THE INTERACTION BETWEEN FAMILY LAW, SUCCESSION LAW AND PRIVATE INTERNATIONAL LAW
European Family Law Series

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

Prof. Katharina Boele-Woelki (Utrecht)
Prof. Frédérique Ferrand (Lyon)
Prof. Cristina González Beilfuss (Barcelona)
Prof. Maarit Jänterä-Jareborg (Uppsala)
Prof. Nigel Lowe (Cardiff)
Prof. Dieter Martiny (Frankfurt/Oder)
Prof. Velina Todorova (Plovdiv)

This book has been made possible with the support of the University of Pisa
THE INTERACTION BETWEEN FAMILY LAW, SUCCESSION LAW AND PRIVATE INTERNATIONAL LAW

Adapting to Change

Edited by
Jens M. Scherpe
Elena Bargelli

INTERSENTIA
Cambridge – Antwerp – Chicago
The Interaction between Family Law, Succession Law and Private International Law. Adapting to Change
© The editors and contributors severally 2021

The editors and contributors have asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

D/2021/7849/4
NUR 822

ACKNOWLEDGEMENTS

The idea for this book arose from a workshop on ‘The Present and the Future of European Family and Succession Law’, which took place on 7 June 2018 at the University of Pisa. This workshop was organised by Elena Bargelli, and supported by the European Law Institute’s Family and Succession Special Interest Group (SIG) through their network and advertising. It was also generously supported financially by the University of Pisa to cover the costs of travel and sustenance. Without this support, the book would not exist.

After the workshop, the editors began discussing a possible publication and developed the structure of the book that you now have in your hands (or your screen!). We then commissioned several additional contributions, and we are very grateful to all contributors for being so supportive during the rather rocky editing process (which fell during the – still ongoing, at the time of writing – COVID-19 health crisis, and also saw one of the contributors giving birth – congratulations again!). We are very grateful that the editorial process was financially supported by the University of Pisa.

Despite the rocky road to get there, as soon as we passed the manuscript to the publisher, things immediately worked extremely smoothly. We would like to thank the amazing Intersentia team, and Rebecca Moffat in particular, for making the publication process so easy and comfortable for us.

Finally, we want to thank the members of the Organising Committee of the Commission on European Family Law (CEFL) for accepting this book into their European Family Law series.
## CONTENTS

*Acknowledgements* ................................................................. v
*List of Cases* ........................................................................ xi
*List of Contributors* ............................................................. xv

**The Interaction between Family Law, Succession Law and Private International Law: An Introduction**  
Jens M. Scherpe and Elena Bargelli .................................. 1

1. **The Aim of this Book** .................................................. 1  
2. **Influence without Legal Competence?** .......................... 2  
3. **Competence without Influence?** .................................. 3  
4. **Overview of the Themes and Ideas in this Book** ............ 3  
5. **The Structure and Content of this Book** ....................... 5  
6. **Adapting to Change** .................................................... 8

**PART I. THE IMPACT OF DEVELOPMENTS IN NATIONAL FAMILY LAWS ON EU PRIVATE INTERNATIONAL LAW**

**Cross-Border (Non-)Recognition of Marriage and Registered Partnership: Free Movement and EU Private International Law**  
Máire Ní Shúilleabháin ................................................... 13

1. **Introduction** ............................................................... 13  
2. **Negative Integration and Coman** ................................. 16  
3. **The Desirability, Legitimacy and Likely Contours of an EU Obligation of Marriage Recognition under Article 21(1) TFEU** .... 24  
4. **Positive Integration and Legislative Harmonisation: A Better Solution?** ..................................................... 32

**Empowering Private Autonomy as a Means to Navigate the Patchwork of EU Regulations on Family Law**  
Wendy Schrama ................................................................. 35

1. **Setting the Scene** ....................................................... 35  
2. **Empowering European Families Explained** ................. 37
### Contents

3. A Scattered Landscape: Relationship Models in Substantive Law in Europe .............................................. 38
4. A Scattered Landscape: Relationship Models in Private International Law .................................................. 46
5. Conclusions: Patchwork and Party Autonomy ......................... 55

