution ............................... 55

PART TWO
BREAKUP OF (NON-)FORMALISED RELATIONSHIPS

Statutory Regulation of Cohabiting Relationships in the Nordic Countries: Recent Developments and Future Challenges
Tone Sverdrup ................................................................. 65
1. The Reason for Sharing Assets upon a Relationship Breakdown .......... 65
2. Legal Situation in the Nordic Countries ................................ 68
3. Fixed Rules and the Logic of Cohabitation .............................. 72
4. Closing Remarks ........................................................... 74

Legislating for Cohabitation in Common Law Jurisdictions in Europe: Two Steps Forward and One Step Back?
Anne Barlow ................................................................. 77
1. Abstract ................................................................ 77
2. Introduction ............................................................. 78
3. Changing Social Trends in the British Isles ............................. 80
4. The Legal Landscape .................................................... 82
5. Conclusion ............................................................... 91

The Swedish Cohabitees Act in Today’s Society
Kajsa Walleng ................................................................. 95
1. Introduction ............................................................... 95
2. Unmarried Cohabitation: A Social Norm ............................... 96
3. Legal Rules: Marriage versus Unmarried Cohabitation .............. 97
4. Results of the Empirical Study ......................................... 98
5. A Law not Keeping Pace with Time .................................. 105

Maintenance between Former Spouses and Gender Equality
Marketa Rihova Batista ...................................................... 109
1. Introduction .............................................................. 109
2. Necessity to Justify Maintenance ....................................... 110
## Contents

3. Perspectives of an Autonomy-Based Exertion of Influence on the Law of Parentage ................................................................. 161
4. Conclusion: Intentional and Biological Parentage Side by Side .......... 167

**Biological and Social Parenthood**

Gabriele Britz ................................................................. 169

1. Supremacy of Legal Parenthood ............................................. 170
2. Constitutional Guidelines ..................................................... 171
3. Future Questions .............................................................. 173

**France: Biological and Social Parentage**

Françoise Monéger .......................................................... 175

1. The Past ................................................................. 176
2. The Present: the Law of 17 May 2013 .................................... 179
3. The Future ................................................................. 181

**Anonymous Relinquishment and Baby-Boxes: Life-Saving Mechanisms or a Violation of Human Rights?**

Claire Fenton-Glynn .......................................................... 185

2. Defining the Rights of the Child ............................................. 187
3. Complimentary or Contradictory? The Balancing of Maternal and Child Rights ................................................................. 191
4. Conclusion ................................................................. 196

**Cross-Border Surrogacy: Time for a Convention?**

Martin Engel ................................................................. 199

1. Introduction ................................................................. 200
2. Legal Diversity in International Surrogacy Law .......................... 201
3. Trends in Recent European Case Law ...................................... 206
4. Consequences of Legal Diversity in the Recognition of Parenthood . 208
5. *Lex Ferenda* ................................................................. 210
6. Conclusion ................................................................. 215

**Re-Thinking Family Law: A New Legal Paradigm for Stepfamilies?**

Angela d’Angelo ............................................................... 217

1. Introduction ................................................................. 217
2. Stepfamily Issues and Related Theoretical Problems .................... 219
PART FOUR
INTERNATIONAL FAMILY RELATIONSHIPS

The Proposal for a Regulation on Matrimonial Property: A Critique of the Proposed Rule on the Immutability of the Applicable Law
Andrea Bonomi ............................................................. 231

1. Introduction .................................................................. 231
2. The Immutability System from a Comparative Law Perspective ......... 232
3. The Drawbacks of the Immutability System .......................... 234
4. The Possible Alternatives .............................................. 240
5. The Alleged Flaws of a Retrospective Mutability Rule ................. 242
6. Conclusion .................................................................. 247

‘Habitual Residence’ in European Family Law: The Diversity, Coherence and Transparency of a Challenging Notion
Katharina Hilbig-Lugani ..................................................... 249

1. Introduction .................................................................. 250
2. Divergence Factors ....................................................... 253
3. Conclusions: Transparent Standards for Interpretation ................ 261

New Approaches to Same-Sex Marriage: The End of Nationality as a Connecting Factor?
Stuart Davis .................................................................. 263

1. Introduction .................................................................. 264
2. Removing the Yoke of Citizenship: Belgium and Elsewhere ............ 265
3. French Developments ................................................... 269
4. English Developments ................................................... 274

Protection Orders across Europe: First Remarks on Regulation No. 606/2013
Eva de Götzzen ................................................................. 277

1. Context of the EU Legislative Proposal ................................ 278
2. Ex Parte Protection Orders and the Former EU Private International Uniform Law Instruments ................................... 279
3. Main Features of Regulation No. 606/2013 ............................ 281
4. Recognition and Enforcement under Regulation No. 606/2013 ........ 282
5. The Brussels I Recast System and Protection Orders Issued Ex Parte: Irreconcilability ................................................. 284
6. The New Regulation and the Former EU Private International Law Uniform Instruments ........................................ 286
7. The Italian Protection Order against Domestic Violence ..................... 287
8. Conclusion ...................................................................... 288