The Impact of Private Divorces on EU Private International Law
Elena D’Alessandro ......................................................... 59

1. Private Divorces: A Growing Phenomenon in Europe ........ 59
2. Globalised Families and Private Divorce Agreements .......... 63
3. The Most Controversial Issue: Recognising the Dissolution of the Marriage Obtained through Private Divorces in the EU ...... 66
4. Religious Informal Private Divorces in Europe .................. 72
5. Conclusions: Waiting for the Application of Regulation No 1111/2019 ...................................................... 73

PART II. THE IMPACT OF EU PRIVATE INTERNATIONAL LAW ON NATIONAL FAMILY LAWS

EU Formalities for Matrimonial Property Agreements and their Effects on German Family Law: Calling the Bluff?
Anne Sanders ............................................................... 79

1. Introduction ............................................................... 79
2. The Nebengüterrecht ...................................................... 81
3. EU Council Regulation 2016/1103 and the Nebengüterrecht .... 87
4. Conclusion ................................................................. 98

The Effects of EU Law on Family Law in England and Wales: Children First?
Anne Barlow and Nigel Lowe ............................................ 101

1. Introduction ............................................................... 101
2. The EU’s Involvement with Family Law ......................... 103
3. The Impact of BIJa on Family Law in England and Wales .... 109
4. The Impact of ‘European Law’ on Post-Divorce Finance and Property Settlements in England and Wales ................. 114
5. Conclusion ............................................................... 118
PART III. THE IMPACT OF NATIONAL SUCCESSION LAWS ON EU PRIVATE INTERNATIONAL LAW

Did Substantive National Succession Laws have an Impact on the EU Succession Regulation?

Walter Pintens .................................................. 123

1. Introduction .................................................. 123
2. The Scope of the European Succession Regulation ............. 124
3. Authentic Instrument ........................................ 128
4. Notary ........................................................ 130
5. Appointment of an Administrator of the Estate ................. 131
6. Ordre public ................................................. 132
7. Choice of Law and Jurisdictions with Multiple Substantive Succession Laws .................................................. 135
8. Conclusion .................................................. 137

Understanding and Interpreting the Succession Regulation through its National Origins

Denise Wiedemann ............................................. 139

1. Introduction .................................................. 139
2. Legislative Debate ........................................... 140
3. Interpretation of the EU Succession Regulation ................. 150
4. Conclusions .................................................. 153

PART IV. THE IMPACT OF EU PRIVATE INTERNATIONAL LAW ON NATIONAL SUCCESSION LAWS

The Impact of the European Certificate of Succession on National Law: A Trojan Horse or Much Ado about Nothing?

Elise Goossens .................................................. 157

1. Introduction .................................................. 158
2. The European Certificate of Succession: A Primer ............. 159
3. The Recording of Immovable Property in Land Registers .... 161
4. The Scope of Succession Law vis-à-vis Matrimonial Property Law .................................................. 170
5. The Implications for the National Certificates of Succession .................................................. 172
A German Perspective on the Impact of EU Private International Law on National Succession Law

Robert Magnus ................................................................. 181

1. Introduction .............................................................. 181
2. The Interplay between Succession and Family Law in Germany:
   The Case of the (In)Famous §1371(1) BGB ............................... 182
   and New Ways to Transfer Ownership under German Law ............ 184
4. The European and the German Certificate of Inheritance:
   A Difficult Relationship .................................................. 188
5. The Overreaching Application of European Private International
   Law in the New Article 25 EGBGB ........................................ 190
6. Conclusion ................................................................. 192

The Impact of European Private International Law
and the réserve héréditaire in France

Lukas Rass-Masson .......................................................... 195

1. The Place of Forced Heirship in International Cases in France ......... 198
2. The Position of European Private International Law .................... 201
3. The Evolution Towards a Marginalisation of Forced Heirship ........... 202
4. The Consequences for French Substantive Law .......................... 207
5. Looking Forward: The Reciprocal Influence between European
   Private International Law and the réserve héréditaire .................. 211

Regulation (EU) 650/2012 and Territorial Conflicts of Laws in Spain

Pablo Quinzá Redondo ....................................................... 213

1. Introduction .............................................................. 213
2. Succession Law(s) in Spain .............................................. 216
3. The Applicable Law According to the Succession Regulation .......... 219
4. The Application of ‘Spanish Law’ under the Succession Regulation ... 223
5. Concluding Remarks ..................................................... 229

Index ................................................................. 231
LIST OF CASES

COURT OF JUSTICE OF THE EUROPEAN UNION

Case C-438/14, Bogendorff von Wolffersdorff, ECLI:EU:C:2016:401. ........................................ 15
Case C-102/18, Brisch, ECLI:EU:C:2019:34. ................................................................. 159
Case C-212/97, Centros v. Erhvervs-og Selskabsstyrelsen, ECLI:EU:C:1999:126 ................. 23
Case C-428/15, Child and Family Services v. D (R Intervening),
  ECLI:EU:C:2016:819 .......................................................... 113
Case C-673/16, Coman and Others v. Romania, ECLI:EU:C:2018:385 ..................................... 5, 14
Joined Cases C-122/99 P and C-125/99, D and Sweden v. Council of the
  European Union, ECLI:EU:C:2001:304 ............................................................... 5
Case C-143/78, de Cavel v. de Cavel, ECLI:EU:C:1979:83 ....................................................... 88
Case C-327/82, Ekro BV Vee- en Vleeshandel v. Produktschap voor Vee en Vlees,
  ECLI:EU:C:1984:11 ................................................................. 88
Case C-199/08, Eschig v. UNIQA Sachversicherung AG, ECLI:EU:C:2009:538 ................ 90
Case C-314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, ECLI:EU:C:1987:452 ..................... 91
Case C-541/15, Freitag, ECLI:EU:C:2017:432 ............................................................... 15
Case C-148/02, Garcia Avello, ECLI:EU:C:2003:539 ............................................................. 15
Case C-287/98, Grand Duchy of Luxembourg v. Berthe Linster, Aloyse Linster
  and Yvonne Linster, ECLI:EU:C:2000:468 .............................................................. 88
Case C-353/06, Grunkin and Paul, ECLI:EU:C:2008:559 ...................................................... 15
Case C-29/12 PPU, Health Service Executive v. SC and AC,
  ECLI:EU:C:2012:255 ........................................................................................................ 114
Case C-67/17, Iliev v. Ilieva, ECLI:EU:C:2017:459 ............................................................... 88
Case C-72/95, Kraaijeveld, ECLI:EU:C:1996:404. ............................................................... 88
Case C-218/16, Kubicka, ECLI:EU:C:2017:755. ................................................................. 8, 141, 167, 184
Case C-292/93, Lieber v. Göbel and Göbel, CJEU, 9 June 1994. ........................................ 162
Case C-452/93 P, Magdalena Fernández v. Commission,
  ECLI:EU:C:1994:332 ................................................................. 111
Case C-558/16, Mahnkopf, ECLI:EU:C:2018:138 ............................................................... 5, 150, 171, 183
Joined Cases C-188/10 and C-189/10, Melki and AbdeIi,
  ECLI:EU:C:2010:363 ................................................................. 91
Case C-497/10 PPU, Mercredi v. Chaffe, ECLI:EU:C:2010:829 .............................................. 111
Case C-456/12, O. and B. v. Minister voor Immigratie,
  ECLI:EU:C:2014:135 ................................................................. 16
Case C-20/17, Oberle, ECLI:EU:C:2018:485. ................................................................. 144, 150, 152, 173–174, 189
Case C-305/05, Ordre des barreaux francophones et
germanophone and Others v. Conseil des ministres, ECLI:EU:C:2007:382 ................ 92
Case C-281/02, Owusu v. Jackson, ECLI:EU:C:2005:120 ................................................ 92
Case C-507/14, P v. M, ECLI:EU:C:2015:512 ................................................................. 150
List of Cases