PART FIVE
TRANSNATIONAL FAMILIES: ACROSS NATIONS AND CULTURES

Family Life and EU Citizenship: The Discovery of the Substance of the EU Citizen's Rights and its Genuine Enjoyment
Katharina Kaesling .......................................................... 293
1. EU Citizenship as a Trigger for Fundamental Evolutions ................... 294
2. The Rights of Third Country Nationals to Reside with their Static EU Citizen Family Members ........................................ 296
3. For an Interpretation in the Light of the Right to Respect for Private and Family Life ............................................. 300
4. A Sensible Delimitation of EU and National Spheres: A New Definition of the Category of Purely Internal Situations ........... 303
5. Conclusions .................................................................... 304

Private and Family Life versus Morals and Tradition in the Case Law of the ECtHR
Geoffrey Willems .............................................................. 305
1. Introduction ...................................................................... 305
2. From a Delegitimisation of Morals and Tradition as Justifications for Restrictions on Rights ....................................... 306
3. Towards a Relegitimisation of Morals and Tradition as Justifications for Restrictions on Rights? .............................. 314
4. Conclusion ...................................................................... 321

Jinske Verhellen ................................................................. 323
1. Introduction ...................................................................... 323
2. Empirical Research in the Field of Private International Law .......... 324
3. Added Value of Empirical Research ..................................... 326
4. Selection of Research Findings .......................................... 328
5. Conclusion ...................................................................... 333
Transnational Family Relations Involving Moroccan Nationals Living Abroad: An Analysis of the Implementation of the Moroccan Family Code
Brief report on research in progress

Marie-Claire Foblets .............................................. 335

1. Project Description ............................................. 336
2. A Research Programme with Five Components ................. 337
3. Principal Themes Studied........................................ 339
4. Role of Consular Officials...................................... 341
5. Why Focus on the Legal Aspects of the Family Lives of MNAs? .. 343

Family Law as Culture

Werner Gephart ...................................................... 347

1. Introduction and Overview: Why Family Law should be Linked to the Cultural Basics of Society .......................... 347
2. Culture Matters: as a Constraint or as a Condition? .......... 348
3. Family Law as a Methodological Tool: A Durkheimian Legacy .... 350
4. A Multidimensional Concept of Law ............................. 353
5. Shapes and Shadows: Religious Images and their Traces ........ 354
6. Conflicts or Dialogues: the Encounter of Family Conceptions and Realities ............................................. 356
7. Family Law Expressed in Cultural Forms: the Family in the Court TV Show ................................................. 357
8. The Emergence of European Normativity regarding Family .... 358
LIST OF AUTHORS

Professor Anne Barlow
Professor of Family Law and Policy, University of Exeter

Professor Katharina Boele-Woelki
Professor for Private International Law and Comparative Law, University of Utrecht, Utrecht Centre for European Research into Family Law (UCERF); Chair of the Commission on European Family Law

Professor Andrea Bonomi
Professor for Comparative Law and Private International Law at the Faculty of Law and Criminal Justice, University of Lausanne; Center of Comparative, European and International Law (CDCEI)

Professor Gabriele Britz
Justice at the German Federal Constitutional Court; Professor for German Public Law and European Law, University of Gießen

Professor Christine Budzikiewicz
Professor of Civil Law and Private International Law, University of Marburg

Angela d’Angelo
Post-doctoral Researcher at the Sant’Anna School of Advanced Studies of Pisa

Stuart Davis
Solicitor; PhD Candidate at the University of Reading

Professor Nina Dethloff
Professor for Civil Law, Comparative Law, Private International Law and European Private Law, University of Bonn, Institute for German, European and International Family Law; Vice Director of the Käte Hamburger Center for Advanced Study in the Humanities ‘Law as Culture’

Dr Eva de Götzen
Teaching Assistant at the University of Milan
Dr Martin Engel
Post-doctoral Researcher and Assistant Lecturer at the Ludwig Maximilians University, Munich

Dr Claire Fenton-Glynn
College Teaching Officer at Lucy Cavendish College, University of Cambridge

Professor Frédérique Ferrand
Professor at the Institute of Comparative Law Edouard Lambert, University Jean Moulin 3, Lyon

Professor Marie-Claire Foblets
Director of the Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle/Saale; Professor of Law, University of Louvain

Professor Werner Gephart
Professor for Sociology at the Institute for Political Science and Sociology, University of Bonn; Director of the Käte Hamburger Center for Advanced Study in the Humanities 'Law as Culture'

Connie Healy
PhD Candidate at the National University of Ireland

Dr Katharina Hilbig-Lugani
Post-doctoral Researcher and Assistant Lecturer at the University of Göttingen

Katharina Kaesling
PhD Candidate and Academic Assistant at the University of Bonn

Professor Nigel Lowe
Professor of Law, Cardiff Law School

Professor emeritus Dieter Martiny
Professor Emeritus, Europe-University Viadrina in Frankfurt/Oder; Guest Researcher at the Max Planck Institute for Comparative and International Private Law, Hamburg

Françoise Monéger
Former Justice at the French Cour de Cassation

Marketa Rihova Batista
PhD Candidate at the Ludwig Maximilians University, Munich
List of Authors

Professor Anna Singer
Professor of Private Law, Uppsala University

Professor Tone Sverdrup
Professor at the Institute for Private Law, University of Oslo

Dr Jinske Verhellen
Post-doctoral Assistant at the University of Ghent

Kajsa Walleng
PhD Candidate at Uppsala University

Geoffrey Willems
PhD Candidate and Teaching Assistant at the Catholic University of Louvain