Case C-523/07, Proceedings Brought by A, ECLI:EU:C:2009:225 .............................................. 111
Case C-435/06, Re C, ECLI:EU:C:2007:714 .............................................................. 112
Case C-147/08, Römer v. Freie und Hansestadt Hamburg, ECLI:EU:C:2011:286 ............... 2
Case C-391/09, Runević—Vardyn and Wardyn, ECLI:EU:C:2011:291 ........................................... 15
Case C-281/15, Sahyouni v. Mamisch (Sahyouni I), ECLI:EU:C:2016:343 ......................... 192
Case C-372/16, Sahyouni v. Mamisch (Sahyouni II), ECLI:EU:C:2017:686 ................. 69–70
Case C-208/09, Sayn-Wittgenstein, ECLI:EU:C:2010:806 .......................................................... 15
Case C-467/16, Schlömp v. Landratsamt Schwäbisch Hall, ECLI:EU:C:2017:993 .............. 68
Joined Cases C-402/07 and C-432/07, Sturgeon v. Concor Flugdienst
   GmbH and Böck and Lepuschitz v. Air France SA, ECLI:EU:C:2009:716 ......................... 92
Case C-393/18 PPU, UD v. XB, ECLI:EU:C:2018:835 .................................................. 113
Case C-260/97, Unibank A/S and Flemming G. Christensen, ECJ, 17 June 1999 ........ 129
Case C-658/17, WB v. Notariusz Przemysław Bac, ECLI:EU:C:2019:444 ............... 7, 150, 131,
   151, 175, 190

EUROPEAN COURT OF HUMAN RIGHTS

Oliari and Others v. Italy, Application nos. 18766/11 and 36030/11,
   21 July 2015 [2015] ECHR 716 .............................................................. 14
Orlandi v. Italy, Application nos. 26431/12, 26742/12, 44057/12
   and 60088/12, 14 December 2017 [2017] ECHR 1153 ............................... 14, 28, 32
R v. United Kingdom, Application no. 10496/83, 8 July 1987 (1988) 10 EHRR 74 .... 110

AUSTRIA

OGH Wien 27.05.2015, BeckRS 2016, 80223 (= FamRZ 2016, 229) ....................... 86
OGH Wien 30.08.2016, RIS-Justiz RS0033921 ............................................... 82

FRANCE

Cons. const. 5 August 2011, N° 2011-159 QPC .................................................. 200

GERMANY

BGH 29.11.1952, BGHZ 8, 157 .............................................................. 97
BGH 20.12.1952, BGHZ 8, 249 .............................................................. 82
BGH 29.06.1970, NJW 1971, 375 .............................................................. 97
<table>
<thead>
<tr>
<th>Case Details</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>BGH 08.07.1982, BGHZ 84, 361</td>
<td>85</td>
</tr>
<tr>
<td>BGH 08.07.1982, NJW 1982, 2236</td>
<td>85</td>
</tr>
<tr>
<td>BGH 08.04.1987, FamRZ 1987, 907</td>
<td>82</td>
</tr>
<tr>
<td>BGH 17.01.1990, FamRZ 1990, 600</td>
<td>85</td>
</tr>
<tr>
<td>BGH 02.10.1991, DNotZ 1992, 439</td>
<td>85</td>
</tr>
<tr>
<td>BGH 30.06.1999, BGHZ 142, 137 = FamRZ 1999, 1580</td>
<td>82</td>
</tr>
<tr>
<td>BGH 28.11.2001, FamRZ 2003, 230</td>
<td>84</td>
</tr>
<tr>
<td>BGH 28.09.2005, BGHZ 165, 1</td>
<td>83</td>
</tr>
<tr>
<td>BGH 03.02.2010, BGHZ 184, 190</td>
<td>84</td>
</tr>
<tr>
<td>BGH 06.07.2011, NJW 2011, 2880</td>
<td>83, 85</td>
</tr>
<tr>
<td>BGH 08.05.2013, NJW 2013, 2187</td>
<td>85</td>
</tr>
<tr>
<td>BGH 23.07.2013, NJW-RR 2013, 1373</td>
<td>97</td>
</tr>
<tr>
<td>BGH 13.05.2015, NJW 2015, 2185</td>
<td>182</td>
</tr>
<tr>
<td>BGH 10.06.2015, FamRZ 2015, 1379</td>
<td>82</td>
</tr>
<tr>
<td>BGH 03.02.2016, FamRZ 2016, 965</td>
<td>82</td>
</tr>
<tr>
<td>KG 30.03.2020, BeckRS 2020, 6463</td>
<td>67</td>
</tr>
<tr>
<td>OLG Saarbrücken 23.05.2019, NJW 2019, 3530</td>
<td>187</td>
</tr>
<tr>
<td>OLG Schleswig 25.04.2016, FamRZ 2016, 1606</td>
<td>191</td>
</tr>
</tbody>
</table>

**IRELAND**

<table>
<thead>
<tr>
<th>Case Details</th>
<th>Page(s)</th>
</tr>
</thead>
</table>

**ITALY**

<table>
<thead>
<tr>
<th>Case Details</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of Cassation, order 1.3.2019, No. 6161</td>
<td>72</td>
</tr>
</tbody>
</table>

**UNITED KINGDOM**

<table>
<thead>
<tr>
<th>Case Details</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A v. A (Children: Habitual Residence) (Reunite International Child Abduction</td>
<td>111</td>
</tr>
<tr>
<td>Centre Intervening) [2013] UKSC 75</td>
<td></td>
</tr>
<tr>
<td>A v. B (Jurisdiction) [2011] EWHC 2752 (Fam)</td>
<td>112</td>
</tr>
<tr>
<td>Bristol City Council v. AA and HA [2014] EWHC 1022 (Fam)</td>
<td>112</td>
</tr>
<tr>
<td>Miller; McFarlane [2006] UKHL 24</td>
<td>118</td>
</tr>
<tr>
<td>Radmacher v. Granatino [2010] UKSC 42</td>
<td>118</td>
</tr>
<tr>
<td>Ravindran v. Rasanagayam [2001] EWCA Civ 365</td>
<td>83</td>
</tr>
</tbody>
</table>
List of Cases

Re C [2008] 1 FLR 490 ................................................................. 112  
Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51 ........................................... 112  
Re H-K (Abduction: Habitual Residence: Consent) [2011] EWCA Civ 1100 .......................... 111  
Re I (A Child) (Contact Application: Jurisdiction) (Centre for Family Law and Practice Intervening) [2009] UKSC 10 .......................................................... 113  
Re KP (A Child) (Abduction: Rights of Custody) (Practice Note) [2014] EWCA Civ 554 .......................................................... 112  
Re N (Children) (Adoption: Jurisdiction) (AIRE Centre Intervening) [2016] UKSC 15 .................................................................................. 113  
R (on the Application of Steinfeld and Keidan) v. Secretary of State for the International Development [2018] UKSC 32 ......................................................... 40  
Steinfeld and Keidan v. Secretary of State for Education [2017] EWCA 81 ................................................. 28  
Taylor v. Mazorriaga [1999] EWCA Civ 1393 ........................................................................ 83  
White v. White [2000] UKHL 54 ......................................................................................... 118  
Wilkinson v. Kitzinger (No. 2) [2006] EWHC 2022 (Fam) ..................................................... 28
LIST OF CONTRIBUTORS

Elena Bargelli
University of Pisa, Italy

Anne Barlow
University of Exeter, England, United Kingdom

Elena D’Alessandro
University of Turin, Italy

Elise Goossens
KU Leuven; Vrije Universiteit Brussel; University of Antwerp, Belgium

Nigel Lowe
Cardiff University, Wales, United Kingdom

Robert Magnus
University of Bayreuth, Germany

Máire Ní Shúilleabháin
University College Dublin, Ireland

Walter Pintens
KU Leuven, Belgium; Saarland University, Germany

Pablo Quinzá Redondo
University of Valencia, Spain

Lukas Rass-Masson
University of Toulouse, France

Anne Sanders
University of Bielefeld, Germany

Jens M. Scherpe
University of Cambridge, England, United Kingdom; University of Hong Kong; University of Aalborg, Denmark; University of the Western Cape, South Africa

Wendy Schrama
Utrecht University, The Netherlands

Denise Wiedemann
Max Planck Institute for Comparative and International Private Law, Hamburg, Germany